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**A Mountain Biker cannot start a journey
in sixth gear: An Assessment of the U.N.
Global Compact's Use of Soft Law as a
Global Governance Structure for
Corporate Social Responsibility**

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*‘A Mountain Biker cannot start a journey in sixth gear’
An Assessment of the U.N. Global Compact’s Use of Soft Law as
a Global Governance Structure for Corporate Social
Responsibility*

By Roya GHAFELE¹ and Angus MERCER²

Key Words: U.N. Global Compact, Soft Law, Corporate Social Responsibility, Global Governance, Legalization Spectrum, Obligation, Precision, Delegation, Naming & Shaming

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Abstract

The practical impossibility of employing hard law at an international level has meant that softer codes of conduct have stepped in to fill the void. The Global Compact is the most ambitious of these codes, created with a desire to engage business in the project of international development and thus develop a global governance structure for corporate social responsibility.

Soft law instruments, such as voluntary standards and framework agreements have been roundly criticised for being vague and indistinct and creating commitments that may be subjective, tentative and conditional. However, what appears to be lacking in the existing literature is a critical analysis of the governance structures created by a voluntary regulatory instrument like the Global Compact using a framework capable of both assessing the initiative's merits and weaknesses, and tracing its development. Through examining the use of soft law by the Global Compact, we argue that although many question or dismiss its non-binding approach, it provides an illustrative example of the benefits of soft law over harder forms of legislation.

One of the most important lessons to take from the case study is that the use of soft law as a global governance structure of corporate social responsibility should not be dismissed as a 'Plan B' in the event that harder law is not practical. Corporate social responsibility is a relatively recent phenomenon; clear benefits exist in starting an international regulatory mechanism at the softer end of the legalization spectrum, before toughening up later on.

Introduction: Business increasingly shapes the Global Domain

“Transnational corporations are increasing their influence over the economic, political and cultural life of humanity whilst remaining almost completely unaccountable to global civil society.”³

The rising influence of multinational corporations is now widely accepted in contemporary international law and public policy scholarship. As James Rosenau observed twenty years ago, ‘[t]he very notion of “international relations” seems obsolete in the face of an apparent trend in which more and more of the interactions that sustain world politics unfold without the direct involvement of nations or states.’⁴ Multinationals have emerged as the most powerful actor in a new global civil society; the biggest beneficiary of a post-Cold War reconstitution of the global public domain. Along with international nongovernmental organisations and other increasingly powerful non-state actors, big businesses now vie for power on the international stage, a development which has led to the abandonment by many of more traditional state-centric perspectives.⁵ By the turn of the last century, multinationals accounted for 51 of the largest 100 economic entities in the world, and a quarter of global output.⁶ Given this enormous resource capacity, some scholars have even started to view multinationals as an emerging type of ‘private authority’ that has the capability of usurping roles traditionally associated with the state.⁷

The importance in keeping companies in check through global corporate social responsibility initiatives is difficult to overstate. Businesses have the capacity to both benefit and cause great harm to their surrounding environment. As Andrew Kuper argues, ‘[a]n outlook that ignores corporations... strikes most informed commentators as fiddling while Rome burns.’⁸ The specific resources and competencies of large-scale companies must be harnessed to ensure cheap and efficient delivery of socially beneficial services.

³ Winston, M. (2002) ‘NGO Strategies for Promoting Corporate Social Responsibility’ *Ethics and International Affairs* 16 (2): 75

⁴ Rosenau, J. (1990) *Turbulence in World Politics: A Theory of Change and Continuity*, Princeton: Princeton University Press: 6

⁵ Fritsch, S. (2008) ‘The U.N. Global Compact and the Global Governance of Corporate Social Responsibility: Complex Multilateralism for a More Human Globalisation?’ *Global Society* 22 (1): 4

⁶ Anderson, S. and Cavanagh, J. (2000) ‘Report on the Top 200 Corporations’, Institute for Policy Studies, Washington DC at: <http://www.globalpolicy.org/socecon/tncs/top200.htm>

Florini, A. (2003): ‘Business and Global Governance: The Growing Role of Corporate Codes of Conduct’ *Brookings Review* 21: 5

⁷ Cutler, C., Haufler, V. and Porter, T. (eds) (1999), *Private Authority in International Affairs*, Albany: State University of New York Press

Hall, R. and Biersteker, T. (eds) (2002) *The Emergence of Private Authority in Global Governance*, New York: Cambridge University Press

⁸ Kuper, A. (2004) ‘Harnessing Corporate Power: Lessons from the U.N. Global Compact’ *Society for International Development* 47 (3): 10

Corporate social responsibility (CSR) initiatives have risen to prominence because of a discrepancy between the social costs caused by companies and the scrutiny they face in dealing with those costs.⁹ The concept of CSR is amorphous, with definitions ranging from mere corporate compliance with legal obligations to those involving active and voluntary engagement in socially beneficial behaviour.¹⁰ However one chooses to define the concept, the key point is that the growing influence of companies at an international level has triggered heightened societal expectations of corporate behaviour. There is, in short, a growing sense that businesses need to accept greater responsibility for their actions.¹¹

So, how can multinational corporations be held accountable for their actions? How can their unrivalled global capacity be harnessed and utilised in the most effective way possible? In other words, how can we develop global governance structures that are relevant to the new economic realities of our times?

