

Should Global Rules Have Legal Teeth? Policing (WHO Framework Convention on Tobacco Control) vs. Good Citizenship (UN Global Compact)

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ABSTRACT

This study examines two multilateral initiatives, the World Health Organization's Framework Convention on Tobacco Control (FCTC) and the United Nations Secretary-General's Global Compact. These are two efforts to engage transnational corporations in the development process and in the articulation of a set of multilateral rules of engagement regarding good corporate behavior. The FCTC is more stringent and proscriptive, seeking to regulate corporate behavior. The second is an invitation to transnational corporations (TNCs) to cooperate voluntarily. The relative success of the two approaches is contingent on meeting seven parameters of legitimacy, and ultimately on the legal standing of the mechanism.

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I. INTRODUCTION

The literature on global strategy is generally silent or contradictory regarding the juxtaposition of corporate strategy and national policy (cf. Porter, 1985; Vernon-Wortzel, 1997; and Bartlett, Ghoshal, and Berkenshaw, 2004). Such scholarly work deals largely with corporate aspects, relegating the role of the external environment, and particularly government, to a secondary position¹. However, there is now on the policy plane a plethora of new initiatives at sub-national, national and international levels, and firms must take these into consideration when designing and implementing their corporate strategy. Navigating these national and international crosscurrents requires knowledge and a sense of responsibility on the part of firms and all stakeholders, including national policy makers and international organizations.

One approach is the *control by governmental bodies* of tobacco's harmful effects. Spectacular successes have been achieved, thanks to the dogged determination of public officials in the United States -- surgeons-general, state attorneys-general, and private attorneys. The story of how tobacco companies were called to task, how some came tumbling down, and how others survived and continue to prosper in a hostile environment makes a legendary chronicle. This paper suggests that the encounter between "big tobacco", governments, and international organizations, primarily the World Health Organization (WHO), is a triad within which groundwork for policy and strategy is laid.

A second approach to resolving multilateral public policy problems is via appeal to *voluntary corporate social responsibility*. Over the past thirty years, myriad policy schemes have been proposed and promulgated with a view to enhancing global corporate compliance with laws, customs, standards and preferences of countries in which transnational corporations (TNCs) operate. These have ranged from corporate codes of conduct to industry standards, regional proclamations and international codes and guidelines.² The United Nations Secretary-General Kofi Annan's 1999 Global Compact stands at the pinnacle of these efforts due, in part, to his position as Secretary-General.

II. THE CONCEPTUAL FRAMEWORK

This is a comparative case study of two distinct UN policy initiatives -- the World Health Organization's Framework Convention on Tobacco Control (FCTC) and the UN Secretary-General's Global Compact. Following Perlmutter and Sagafi-nejad (1981) and Sagafi-nejad and Perlmutter (2001) the seven "parameters of legitimacy" are used to assess the relative viability of the two approaches: 1) Desirability of the approach; 2) its feasibility; 3) intra-stakeholder consensus; 4) clarity of perception between stakeholders; 5) trust between stakeholders; 6) role legitimacy; and 7) legal status of the instrument. These will be defined and applied to the cases at hand. The working proposition is that the initiatives under investigation, and similar ones, will succeed or fail depending on the extent to which they meet these seven parameters of legitimacy. Below we describe each of the two initiatives, and compare them in light of these criteria, using published statements and documents to provide evidence.

III. WHO FRAMEWORK CONVENTION

It has long been recognized that tobacco smoking creates a serious health hazard. The health care costs and deaths associated with tobacco-related illnesses demonstrate tobacco's deleterious health effects in unequivocal terms, as does extensive research by the US National Institutes of Health, the World Health Organization, and court rulings in several countries; consensus on these deleterious effects is virtually universal. The history of the drive to control tobacco consumption and therefore the advertising, production, manufacture and trade in tobacco, is lengthy (Stewart, 1993; Saffer, 2000; Jones, 1997; and Saloojee, 2000).

The millions of smokers constitute the main stakeholders. Next are the producers, manufacturers and traders of tobacco. As guardians of public health, national and international agencies must be included as stakeholders, as their mandates are to protect the health and welfare of their constituents. The latter, of course, includes the United Nations, primarily the WHO, one of its specialized agencies. Ancillary groups -- consumer associations, civil society organizations and other interest groups -- are active on the margin. Therefore various groups have a stake in the outcome of the tobacco initiatives, to wit, tobacco growers and producers whose livelihood and economic viability is at stake, governments that have to bear the costs of health care yet forgo tax revenues lost when consumption declines, and tobacco users, whose health (and choice) may be at risk. Some non-governmental organizations (NGOs) have also used public concern as their *cause celebre*.