In this article we state the case for the role of soft law mechanisms in the regulation of large corporations. Soft law instruments, such as voluntary standards and framework agreements have been roundly criticised for being ‘vague and indistinct, creating commitments that may be subjective, tentative and conditional.’¹² However, what appears to be lacking in the existing literature is a critical analysis of the norms created by a voluntary regulatory instrument like the Global Compact (GC) using a framework capable of both assessing the initiative’s merits and weaknesses, and tracing its development. Through examining the use of soft law by the GC, we argue that although many question or dismiss its non-binding approach,¹³ it provides an illustrative example of the benefits of soft law over harder forms of global governance. This proves particularly beneficial for the governance of corporate social responsibility of multinational companies.

⁹ Florini, A (2003): ‘Business and Global Governance: The Growing Role of Corporate Codes of Conduct’ *Brookings Review* 21: 5

¹⁰ Whitehouse, L. (2003) ‘Corporate Social Responsibility, Corporate Citizenship and the Global Compact: A New Approach to Regulating Corporate Social Power?’ *Global Social Policy* 3: 303- 304; Votaw, D. (1973) ‘Genius Becomes Rare’, in Votaw, D. and Sethi, S. (eds) *The Corporate Dilemma: Traditional Values and Contemporary Problems*, Englewood Cliffs, NJ: Prentice Hall: 11

¹¹ Fritsch, S. (2008) ‘The U.N. Global Compact and the Global Governance of Corporate Social Responsibility: Complex Multilateralism for a More Human Globalisation?’ *Global Society* 22 (1): 7

¹² Gamble, J. (1985) ‘The 1982 United Nations Convention on the Law of the Sea as Soft Law’ *Houston Journal of International Law* 8: 37

¹³ Cohen, J. (2001) ‘The World’s Business: The United Nations and the Globalisation of Corporate Citizenship’, in Andriof, J. and McIntosh, M. (eds) *Perspectives on Corporate Citizenship*, Sheffield: Greenleaf Publishing: 196; Kilgour, M. (2007) ‘The U.N. Global Compact and Substantive Equality for Women: revealing a ‘well-hidden’ mandate’ *Third World Quarterly*, 28 (4): 751-773; Fritsch: *ibid*: 22;

The Legalization Spectrum: From Soft Law to Hard Law

It is important to define the most basic concepts of soft and hard law at the outset. Hard law has been defined as consisting of ‘norms creating precise legal rights and obligations.’¹⁴ Soft law, by contrast, has been described as consisting of ‘rules of conduct which, in principle, have no legally binding force but which may nevertheless have practical effects.’¹⁵ No binary choice exists between soft and hard law; it is better to regard these two forms of legalization as ideal types sitting at opposite ends of a ‘continuum with numerous graduations.’¹⁶ We shall be referring to this continuum as the ‘legalization spectrum’.

What factors determine the ‘softness’ or ‘hardness’ of a rule? In their seminal article, Kenneth Abbott and Snidal suggest that rules can be broken down into three different dimensions: ‘obligation’, ‘precision’ and ‘delegation.’¹⁷ ‘Obligation’ simply refers to the extent to which actors are legally bound by the rule in question. Ideal-typical soft law does not confer binding legal obligations, unlike its hard law counterpart. The ‘precision’ dimension refers to the detail in which the rule governing the actor in question is set out, both in terms of the objective and the method by which to achieve it. In this respect, soft law is identifiable by the deliberately vague nature of the obligations imposed¹⁸ and the consequent discretion left to the parties being regulated.¹⁹ Thus, the term ‘precision’ seeks to determine the degree to which the rules in place specify (a) the intended objective and (b) the means by which this should be achieved. A ‘precise’ rule is clear and unambiguous.²⁰ ‘Delegation’ refers firstly to the degree to which third parties have been delegated the responsibilities of interpreting, implementing and applying the rules. Secondly, it refers to the degree to which such parties have been delegated the responsibility for resolving disputes. The degree of enforcement plays a crucial role in determining the degree of ‘delegation.’ At the ‘engagement’ end, strategies focus around engaging companies in dialogue; encouraging (and sometimes pressuring) them to sign up to voluntary initiatives in which companies undertake to provide a living wage for their employees. ‘Confrontation’ tactics involve holding socially irresponsible companies to account through such means as boycotting and litigation proceedings. ‘Documentation of abuses and moral shaming’ is

¹⁴ Weil, P. (1983) ‘Towards Relative Normativity in International Law?’ *The American Journal of International Law* 77: 414

¹⁵ Snyder, F. (1993) ‘Soft Law and Institutional Practise in the European Community’, European University Institute Working Paper, Law No. 93/5: 2

¹⁶ Gamble, *ibid*: 38

¹⁷ Abbott, K. and Snidal, D. (2000) ‘Hard and Soft Law in International Governance’ *International Organization* 54 (3): 421-456

¹⁸ Gold, J. (1983) ‘Strengthening the soft law of exchange arrangements’ *American Journal of International Law* 77: 443

¹⁹ Gruchalla-Wesierski, T. (1984) ‘A Framework for Understanding Soft Law’ *McGill Law Journal* 30: 37

²⁰ Abbott, K. and Snidal, D. (2000) ‘Hard and Soft Law in International Governance’ *International Organization* 54 (3): 412

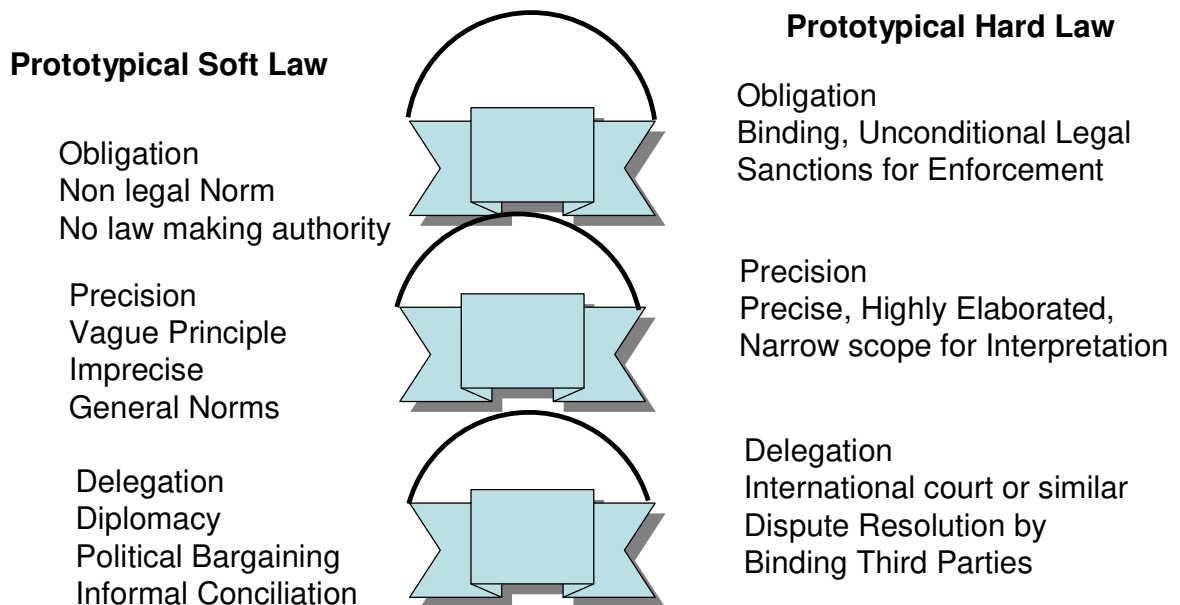
positioned the halfway point on this spectrum, giving thus way to a ‘moderate’ degree of ‘delegation’ on the Legalization spectrum.²¹

Under this framework, each of the three dimensions of legalization has its own continuous sliding scale. The higher a rule scores across the three dimensions, the harder it is, hence the higher it will sit on the overall spectrum.²² In adopting this analytical framework, we reject the notion of a specific threshold at which ‘hard law’ is suddenly born.²³ Given the myriad different forms of legalization employed throughout the international arena,²⁴ and the diverse range of institutions which can generate these forms, we submit that it is impossible to identify any such universally applicable threshold with any kind of certainty. Rules can be placed accurately on the three sliding scales (obligation, precision and delegation) as well as on the overall spectrum (see diagram below).

What distinguishes Soft Law from Hard Law?

The Legalization Spectrum

In Practice: Smooth Transitions, rather than a Dichotomy



Adapted from Abbott & Snidal, 2000

²¹ Winston, M. (2002) ‘NGO Strategies for Promoting Corporate Social Responsibility’ *Ethics and International Affairs* 16 (2): 77- 80

²² Abbott, K. and Snidal, D., *ibid*, 401-412

²³ Weil, P. (1983) ‘Towards Relative Normativity in International Law?’ *The American Journal of International Law* 77: 417

²⁴ Chinkin, C (1989) ‘The Challenge of Soft Law: Development and Change in International Law’ *International and Comparative Law Quarterly* 38: 851

How this Study Was Conducted

This framework has been chosen because it emphasises the fact that any perception of a ‘soft law/ hard law’ dichotomy is illusory and misguided, and underlines the continuous nature of the legalization spectrum. For the purpose of this essay, it also serves to illustrate the transition made by the norms generated by the Global Compact, from almost prototypical soft law at its inception to rules occupying a more moderate position on the overall legalization spectrum. The Global Compact was selected as a case study because it constitutes the single most ambitious international code for the governance of corporate social responsibility. Other codes of conduct, such as the OECD Guidelines for Multinational Enterprises (1976, revised 2000), the Caux Round Table Principles (1994) or the WHO/UNICEF code for transnational corporations have failed to achieve the degree of internationalization as the Global Compact has.²⁵ The same can be said for various private sector self regulatory initiatives for corporate social responsibility, which lack the degree of authority enjoyed by the United Nations. Further, the institutionalization of the Global Compact illustrates the U.N.’s recognition of corporations as an important emerging actor in the international system. The strategy adopted of the Global Compact thus serves as the primary instructive template for international voluntary initiatives, both in the area of corporate social responsibility and beyond.

Because all qualitative techniques rely on the gathering of reliable and timely information, we emphasized the generation of concrete empirical information and the illustration of current mechanisms. In doing so, we used an ‘outside-in’ perspective so to assess the systematic effects of the potential or actual application of Soft Law by the Compact. When determining the application of a governance structure, it is good practice to combine technical and legislative information from a number of sources. It is then necessary to reflect endogenous-induced changes in the use of a governance structure so to determine its potential, before singling out the various impact factors so to clearly discern their benefits and pitfalls and associate them with desired outcomes. Thus, our study is based on an analysis of the Global Compact’s website, all relevant reports that the Global Compact (including those that the United Nations Secretariat has issued in this context in the last decade), the United Nations Charter of Economic Rights and Duties of States (1974),²⁶ the various speeches of the U.N. Secretary General at the time, Kofi Annan, relevant press releases by the Compact and the U.N. Secretariat, as well as all further publications by the Global Compact itself. In doing so, we sought to capture in qualitative terms the global governance structures provided by the Compact. We examined the available information and collected further secondary sources, particularly academic publications, helping to determine and document the implementation of Soft Law by the Compact. At stages when a number of options (each with its own summary, analysis & evidence page) were considered, we opted for a single evidence base, addressing clearly our subject of analysis. Our evidence base

²⁵ OECD (2010) The OECD Guidelines for Multinational Enterprises <http://www.oecd.org/dataoecd/12/21/1903291.pdf>; CAUX (2010): The Caux Roundtable Principles <http://www.cauxroundtable.org/>; Sikkink, K. (1986). Codes of Conduct for Transnational Corporations. The Case of the WHO/UNICEF Code. *International Organization*, 40: 815-840

²⁶ U.N. Resolutions adopted by the General Assembly 3281 (XXIX). Charter of Economic Rights and Duties of States <http://www.un-documents.net/a29r3281.htm>

thus sought to address any uncertainties associated with the Soft Law mechanisms of the Global Compact.