Although harmful effects of tobacco have long been known,³ the attack on the tobacco industry began in earnest when individuals and groups brought suit against US tobacco companies in American state and federal courts. US Congressional hearings, held in 1985 by a subcommittee of the House Committee on Energy and Commerce, focused on tobacco's harmful health effects. The states of Mississippi, Massachusetts and West Virginia filed suit in their respective jurisdictions seeking reimbursement for health care expenditures incurred to treat their citizens' tobacco-related diseases. In 1995, Dr. Jeffery Wigand became a celebrated whistle-blower when he revealed that tobacco companies had withheld information from the public and had "spiked" their products to render them more addictive -- and incidentally, more carcinogenic.⁴

Over the following years, other states brought suit. As defendant, tobacco companies lost many battles; they succeeded in a few; and some cases against them were dismissed. See Table 1 for a partial list of cases between 1980 and 2002. Other litigation was instituted by private and public agencies including Blue Cross/Blue Shield, the Food and Drug Administration, and the Federal Trade Commission. This protracted tug of war between tobacco companies and their opponents continued with mixed effects. Some companies like Liggett declared bankruptcy; some diversified; some further internationalized; and others developed aggressive and combative counterstrategies.

In 1997 tobacco manufacturers and a group of state attorneys-general reached a comprehensive nationwide settlement of all claims, the Tobacco Resolution. In November 1998 a Master Settlement Agreement was reached between forty-six states, the District of Columbia, and Puerto Rico and the major tobacco companies, including

Table 1 (continued)

2000	Tompkin v. American Brands et al 219 F.3d 566 (6th Cir. 2000)	Federal Appellate 6th Cir.	Claim was the tobacco cos. had misrepresented the dangers associated with cigarette smoking and challenged FTC's decision to exempt tobacco cos. from statute's warning requirement on utilitarian items such as pens, pencils, t-shirts and sporting goods used for promotional purposes	FTC's decision to exempt such items from the warning requirement was contrary to the clear mandate of the statute
2000	Allegheny General Hospital v. Philip Morris et al. 228 F.3d 429 (3d Cir.2000)	Federal Appellate	16 charitable not-for-profit hospital brought suit against tobacco cos. to recover costs for treating indigent patients with tobacco-related diseases	Dismissal of hospitals' claims affirmed
1998	Brown & Williamson v. FDA 153 F.3d 155 (4th Cir.1998)	Federal Appellate 4th Cir.	Tobacco cos. challenged the FDA rule "Regulations Restricting the Sale and Distribution of Cigarette and Smokeless Tobacco to Protect Children and Adolescents"	FDA lacks jurisdiction to regulate tobacco products
2000	FDA v. Brown & Williamson et al 529 U.S. 120 (2000)	U.S. Supreme Court	Same case as above	same as above
1989	Public Citizen v. FTC	Federal Appellate D.C. Cir.	This suit involved the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. §4401-4408 and the plaintiff-organization's standing to sue	The organization did have standing to sue
1983	Brown & Williamson Tobacco Corp. v. FTC 710 F.2d 1165(6th Cir.1983)	Federal Appellate 6th Cir.	B & W appealed from dismissal of suit challenging FTC's publishing in the Federal Register that present testing methodology does not accurately measure tar and nicotine yields in B &W's Kool Ultra	Dismissal reversed
1983	Brown & Williamson v. Jacobson and CBS, Inc. 713 F.2d 262 (7th Cir. 1983)	Federal Appellate 7th Cir.	Tobacco co. brought a libel suit against newscaster	The lower court's dismissal of the defamation claim reversed
1980	Action on Smoking and Health v. Harris 655 F.2d 236 (D.C. Cir. 1980)	Federal Appellate D.C. Cir.	Action on Smoking and Health challenged the refusal of the FDA to assert jurisdiction over cigarette containing nicotine as a drug under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(g)(1)(C)	Affirmed agency decision as not arbitrary or capricious

Source: Compiled by the author from court documents.

Philip Morris, R. J. Reynolds Tobacco Co., Brown & Williams Tobacco Corp., and Lorillard Tobacco Co. The companies agreed to pay some \$246 billion over the ensuing 25 years in exchange for liability releases for past and future damages (see Table 2) Tobacco manufacturers challenged the constitutionality of the Master Settlement, but the court affirmed its legality in 2002 (see *Starr Scientific Inc. v. Beales*, listed in Table 1).