In a second step we assessed the empirical data through the prism of analysis provided by Abbott and Snidal,²⁷ so to monitor and document the evolution of the soft law mechanisms of the Compact. This methodological framework was chosen for its conceptual clarity as well as originality. To our knowledge it is the first of its kind to systematically define what elements determine the degree of ‘hardness’ of a law. We assessed these by referring to a mixture of analytical and narrative methods, as well as with reference to research that supports the formulation of our hypothesis that since its inception the GC has moved from a purely soft law position to a moderately more advanced position on the legalization spectrum. We recognize however that certain changes may have occurred because of a further increase of international economic integration, lying outside the realm of our analysis. We have the aspiration that our findings may offer additional indicators that allow to discuss the impact and relevance of the Compact’s use of Soft Law as a Governance Structure. Thus, they must stand up to external scrutiny; i.e. they should be accessible to the reader, and external parties with an interest must be able to contest the findings.

The Soft Law Mechanisms of the Global Compact

The practical impossibility of employing hard law at an international level has meant that softer codes of conduct have stepped in to fill the void. The Global Compact (GC) is the most ambitious of these codes, created with a desire to include rather than alienate companies. The GC reflects an eagerness on the part of the U.N. to engage businesses in the project of international development, and highlights the ‘pendulum swing away from stricter forms of regulation’²⁸ at the international level. Its mandate recently reaffirmed by a new U.N. General Assembly Resolution,²⁹ the Compact employs soft (though increasingly more moderate) forms of legalization to ‘leverage the platform’ of large corporations³⁰ and encourage socially responsible corporate behaviour. It has been aptly characterised as a ‘standardised ethics initiative.’³¹ Corporate participants are required to ‘embrace, support and enact’ ten principles in the areas of human rights, labour, the environment and anti-corruption.

²⁷ Abbott, K. and Snidal, D., *ibid*

²⁸ Utting, P. (2000) *Business Responsibility for Sustainable Development*, New York: United Nations Research Institute for Social Development: 30

²⁹ United Nations General Assembly (2007) ‘Towards Global Partnerships’, Session 62, Agenda Item 61: A/C.2/62/L.33/Rev.1 at: http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2007_12_05/towards_global_partnerships.pdf

³⁰ Ruggie, J. (2004) ‘Reconstituting the Public Domain- Issues, Actors and Practises’ *European Journal of International Relations* 10 (4), 514

³¹ Rasche, A. And Gilbert, D.U. (2008): *Upsetting Traditional Governance – How the United Nations Global Compact Links Actors and Levels*, Paper presented at the Annual Meeting of the European Group for Organization Studies (EGOS), Amsterdam: 758- 9

The initiative operates on a purely voluntary basis; companies sign up simply by completing an online form and sending a letter of commitment, approved by its board, from its CEO to the U.N. Secretary-General expressing its desire to participate.³² Other stakeholders include NGOs, academia, labour associations and stock exchanges.³³ The Compact relies on ‘public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which [it] is based.’³⁴ It has been observed that the ten fundamental principles serve as ‘macro contracts’ defining the responsibilities of the participant companies, whilst at a micro-level, local networks are developed between participating firms and other stakeholders.

The Ten Principles for Corporate Social Behaviour issued by the Global Compact

- 1) Businesses should support and respect the protection of internationally proclaimed human rights.
- 2) Businesses should make sure that they are not complicit in human rights abuses.
- 3) Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining.
- 4) Businesses should eliminate all forms of forced and compulsory labour.
- 5) Businesses should ensure the effective abolition of child labour.
- 6) Businesses should ensure the elimination of discrimination in respect of employment and occupation. .
- 7) Businesses should support a precautionary approach to environmental challenges.
- 8) Businesses should undertake initiatives to promote greater environmental responsibility.
- 9) Businesses should encourage the development and diffusion of environmentally friendly technologies.
- 10) Businesses should work against corruption in all its forms, including extortion and bribery

These are based on existing norms espoused in the Universal Declaration of Human Rights, the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption respectively.

The Compact’s lack of enforceability is viewed by many as a fundamental weakness of the initiative.³⁵ The GC has been strongly criticised for not demanding a higher degree of accountability from its corporate participants³⁶ and for lacking the ability to sanction those

³² Global Compact (2010) at:

http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html

³³ Fritsch, S. *ibid*: 17

³⁴ Blanpain, R. and Colucci, M. (2004) *The Globalization of Labour Standards: The Soft Law Track*, The Hague: Kluwer International Law School: 41

³⁵ Cohen, J. (2001) ‘The World’s Business: The United Nations and the Globalisation of Corporate Citizenship’, in Andriof, J. and McIntosh, M. (eds) *Perspectives on Corporate Citizenship*, Sheffield: Greenleaf Publishing: 196

³⁶ Haider, H. (2004) ‘U.N. Pact with Business Lacks Accountability’, *Inter Press Service* (24 June 2004), June 24 at: <http://www.globalpolicy.org/reform/business/2004/0624lack.htm>; Kilgour, M. (2007) ‘The U.N. Global Compact and Substantive Equality for Women: revealing a ‘well-hidden’ mandate’ *Third World Quarterly*, 28 (4): 768

failing to live up to their commitments.³⁷ Referring to Corporate Social Responsibility projects undertaken by signatories to the Compact in India, Aruna Das Gupta argues that '[i]ndividual and collaborative initiatives continue to be dominated by self-assertion rather than accountability.'³⁸ Critics of the Compact assert that companies can only be made accountable through legally enforceable obligations, and that softer forms of legalization such as voluntary Corporate Social Responsibility initiatives are 'no substitute for the legislative actions of a recognised political authority'³⁹ given the 'lack of any basis for legal claims or redress' under such initiatives.⁴⁰ These critics reached a peak in spring 2010. British Oil giant 'BP' had been a member of the Global Compact since 2000 and systematically complied with all the requirements set out by the Compact. Yet, in spite of that BP caused a major oil leak in the Gulf of Mexico in early 2010.⁴¹

In the face of such condemnations, critics tend to further dismiss the Compact as a public relations gimmick;⁴² an example of companies lobbying for 'business friendly (sic) pseudo-solutions' to the social costs they create, instead of enforceable rules.⁴³ Critiques thus call for rules to replace the voluntary approach,⁴⁴ and pressure the U.N. to 'have its own system of complaints and adjudications, which could conduct investigations to a standard that would have legal standing.'⁴⁵ However such criticism fails to appreciate the advantages soft law presents in this context. Voluntary initiatives like the Global Compact compensate for their lack of binding authority through a variety of mechanisms. We now examine these mechanisms using the legalization spectrum as our analytical framework. NGOs for example have criticized the Global Compact for admitting firms such as 'Anglo American' or 'Petro China.' According to critics

³⁷ Fritsch, S. (2008) 'The U.N. Global Compact and the Global Governance of Corporate Social Responsibility: Complex Multilateralism for a More Human Globalisation?' *Global Society* 22 (1): 22

³⁸ Das Gupta, A. (2007), 'Social Responsibility in India: Towards Global Compact Approach' *International Journal of Social Economics* 34 (9): 655

³⁹ Hughes, S., Wilkinson, R., Humphreys, D., Macmillan, T and Rae, I. (2001) 'The Global Compact: Promoting Corporate Responsibility?' *Environmental Politics* 10 (1): 157

⁴⁰ Paul J. and Garred, J. (2005), 'Making Corporations Accountable: A Background Paper for the United Nations Financing for Development Process' at: <http://www.globalpolicy.org/soecon/ffd/2000paper.htm>

⁴¹ Scheffer, D. (28. 5. 2010) 'BP shows the need for a rethink of regulation.' Financial Times Online

⁴² Winston, M. (2002) 'NGO Strategies for Promoting Corporate Social Responsibility' *Ethics and International Affairs* 16 (2): 75-6; Hassel, A. (2008) 'The Evolution of a Global Labor Governance Regime' *Governance: An International Journal of Policy, Administration, and Institutions* 21 (2): 231

⁴³ Hoedeman, O. (2002) 'Rio +10 and the Greenwash of Corporate Globalization' *Society for International Development* 45 (3): 40

⁴⁴ Amnesty International(2003) 'Letter to Louise Frechette raising concerns on U.N. Global Compact,' at <http://www.globalpolicy.org/ngos/ngo-un/access/2003/0606compact.htm>

⁴⁵ Bendell, J. (2004) 'Flags of Inconvenience? The Global Compact and the Future of the United Nations', Nottingham International Centre for Corporate Social Responsibility, ICCSR Research Paper Series 22: 12

both firms do not act in a corporate socially responsible way. The NGO 'Action Aid' blames 'Anglo American' for allegedly operating gold mines in Ghana that cause severe ecological and social damages. Equally, the company 'Petro China' has been associated with providing funding to the most controversial Sudanese Government.⁴⁶ A search of GC participating companies also shows that many alcohol producing firms participate in the initiative. We could not identify a statement on behalf of the GC how the participation of such firms can be matched to the World Health Organization's (WHO) efforts to fight non communicable diseases. However it is worth noting, that no tobacco company is a member of the GC, at least one illustration that a concerted policy among various UN agencies is possible.

Assessing the Institutionalization of Soft Law by the Global Compact

Obligation: The Compact's 'Carrots and Sticks' Approach

The Compact's self-professed challenge at its inception was to implement existing norms effectively without being able to legally enforce them.⁴⁷ It has been observed that '[t]he effectiveness of voluntary enforcement mechanisms... depends on the interests of competing firms.'⁴⁸ By this logic, the Compact needs to make it in the interest of businesses themselves to live up to their commitments. Soft law initiatives have a variety of carrots and sticks at their disposal to help them achieve this. For the Compact, the 'carrot' approaches involve selling the advantages of its voluntary, flexible status to its participants. The 'stick' approaches involve sanctioning non-complying, free-riding companies by eroding their reputation and articulating precise regulations, thereby upholding the integrity and credibility of the initiative. Crucially, the 'carrot' approaches were employed from the very outset to secure broad participation in the GC. It was only once this had been achieved that the 'stick' approaches were progressively ratcheted up to preserve the integrity of the initiative.