Table 2
Master settlement agreement- history and basic elements

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- In 1985 there were Congressional hearings held by the Subcommittee on Health and Environment of the House Committee on Energy and Commerce, 99th Cong., 1st Sess., 260.
 - In 1994 the Attorneys-General of Mississippi, Minnesota, West Virginia and Massachusetts filed suits in their respective state courts seeking reimbursements for health care expenditures by those states for their citizens suffering from tobacco-related diseases.
 - By 1996 fifteen other states had filed suit. Common themes among these suits were charges that the tobacco companies 1) had misled and deceived the public by suppressing internal research about the risks and addictive properties of cigarettes 2) had committed fraud and had engaged in racketeering activity through efforts to disseminate false statements about the addictive nature of nicotine, and 3) had violated anti-trust laws by conspiring to suppress the development and marketing of safer cigarettes.
 - By 1997 more states had filed similar lawsuits.
 - It was also in 1997 that cigarette manufacturers negotiated with a group of state attorneys-general to reach a comprehensive nationwide settlement of all claims. This was called the Tobacco Resolution. Federal legislation to implement this resolution was introduced in the Senate in 1997, but the legislation was never enacted because of protests by the tobacco companies to increased sums of money and greater restrictions on their manufacturing of cigarettes.
 - Meanwhile, the tobacco companies reached individual settlements with Mississippi, Florida, Texas, and Minnesota. Also several other attorneys-general negotiated with tobacco companies on a new multi-state settlement.
 - In November 1998, the Master Settlement Agreement was approved in all respects; it permitted non-settling states to participate if they acted within seven days. Forty-six states entered into this agreement in addition to the District of Columbia, Puerto Rico, Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands. The Agreement called for the major tobacco companies, Philip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp, and Lorillard Tobacco Co., to pay approximately \$200 billion over the next 25 years in exchange for liability releases for past and future damages.
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This litigation and the Master Settlement it produced were major landmark events, propelled by initiatives at state and national levels⁵. The issues raised by the Master Settlement further percolated to the international arena, where the World Health Organization, following the recommendations of a 1999 United Nations inter-agency task force, undertook the challenge of globally investigating and publicizing the harmful effects of tobacco. The WHO's objective, through the Tobacco Free Initiative and, ultimately, by international treaty, was to seek a global solution to a dangerous health hazard.

When the 191-nation members of the WHO began negotiations on a treaty called Framework Convention on Tobacco Control (FCTC) in 2000, the seven largest global tobacco companies, including Philip Morris, Japan Tobacco and British-American Tobacco, were attempting preemptively to develop a voluntary pact. According to Solomon Smith Barney, Philip Morris and Japan Tobacco alone had a combined market share of 40.5% of the international cigarette market (Fairclough Branch, 2001). But that

pact was superseded by what transpired under the World Health Organization. A report stated:

Negotiators from WHO member states meet in Geneva next week for two weeks of talks on developing global rules to curb the advertising, promotion and sales and smuggling of tobacco products. The fifth session of the Intergovernmental Negotiating Body (INB, October 14-25, 2002) was expected to examine a new text of the Framework Convention on Tobacco Control (FCTC) that proposes options culled out of four years of negotiations. The new text was drawn up by the Brazilian head of the negotiations, Ambassador Luis Felipe de Seixas Corrêa. (www.WHO.org)

A final round of negotiations concluded in early March of 2003. This Framework Convention on Tobacco Control (FCTC) was adopted during the 56th World Health Assembly, May 19-28, 2003, in Geneva by governments representing 95% of the world population, and as an “international legal instrument” aimed at circumscribing the global spread of tobacco products. Throughout, the WHO continued to put forth arguments against tobacco consumption. The FCTC was adopted unanimously by all WHO Member States in May 2003. It was the first public health treaty negotiated under the auspices of the WHO, addressing what it called “the single biggest preventable cause of death” and affecting “an estimated 1.3 billion smokers worldwide.” It declared further that “half of them, some 650 million people, are expected to die prematurely of a tobacco-related disease.”⁶

The United States objected to certain of its provisions, and did not endorse the draft until May 10, 2004. By the June 29, 2004, deadline, some 168 countries had become signatories to the Convention; thirty became “parties” to the treaty by virtue of ratification, acceptance, approval, formal confirmation, or accession.⁷

The entire tobacco industry unified in opposition to the WHO initiative. The industry association web site⁸ does not explicitly refer to the WHO or the FCTC; it focuses on tax revenues collected by governments from their sales of tobacco products. Corporate response to the FCTC has been a complex admixture of strategies, akin to their post-Master Settlement behavior. One strategy of the tobacco companies has been diversification. The other has been expansion through global acquisitions. During the past decade, examples of the latter include: Philip Morris into Hungary, Russia, Czech Republic, Lithuania, Ukraine, Kazakhstan, China, Poland, Portugal and Mexico; British American Tobacco into Hungary, USA, Uzbekistan, Russia, Poland, Cambodia, Mexico, and Turkey; and RJ Reynolds into Russia, Ukraine, Kazakhstan, Azerbaijan, Turkey, Poland, Hungary, Tanzania, Finland and Romania. See Joossens and Ritthiphakde (2000).

Global tobacco companies have shown considerable resilience in the face of these hostile political and social environments by employing various strategies that have resulted in an industry performance on a par with, or better than, the manufacturing industry as a whole.⁹ For example, Philip Morris, the world’s largest tobacco company, has pursued a twin strategy of product and geographic diversification. Faced with the prospects of having to pay billions of dollars in fines when the US Government filed charges under RICO, Philip Morris’s parent company, Altria, was considering splitting into two or three independent companies, to mitigate the potential

damage resulting from such an enormous and devastating law suit. See Foster (2005) Even before the RICO litigation loomed, it had already aggressively diversified its product portfolio by acquiring food, beverage, and other companies while also restructuring into Philip Morris International and Philip Morris USA to more effectively expand in the global market.¹⁰ At the same time, the company declared that it shared “the desire of the WHO to make progress on many of the issues addressed in the proposal,” while disagreeing, not surprisingly, with some of the policy measures. The company stated:

Among the areas where we share common ground with the WHO are the prevention of youth smoking; reasonable restrictions on marketing; efforts to continue to inform the public about the health consequences of smoking and the benefits of quitting; regulation of the content of tobacco products; package labeling requirements; reduction and elimination of cigarette smuggling; and reasonable restrictions on smoking in public places. These are just some of the areas of common ground that we share with the WHO and governments around the world.¹¹

Other major players, British American Tobacco (BAT), Japan Tobacco, and R. J. Reynolds have pursued similar strategies,¹² although R.J. Reynolds Tobacco Company (not to be confused with R. J. Reynolds Inc, which was purchased by Japan Tobacco in 1999) is silent with respect to the FCTC. On the other hand, British American and Japan Tobacco faced the Convention head on. Japan Tobacco traces its heritage to 1898, although it was reconstituted after its 1999 purchase of R. J. Reynolds, Inc. It manufactures three of the world’s most recognizable brands -- Camel, Salem, and Winston, and controls three-quarters of the Japanese tobacco market. Perhaps significantly, its international headquarters is in Geneva, home of the WHO. The company has testified and provided other documentation to challenge the premises of the FCTC, and in its opposition, invokes not only the rights of its employees but also its “millions” of other stakeholders:

We represent not only our 45,000 employees worldwide, but also millions of people who depend on us for their livelihoods – tobacco growers, suppliers, and retailers, to name but a few. While we are willing to cooperate and work with the WHO, the principle of “proportionality” demands that the impact of a proposed regulation needs to be proportional to its expected benefit. The FCTC fails to meet this key test in a number of ways.¹³

With respect to the FCTC, British American Tobacco summarizes its position:

As the producers of a legal product we assert the right to communicate with adult consumers and also the right to participate in international trade. We take issue with the notion that the world in the 21st century is faced with a tobacco “epidemic” that is “spreading across national borders”. In addition, we are concerned about the claim that international tobacco companies are portrayed as “spreading the epidemic” and that advertising is claimed to be the “tool” to do so. It is an accepted fact that tobacco use was widespread in all countries in the world for centuries, well before the advent of either international tobacco companies or mass-market advertising.

We have always recognised the right of governments to regulate tobacco products at a national level. We believe that nothing stands in the way of such governments to do so effectively. We believe that it is our right to participate in the regulatory process, and we are concerned about efforts to preclude our participation or to undermine our legally protected fundamental rights.

Because of the above, we believe that the need for an international response in the form of a detailed and binding multilateral convention is much more limited than stated in the Preamble of the FCTC. Observing the proceedings of the international negotiating body over the last two years strengthened our view that if there is to be a convention, it should for the majority of issues be limited to non-binding guidelines for national governments.

Since we recognise the negative health impact of tobacco use, we do recognise the role of the WHO in supporting governments with health policy advice based on sound science. We think that it is appropriate for the WHO to advise on tobacco control measures within its field of expertise, but not in fields outside its remit.¹⁴

By making this statement, BAT recognized a role for the WHO, but a far more limited one than that envisaged by the FCTC. In addition to individual corporate responses, tobacco companies created the Tobacco Manufacturers Association (TMA), which provides:

... factual information on smoking related issues in order to instil (sic) a sense of balance and proportion into the debate. This ensures that people who take an interest have all the relevant information they need to make up their own minds.¹⁵

An overall assessment of the tobacco companies' position leads to several conclusions. Tobacco companies appear to agree with the underlying propositions of the FCTC, namely, the harmful health effects of tobacco, and have even demonstrated some willingness to move toward the fulfillment of its goals. Nor do they deny a legitimate role for the WHO in this effort. However, there is some disagreement among the companies as to how far the FCTC should be allowed to go in curbing the companies' production, marketing and distribution, presumably the domain of private enterprise. Most, if not all, tobacco companies oppose a binding international instrument as proposed by the FCTC. Secondly, when opposing the initiative, companies tend to invoke the widest possible spectrum of stakeholders, the basic rules of competition in a free market system, and individual choice. Finally, there is no "intra-stakeholder unanimity" on how to countenance this external challenge; some companies broke ranks during the litigation process and became instrumental in the claims against their industrial compatriots.

The hostile environment continued to cast its shadow over the tobacco companies. In 2004, the US Justice Department began preparations to take the

companies to court again, charging them with conspiracy to defraud consumers by denying the dangers of smoking, and by deliberately marketing cigarettes to underage youth, while knowing about the causal link between smoking and disease. Five years in preparation, this \$280 billion federal suit, brought before federal judge Gladys Kessler, September 21, 2004, was based on the 1970 US Racketeer Influenced and Corrupt Organizations (RICO) Act, initially aimed at the Mafia. This action was “perhaps the biggest judicial assault ever launched by a government on a legal industry.” See Buckley (2004). The suit claimed that tobacco companies should “disgorge” \$280 billion in “ill-gotten gains.” The companies vigorously denied the charges and went on the attack as they had in earlier court contests. Interestingly, press coverage of this case did not mention the WHO or its FCTC. In early February, 2005, the United States Court of Appeals for the District of Columbia ruled (2-1) that RICO did not apply.¹⁶ The matter may escalate to the US Supreme Court.