The Carrots

At its inception the coercive force of the Compact was relatively weak. It offered 'carrots' to its participants in the form of non-binding principles and autonomy regarding their implementation. The biggest carrot of all for companies was membership of the Global Compact itself -

⁴⁶ Global Compact Critics, (2010) at: <http://globalcompactcritics.blogspot.com/2008/07/anglo-american-responds-to-questions.html> or Global Policy (2010) at <http://www.Globalpolicy.org>, or Morgan, S. (7.1.2009) Petro China, The UN and the Blood Money. The Huffington Post http://www.huffingtonpost.com/susan-morgan/etrochina-the-un-and-blo_b_155794.html

⁴⁷ Kell, G. (2005) 'The Global Compact: Selected Experiences and Reflections' *Journal of Business Ethics* 59 (2): 74

⁴⁸ Hassel, A. (2008) 'The Evolution of a Global Labor Governance Regime' *Governance: An International Journal of Policy, Administration, and Institutions* 21 (2): 247

corporations could enhance the value of their brand by associating themselves with the Compact. It also provided interactive forums for its participants to facilitate dialogue and promote the sharing of CSR strategies. By allowing those regulated to retain autonomy in terms of how they incorporate the ten principles into their everyday practices, the Global Compact does not alienate potential participants. Certain scholars believe that corporations quite simply would not sign up to the Compact if a legal obligation was imposed,⁴⁹ and there is evidence to support this theory. The binding nature of the ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights’, introduced in 2003 by the U.N. Human Rights Commission, meant that the initiative met with firm resistance from most businesses and suffered as a result.⁵⁰ The danger of imposing forms of legalization scoring too high on the ‘obligation’ dimension was also highlighted by the unwillingness of developed states to legally bind themselves to the Principle of Non-Reciprocal Preferential Treatment of Developing States in the 1974 Charter of Economic Rights and Duties of States.⁵¹ Companies prefer that their activities are not subject to the decisions of an external force. The Compact appears to have taken this message on board by initially prioritising high participation over enforcement integrity before redressing the balance once enough companies are signed up.⁵²

The Sticks

The balance was redressed through progressively more advanced and onerous ‘stick’ tactics. The GC did employ coercion in a negative sense from the outset, but this was initially limited to monitoring of company behaviour by NGOs and the media, together with the reputational sanctions that ensued for socially irresponsible practices. Margaret Keck and Kathryn Sikkink suggest that activist networks employ a variety of tactics designed to hold the actors they scrutinise to account. These tactics include ‘leverage politics.’ This involves the ‘mobilisation of shame’, where ‘the behaviour of actors is held up to the bright light of international scrutiny.’⁵³ The effectiveness of these activist networks lies in employing what Joseph Nye sees as a classic feature of ‘soft power’; using the ‘hard power’ of another actor (in this case, a company’s high brand equity) against it as a means to obtain a desired outcome.⁵⁴ A state signing up to a voluntary agreement has been described as offering its ‘reputation for living up to its

⁴⁹ Mowery, L. (2002) ‘Earth Rights, Human Rights: Can International Environmental Human Rights Affect Corporate Accountability?’ *Fordham Environmental Law Journal* 13 (2): 343; Kuper, A. (2004) ‘Harnessing Corporate Power: Lessons from the U.N. Global Compact’ *Society for International Development* 47 (3): 11

⁵⁰ Fritsch, S. (2008) ‘The U.N. Global Compact and the Global Governance of Corporate Social Responsibility: Complex Multilateralism for a More Human Globalisation?’ *Global Society* 22 (1): 25-6

⁵¹ Gruchalla-Wesierski, T. (1984) ‘A Framework for Understanding Soft Law’ *McGill Law Journal*: 41

⁵² Hassel, A. (2008) ‘The Evolution of a Global Labor Governance Regime’ *Governance: An International Journal of Policy, Administration, and Institutions* 21 (2): 245

⁵³ Keck, M. and Sikkink, K. (2008) ‘Transnational Advocacy Networks in International and Regional Politics’ *International Social Science Journal* 51 (159): 97

⁵⁴ Nye, J. (2009), Lecture at Oxford University: ‘Hard and Soft Power in International Governance’, 25 May 2009

commitments as a form of collateral,' where 'failure to live up to one's commitments harms ones reputation and makes future commitments less credible.'⁵⁵ This principle applies to an even greater extent to large companies, given the enormous value and investment placed in their corporate image.

As the Compact has developed, its mechanisms for inflicting reputational sanctions on its non-complying participants have become progressively more onerous. The GC's initial refusal to publicly shame those failing to file annual progress reports was seen as a major weakness.⁵⁶ However, now that it has attracted a plethora of participants, the initiative has toughened its stance. As part of the 2005 reforms, 'Integrity Measures' were introduced stating that any company missing two consecutive deadlines would be labelled publicly as 'non-communicating' on the Global Compact website, the only exception being for those companies lacking the capacity to report or communicate fully. To reinforce this, a more detailed and transparent system for reviewing complaints has been put into place. Initially, the Global Compact adopted a 'softly-softly' approach: it forwarded substantiated complaints to the company concerned, and it requested information on the company's plans to rectify the situation, possibly providing guidance to assist the company in this process. However, failure on the part of the company to enter into dialogue can result in them being labelled 'inactive' or even removed from the list of Global Compact participants, a process known as being 'delisted.'⁵⁷ The complaints procedure works primarily because it is in the interests of both advocacy networks and rival companies to see an offending participant held to account for its violations. Other firms lose out when their competitors succeed in evading their responsibilities.⁵⁸ The 2005 reforms provided for 'the possibility of filing complaints of systematic or egregious abuse of the Compact's overall aims and principles to the Global Compact Office against any participating company.'⁵⁹ To reinforce this, a more detailed and transparent system for reviewing complaints has been put into place.⁶⁰ Finally, since 2005 the 'Policy on the Use of the Compact Name and Logos' has provided 'specific and detailed examples of circumstances under which and in what way the display of the