IV. THE UN GLOBAL COMPACT

Unlike the WHO initiative on tobacco, where the focus is on “legal control,” UN Secretary-General Kofi Annan’s 1999 Global Compact initiative focuses instead on voluntary cooperation. The two have similar aims, viz., aiding the development of developing countries, and encouraging good global corporate citizenship. However, they differ on matters of rights and responsibilities and on overall tone and tenor. The WHO Framework Convention on Tobacco Control demonstrates an essentially unilateral and confrontational approach, where the battle is fought in national legal courts, and through litigation and legislation. By contrast, the UN Global Compact takes a multilateral approach to urge good corporate citizenship.

On January 31, 1999, at the World Economic Forum in Davos, Switzerland, United Nations Secretary-General Kofi A. Annan challenged world business leaders to “embrace and enact” the Global Compact -- by adjusting their individual corporate practices and by supporting appropriate public policies. He took the elite of global capitalism to task, challenging them to join the United Nations in a partnership mission, a “compact” to deal with basic human needs by addressing human rights, labor, and the environment. The original nine Principles of the Global Compact in three distinct but related areas were enunciated in 1999.¹⁷ Each is grounded in one or more of the fundamental principles that constitute the *raison d’être* of the 1948 United Nations Universal Declaration of Human Rights. The tenth principle, addressing the problem of corruption, was added in June 2004, after the United Nations adopted the Convention against Corruption.¹⁸ The ten principles are listed in Table 3.

The Compact office is responsible for providing general background information, nurturing new partnerships, developing case studies, and arranging dialogues throughout the world, all despite a skeleton staff and modest budget. The director of its office reports directly to the UN Secretary-General. The operational phase of the Compact was launched at a high-level event at UN Headquarters in New York on July 26, 2000. Chaired by the Secretary-General, the meeting “brought together senior executives from some 50 major corporations and the leaders of labor, human rights, environment and development organizations”.¹⁹

Table 3
The ten principles of the global compact

Issue	International benchmark	The Global Compacts Principles
Human Rights	The Universal Declaration of Human Rights	<p><i>Principle 1:</i> Support and respect the protection of international human rights within their sphere of influence; and</p> <p><i>Principle 2:</i> Make sure their own corporations are not complicit in human rights abuses.</p>
Labour	The ILO Fundamental Principles on Rights at Work	<p><i>Principle 3:</i> Freedom of association and the effective recognition of the right to collective bargaining;</p> <p><i>Principle 4:</i> The elimination of all forms of forced and compulsory labour;</p> <p><i>Principle 5:</i> The effective abolition of child labour; and</p> <p><i>Principle 6:</i> The elimination of discrimination in respect of employment and occupation.</p>
Environment	The Rio Principles on the Environment and Development	<p><i>Principle 7:</i> Support a precautionary approach to environmental challenges;</p> <p><i>Principle 8:</i> Undertake initiatives to promote greater environmental responsibility; and</p> <p><i>Principle 9:</i> Encourage the development and diffusion of environmentally friendly technologies.</p>
Anti-Corruption	The 2003 UN Convention against Bribery	<p><i>Principle 10:</i> Businesses should work against all forms of corruption, including extortion and bribery.</p>

Source: Sagafi-nejad with Dunning (forthcoming), based on www.UNGlobalCompact.org.

Once launched, the UN staff began to propagate the concept and encourage companies to adopt it. In its 2001 pilot phase, companies were asked to enunciate their strategy for conforming to the tenets of the Compact by submitting specific cases or instances within their companies that touched on one or more of the principles. Some 42 companies submitted statements indicating that they were addressing one or more of the nine principles in their business operations. British Telecom (BT) stated that it was addressing all nine principles. Indian Oil Corporations, Ltd. was addressing several principles through its community development activities emphasizing health care. Global companies such as BASF, Bayer, BMW, DaimlerChrysler, Deloitte Touche Tohmatsu, Dupont, Nike, Royal Dutch/Shell, SAP, UBS and Unilever each said it was addressing one or more of the Compact principles.

Since its first progress report issued in 2001, the UN Global Compact has continued to expand and to embrace more partners from business associations, labor, civil society, academia, cities, and even stock exchanges; hundreds of companies and organizations have engaged in the Compact. The list of companies that has joined the Global Compact show their multifarious nature; they come from across the world, developed (including those from Australia, Belgium, Canada, France, Germany and the US), as well as emerging market economies (including Brazil, China, and India) and less developed countries (such as Guyana, Tanzania and Uganda). They consist of large and well-known TNCs such as those mentioned above as well as others less well known.²⁰

The incorporation of the Compact tenets into company practices is a positive development, suggesting that this form of moral suasion might produce desired results. Whether long term corporate strategy and action will be influenced by the Global Compact initiative remains an open question. Suasion power is the sole means of convincing TNCs to join this compact, and the UN champions of this project have employed this with vigor:

“For companies, there are a number of benefits to participating in The Global Compact. These include:

- Working directly with UN agencies, labour, non-governmental organizations and other groups on partnership projects.
- Participating in action-oriented "Global Policy Dialogues" in a climate of mutual respect. These dialogues address key issues related to sustainable development and corporate citizenship.
- Sharing good practices and learnings with other companies.
- Having confidence that the Global Compact's principles are endorsed and supported universally, thus having a robust and widely-recognized platform for corporate citizenship.
- Leveraging the UN's global reach and convening power with governments and other bodies.
- Accessing the UN's deep knowledge and expertise related to development issues, key country information and facilitation of broad multi-stakeholder partnerships.
- Building goodwill in communities where companies operate.

- Receiving recognition for substantive company action and change (i.e., corporate reputation)
- Other "corporate responsibility" benefits: higher employee morale and productivity; improved risk profile; operational efficiencies"²¹

The Compact, undertaken in partnership with UN agencies, non-governmental agencies (NGOs), and other stakeholders, is based on dialogue and discourse with transnational corporations (TNCs); it involves a multitude of stakeholders and is linked to the UN's broader Millennium Development Goals²². In addition to its goal of involving TNCs, the Compact seeks to promote the goals and objectives articulated in these Millennium Development goals. Reiterating the need to address developmental issues on a global basis and addressing what it considers its global mandate, the United Nations strives to develop a "global partnership for development" aimed at eradicating poverty, achieving universal primary education and gender equality, reducing child mortality, improving maternal health, combating disease such as HIV/AIDS and malaria, and ensuring environmental sustainability. Clearly, the UN Global Compact initiative fits into this grand scheme.

Since the aim of the Global Compact was to create a broad global network, the UN has reached out to many organizations besides TNCs. It has also brought in other stakeholder groups, including civil society organizations interested in labor, environment, and human rights. In addition, the entire constellation of United Nations agencies interested in one or more of the ten principles are involved. Besides the office of Secretary-General, other UN bodies include the United Nations Development Programme (UNDP), International Labor Organization (ILO) and UNCTAD (www.UNGlobalcompact.org). Proponents passionately argue that the Global Compact provides a path toward the betterment of mankind, the same noble goals that underlie the existence of the United Nations (Kell and Ruggie, 1999). Furthermore, it is a "multi-stakeholder initiative" consistent with the exigencies of today's global economy.²³ However, its critics may argue that it is a well-meaning but toothless effort. Some companies that have not joined the Compact claim that they already adhere to their own or their industry's standards and codes of conduct, and therefore see little advantage in joining. Others say that TNCs that join do so to reap public relations benefits,²⁴ without being subjected to rigorous scrutiny. The relative merits of voluntary versus mandatory instruments to control the activities of TNCs dates back to the 1970s, and are exemplified by the futile efforts under the auspices of the UN Centre on Transnational Corporations (UNCTC) and similar work under United Nations Conference on Trade and Development (UNCTAD) concerning technology transfer codes.

V. ANALYSIS

Since its establishment after World War II, the United Nations has had an ebb-and-flow relationship with multinational corporations, mirroring the evolution of the global constellation of forces. From a reasonably peaceful and collaborative mode up until the 1960s, the international environment turned more discordant in the 1970s. This era of confrontation gradually gave way in the 1980s to one of cooperation, which accelerated with the fall of the Berlin Wall and the collapse of the Soviet

Union.²⁵ Both the Framework Convention on Tobacco Control and the Global Compact must be viewed within this broad global context; rules inevitably are influenced by the tenor of the times.

This paper has selected two efforts to engage transnational corporations in the development process and in the articulation of a set of multilateral rules of engagement regarding good corporate behavior. The World Health Organization's Framework Convention on Tobacco Control is intended to be *binding*, and *proscribes* actions concerning some types of advertising and labeling, illicit trade in tobacco products, and sponsorship of certain events. On the other hand, the United Nations' Global Compact *appeals* to the desire of many TNCs to exhibit good corporate citizenship, and is intent on *convincing* them that good behavior often yields a good "bottom line." Its proponents passionately argue that the Global Compact provides a path toward the betterment of mankind, the same noble goals that underlie the existence of the United Nations. Furthermore, it is a "multi-stakeholder initiative" consistent with the exigencies of today's global economy.

The argument over the relative merits of *mandatory* versus *voluntary* instruments to control the activities of TNCs, here the WHO Framework Convention versus the UN Global Compact initiatives, is reminiscent of similar and hotly debated discussions in the 1970s under the auspices of the UN Centre on Transnational Corporations (UNCTC) to develop a code of conduct for TNCs and similar work under United Nations Conference on Trade and Development (UNCTAD) concerning technology transfer codes. These are treated in depth by Perlmutter and Sagafi-nejad (1981), Kline (1985), and Patel, Roffe and Yusuf (2001).

To gauge the relative efficacy of the two approaches, we now evaluate them in terms of the seven parameters of legitimacy. Restated, these are: the desirability and feasibility of the instrument or approach, the extent to which there is consensus among members of a stakeholder group on its desirability and feasibility, how clearly stakeholder groups perceive one another, the extent of trust between different groups, whether each group concedes a legitimate role for the others in the process, and, most importantly, the legal status of such a regime.