⁵⁵ Guzman, A. (2002) 'A Compliance-based Theory of International Law' *California Law Review* 90: 1848-50

⁵⁶ Cohen, J. (2001) 'The World's Business: The United Nations and the Globalisation of Corporate Citizenship', in Andriof, J. and McIntosh, M. (eds) *Perspectives on Corporate Citizenship*, Sheffield: Greenleaf Publishing: 196; Litvin, D. (2003) 'Memo to the President: Raising Human Rights Standards in the Private Sector' *Foreign Policy* 139: 70

⁵⁷ Global Compact, (undated) at: http://unglobalcompact.org/COP/non_communicating.html;
Global Compact (2010) at:

http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html; Global Compact Office (2005): 'The Global Compact's Next Phase' at:

http://www.unglobalcompact.org/docs/about_the_gc/2.3/gc_gov_framework.pdf;

⁵⁸ Hassel, A. (2008) 'The Evolution of a Global Labor Governance Regime' *Governance: An International Journal of Policy, Administration, and Institutions* 21 (2): 235

⁵⁹ Nowrot, K. (2006) 'The New Governance Structure of the Global Compact: Transforming a 'Learning Network' into a Federalized and Parliamentarized Transnational Regulatory Regime' *Essays in Transnational Economic Law* (47): 27-8

⁶⁰ Global Compact (undated) at:

http://www.unglobalcompact.org/newsandevents/news_archives/2006_10_02.html

logos will be generally permitted or not be allowed respectively.’ The Financial Times reports that in 2010 55 companies were delisted for their failure to provide a communication on progress.⁶¹ Prior to this, the Compact was strongly criticised for allowing participating companies to ‘blue-wash’ their socially irresponsible activities through association with the initiative. Critics have argued that through associating themselves with the U.N., companies could gain favourable publicity by ‘wrapping themselves in the flag of the United Nations’ without taking any substantial steps to improve their behaviour. An illustration of this argument is the Austrian Bank ‘Bawag’, which joined the Global Compact in March 2009 after its senior management was sentenced to prison for serious fraud and damages worth 1.7 billion Euro in 2008. ‘Bawag’s’ membership to the GC may be read as an effort to help reposition the bank and regain again some sort of credibility as the ‘new Bawag’ that is strongly decoupled from the ‘old’ Bawag, associated with fraud and corruption. Bruno and Karliner again argue that the U.N. demonstrated ‘poor judgment in allowing executives such as Nike’s Phil Knight to be photographed with Mr Annan in front of the U.N. flag, without any substantial effort by the company to adhere to the Global Compact principles.’⁶² Since the 2005 reforms, therefore, the negative coercive pressure applied by the Compact has been significantly strengthened. Given the more stringent mechanisms for inflicting reputation sanctions on its lagging participants that are described above, we argue that the Compact’s norms have moved from a low position to a moderate position on the sliding scale of ‘obligation.’

Moral shaming works. An excellent example of this is the Extractive Industries Transparency Initiative (EITI). Set up by the UK-based NGO ‘Global Witness’, the EITI sets an international standard for companies in the extractive sector to publish what they pay and what governments receive from oil, gas and mining contracts. Despite its purely voluntary status, the EITI has been a huge success story. Since 2006, 29 countries have applied to become EITI compliant, and in February this year Azerbaijan became the first country to complete the intensive validation process.⁶³ Why are resource-rich developing countries bending over backwards to comply with a voluntary standard created by small Western NGO? In his recent lecture at Oxford University, Paul Collier suggests that it is because the EITI ‘sorts the sheep out from the goats. The decent governments sign up, and that then reveals the ones that refused to sign up as just what they are.’ As he argues in his recent book ‘The Bottom Billion’, ‘[n]orms are effective because they are enforced by peer pressure... An international charter gives people something very concrete to demand: either the government adopts it or it must explain why it hasn’t’.⁶⁴ The same can be said of the GC, except we replace the word ‘government’ with ‘corporation.’ The beauty of the concept is that it costs next to nothing to implement; it simply relies on the scrutiny of advocacy networks that are already in place, and the desire of the actors regulated to be seen as good global citizens. It seems likely that this mechanism accounts for at least some of the extraordinary growth the Compact has achieved since its inception. The number of signatories

⁶¹ Johnson, S. (14.2.2010) ‘Companies fail UN’s Global Compact’

⁶² Bruno, K. and Karliner, J. (2002) ‘The U.N.’s Global Compact, Corporate Accountability and the Johannesburg Earth Summit’ *Society for International Development* 45 (3): 33-38

⁶³ EITI website (2010) at: <http://eiti.org/implementingcountries>

⁶⁴ Collier, P. (2007), *The Bottom Billion. Why the poorest countries are failing and what can be done about that* Oxford University Press. Oxford: 139- 144

has risen from an initial figure of 38 at its official launch in July 2000, to a present total of over 4,700.⁶⁵

Precision: The Compact's Best Practice & Engagement Opportunities

Although the Global Compact has specified its intended objectives in the form of its ten governing principles, these are set out in extremely vague, one-sentence terms, and initially the means by which companies were supposed to achieve these goals were not articulated. The second principle, for example, states that businesses should 'make sure that they are not complicit in any human rights abuses,'⁶⁶ but the Compact makes it in no way explicit how the respect for this principle should be translated into practice. Unsurprisingly, the Compact has been heavily criticised for failing to define the obligations of its participants in a more detailed manner. Such critics view low 'precision' scores as a clear weakness; an 'impediment to effective implementation' of the Compact's overarching aim to get companies to embrace its core values. They see voluntary codes as frequently amounting to little more than 'vague statements of principle that cannot provide reliable guidelines for behaviour in concrete situations.'⁶⁷