A comparison of the WHO Framework Convention on Tobacco Control and The UN Global Compact reveals certain distinguishing features against the seven parameters of legitimacy. On the first parameter -- *desirability* -- the basic principle articulated in the Framework Convention on Tobacco Control and in the Global Compact can be viewed by most stakeholders as desirable. It is difficult to disagree with the desirability of controlling negative effects of tobacco use, or with the need to devise means by which global companies can be encouraged to adhere to principles of protecting the environment or the rights of workers, while discouraging child labor or workplace discrimination.

Furthermore, it is undeniable that bribery should be stopped, and corporations should be deterred from engaging in corrupt practices. The litmus test comes with the *feasibility* of implementation, enforcement, and acceptance. Both instruments enjoy similar levels of desirability; however, by virtue of its legal standing, the WHO tobacco initiative may have the better chance of realizing its goals. The key difference in the feasibility of the two approaches lies in their legal enforceability. The first is intended to be binding, the second voluntary. One has caused clear

delineation of lines between adversaries, while the other aims to build through persuasion on the commonalities between groups.

Unilateral and binding rules can also ascend from the national to the global level. It was, after all, the massive anti-smoking campaign and the extensive litigation in the United States that provided the initial momentum for global rulemaking with respect to tobacco. It is conceivable that multilateral rules that emanate from national roots have greater chance of adoption at the global level in a bottom-up process than rules contemplated in the insularity of international organizations. The greatest accomplishment of the tobacco companies seems to be their ability, in a hostile environment, to perform their traditional function as business organizations that respond effectively to a market segment -- building on the lack of intra-stakeholder consensus on the harmful effects of tobacco -- and thereby make a profit.

Beyond desirability and feasibility, the third parameter deals with *inter-stakeholder consensus* and the extent to which members of a group reach unanimity. With a few exceptions, tobacco companies closed ranks in defense of their positions and colluded in their contention that they were serving a useful and legal function. Both regulators and companies enjoy a certain amount of intra-stakeholder unanimity²⁶. If this proves true after empirical testing, it would complicate the implementation of binding rules. With respect to the Global Compact, there appears to be less consensus among stakeholder groups, which range from its stakeholders within the UN system and companies, business, labor and civic organizations, to academia. While many, including transnational corporations, have come on board, others view the Compact as merely a public relations gesture. Although the tobacco companies' opponents (unilateral legal actors and the WHO) might concede that tobacco products are legal, they believe that, because they are dangerous to human health, they must be fought. Some TNCs may argue that there are no penalties for non-adherence to Global Compact principles, nor are there great advantages in participating. More information on why companies join or do not join is needed before a definitive judgment of the extent of consensus among stakeholders can be rendered.

A fourth parameter of legitimacy is *clarity of perceptions* between stakeholder groups as well as within each group. The tobacco companies seem to have a clear understanding of their competitors' positions as well as those of other groups. Companies are quite adept at identifying consumer groups and stock traders who would be their allies against controls. These companies further seem to "read" their adversaries well and are accordingly able to mount a spirited struggle. As for the Global Compact, many companies see a legitimate role for the UN in championing industry cooperation in attaining good corporate conduct, although others deny it this role. Thus, one of the greatest challenges facing the Global Compact is to "sell" its idea to a critical mass of companies.

Inter-group *trust*, the fifth parameter, is the most difficult to measure, but forms the cornerstone of legitimizing any policy instrument, particularly one that rests primarily on voluntary adherence rather than "courts and cops." We hypothesize that there is relatively more trust among the Global Compact stakeholders than there is between the tobacco companies and their adversaries.

Ceteris paribus, the greater the level of trust between different stakeholder groups concerning adherence to a policy measure, the greater the likelihood that it will succeed. If underlying trust is lacking, some stakeholders will either refuse to adhere, or will find ways to evade or undermine it.

Contending stakeholder groups need also to acknowledge a *legitimate role* for the other groups when negotiating an accord. If one group, particularly a powerful one with high saliency, denies another (especially an adversarial) group a seat at the table and denies its relevance, no agreement can be reached, much less administered and implemented. The World Health Organization bestowed legitimacy on tobacco companies by engaging them in various phases of the negotiations. So did the UN Secretary-General when he reached out to executives of TNCs and challenged them to embrace the Global Compact. In both cases, giving a legitimate role to various groups with a stake in the matter will help the attainment of intended results.

The seventh parameter, the *legal status* of a policy instrument, can either doom it to failure, as it did with the efforts to design a code of conduct for TNCs,²⁷ or bring it to fruition. The WHO-championed tobacco treaty is an example of a legally binding international instrument that will likely succeed by virtue of being incorporated into the national laws of signatory countries.

VI. CONCLUSION

As globalization continues to erode physical, cultural and legal boundaries as well as the unilateral right to devise rules of engagement, supranational agencies increasingly appropriate the role traditionally held by national players. This paper has raised the issue of whether corporate conduct can be influenced in certain directions through the power of persuasion and voluntary compliance with codes and compacts, or if legally enforceable measures have to be devised. It has also addressed the question of where such measures may originate, how companies have tended to respond to alternative approaches in their own strategies, and most importantly what parameters must they meet to become viable. To be enforced and followed, rules must have their roots in the legitimacy of the rule-maker. Thus the World Health Organization may well have gained the legitimate right to devise means of protecting against the health damage of tobacco consumption. However, actors who wish to withhold legitimacy from WHO view this as an encroachment upon sovereignty. The same can be said about the role of the United Nations in championing good global corporate citizenship.

The saliency or success of these initiatives, and similar multilateral approaches, will depend on the extent to which they can meet these seven parameters of legitimacy. Such approaches must be viewed by a sizeable number of stakeholders as desirable and feasible; they must enjoy intra-stakeholder consensus; groups must have a clear understanding of where others, whom they trust and consider as legitimate participants in the process, stand. Success ultimately may hinge on the legal standing of the mechanism. It is noble to take the moral high ground, but without an effective enforcement mechanism, a noble concept may remain mere platitude. It appears that global rules need legal teeth.

ENDNOTES

1. For some exceptions see Porter (1990), Dunning (1997), Kozul-Wright (1995), and Utting (2002).
2. For an extensive list of policy instruments aimed at controlling technology transfer, see Perlmutter and Sagafi-nejad (1981), and Sagafi-nejad and Perlmutter (2001). On international policy measures, including codes, see Kline (1985), and UNCTAD (2004).
3. As early as 1964, a US Surgeon-General's report "state unequivocally that smoking causes cancer" (Buckley, 2004).
4. He became the subject of "The Insider", a movie based on the story. See Marrie Brenner, 1995. See also <http://www.jeffreywigand.com/insider/vanityfair.html>
5. At the national level, C. Everett Koop, the US Surgeon-General from 1981 to 1989 was a zealous crusader who worked tirelessly to educate the public regarding the harmful effects of tobacco. At the state level, nearly all state attorneys-general came together on this matter.
6. See <http://www.who.int/mediacentre/news/releases/2004/pr47/en/>, retrieved 9/11/2004.
7. See WHO, "Updated status of the WHO Framework Convention on Tobacco Control", http://www.who.int/tobacco/areas/framework/signing_ceremony/countrylist/en/, and <http://www.who.int/tobacco/framework/en/>, retrieved September 11, 2004.
8. See [WWW.the-tma.org.uk](http://www.the-tma.org.uk)
9. According to Hoover, Moody's, Dunn & Bradstreet, RMA, and Mergent, the performance of the "tobacco and beverages" industry – using return on assets, operating profit margin or other performance criteria - have often been above industry norm. See Jones, 1997.
10. See www.PM.com.
11. See www.pmfctc.com/, retrieved October 20, 2002.
12. See www.bat.com and www.rjrt.com.
13. See http://www.jti.com/e/news/publications/jti_pub18.html, retrieved October 20, 2002.
14. See the company's posting on its web site titled "WHO Framework Convention on Tobacco Control" at http://www.bat.com/oneweb/sites/uk__3mnfen.nsf/vwPagesWebLive/6D511F5596943D4B80256BF400033148?opendocument, retrieved October 20, 2002.
15. See www.the-tma.org.uk.
16. The two Reagan appointees voted in favor of the tobacco companies, while the Clinton appointee dissented. See Stout (2005), Foster (2005) and O'Connell (2005).
17. The ten principles of the Global Compact are detailed on its web site, where each principle is hyperlinked to additional information and details (see www.unglobalcompact.org).
18. After some two years of negotiations, the Convention was adopted by the UN in November 2003 and was open to member countries for adoption in Merida,

- Mexico. It will enter into force once 30 countries have ratified it. See UN, 2003. <http://www.un.org/news/press/docs/2003/soccp270.doc.htm>.
19. See “about gc: overview” at www.unglobalcompact.org.
 20. See WWW.UNGlobalCompact.org (Case studies data base).
 21. Ibid
 22. The goals were enunciated in September 2000, when the 191 member nations of the United Nations pledged to achieve eight Millennium Development Goals deal with the eradication of poverty and hunger, universal primary education, gender equality, reduction of child mortality, mental health improvement, combating of HIV/AIDS, malaria and other diseases, environmental sustainability, and the development of a global partnership for development. See <http://www.un.org/millenniumgoals/>.
 23. Utting (2002) identifies 14 such schemes emerging as one of the dominant regulatory approaches. See also Jenkins (1995) and Richter (2001). For a conceptual analysis of stakeholder theory, see Mitchell, Angle and Wood (1997).
 24. Articulating this cynical view, the *Economist* used the term “bluewash.” See *Economist* (2004).
 25. See Sagafi-nejad, with Dunning (forthcoming) for a detailed analysis of the role of the United Nations in the study of TNCs. Other books in the Intellectual History of the United Nations series chronicle related topics (see www.unhistroy.org).
 26. Nevertheless, the US appeals court split ruling in February 2005 shows a certain lack of unanimity within the US legal system on this matter.
 27. See Sagafi-nejad, forthcoming, for an extensive discussion of the UN efforts to devise a code of conduct for TNCs, an exercise that ended in failure.

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