However, these criticisms miss an important point, which is that these ten one-sentence principles are merely intended as a starting point. Detailed ideas for further Corporate Social Responsibility projects may be quickly and easily developed (and, crucially, reformed), given that the more formal, bureaucratic policy instruments of hard law initiatives are avoided.⁶⁸ A parallel here may be drawn with the discretion provided by the Stability and Growth Pact, where 'scope for reform without resort to formal legal changes is possible and more likely than if formal legal instruments... had to be reformed.'⁶⁹ As Georg Kell, Executive Director of the Compact, points out: '[t]he rapid evolution of the Compact stands in stark contrast to the cumbersome task of establishing regulation, and highlights the advantage of voluntary initiatives' flexibility.'⁷⁰ Given that the whole concept of Corporate Social Responsibility is still in its embryonic stages, it makes eminent sense to limit the degree of rigid, detailed *ex ante* legislation and instead to incrementally develop more precise norms through stakeholder dialogue 'free of

⁶⁵ Global Compact (2010) at <http://www.unglobalcompact.org>

⁶⁶ Global Compact (2010) at: <http://www.unglobalcompact.org/aboutthegc/index.html>

⁶⁷ Paul J. and Garred, J. (2005), 'Making Corporations Accountable: A Background Paper for the United Nations Financing for Development Process' at:

<http://www.globalpolicy.org/socecon/ffd/2000papr.htm>; Litvin, D. (2003) 'Memo to the President: Raising Human Rights Standards in the Private Sector' *Foreign Policy* 139: 70; Morgera, E. (2006) 'The U.N. and Corporate Environmental Responsibility: Between International Regulation and Partnerships' *Review of European Community and International Environmental Law* 15 (1): 100

⁶⁸ Cini, M. (2001) 'The Soft Law Approach: Commission Rule-making in the EU's State Aid Regime' *Journal of European Public Policy* 8 (2): 195

⁶⁹ Hodson, D. and Mahler, I. (2004) 'Soft Law and Sanctions: Economic Policy Co-ordination and Reform of the Stability and Growth Pact' *Journal of European Public Policy* 11 (5): 802

⁷⁰ Kell, G. (2005) 'The Global Compact: Selected Experiences and Reflections' *Journal of Business Ethics* 59 (2): 73

‘command and control.’⁷¹ This is where the Compact’s function as an interactive forum for discussion and learning plays such an important role. At the GC’s inception it was imperative not to alienate businesses through legally binding mechanisms, rather to progressively generate detailed ideas for socially responsible behaviour with them as willing, engaged parties to the process. If this had not been achieved, the initiative would have fallen at the first hurdle. The Compact recognised the need to get the Corporate Social Responsibility ball rolling with companies on its side.

Thus, critics fail to appreciate that the GC’s so-called ‘vagueness’ presents significant advantages. The low ‘precision’ score of the Global Compact principles encourages widespread corporate participation in the initiative. Rather than alienate companies by scaring them away with detailed rules, the Global Compact gives them the autonomy to implement its principles in different ways, according to what works best in their industry and in the jurisdiction in which they operate. Comparisons can be made with the Open Method of Coordination governance system (OMC) operating within the European Union, which also allows for the flexible adaptation of policy initiatives according to the ‘diverse institutional arrangements, legal regimes and national circumstances in the member states.’⁷² The Compact shares the desire of the OMC to strike a balance between respecting the diversity of its participants, whilst retaining the advantages of collective action.⁷³

The Compact’s soft law instruments provide a variety of interactive platforms for participating companies to discuss and learn about Corporate Social Responsibility policies collectively. In doing so, the Compact’s value proposition falls squarely into companies’ needs. An assessment of the motivations for firms to sign up to the Compact revealed that after the purpose of addressing humanitarian concerns, the next three motivations companies most frequently cited were: (1) the acquisition of practical know-how, (2) the opportunity to network with other organisations, and (3) to become more familiar with Corporate Social Responsibility practices.⁷⁴ Arguably, the most attractive feature of the Global Compact for its participants, therefore, is that it provides them with opportunities to engage in cooperative dialogue with other civil society actors (including other companies) and thereby learn about how they can best improve their Corporate Social Responsibility activities. These so-called ‘engagement opportunities’ fall into three principal categories.⁷⁵

⁷¹ McKenzie, K. (2001) ‘Compact Must Avoid ‘Command and Control’’, *International Herald Tribune*, 25 January: 13; Therien, J-P. and Pouliot, V. (2006) ‘The Global Compact: Shifting the Politics of International Development?’ *Global Governance* 12: 62

⁷² Schafer, A. (2006) ‘A New Form of Governance? Comparing the Open Method of Co-ordination to Multilateral Surveillance by the IMF and the OECD’ *Journal of European Public Policy* 13 (1): 83

⁷³ Borrás, S. and Jacobsson, K. (2004) ‘The Open Method of Coordination and New Governance Patterns in the EU’ *Journal of European Public Policy* 11 (2): 186

⁷⁴ McKinsey & Company (2004), ‘Assessing the Global Compact’s Impact’, May 11 2004, at: http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2004_06_09/imp_ass.pdf

⁷⁵ Blanpain, R. and Colucci, M. (2004) *The Globalization of Labour Standards: The Soft Law Track*, The Hague: Kluwer International Law School: 112

Firstly, the Compact has a system of ‘Learning Networks’. These are designed to ‘facilitate the progress of companies... with respect to implementation of the ten principles, while also creating opportunities for multi-stakeholder engagement and collective action’ The aim is to foster an environment in which companies are able to engage in a mutually beneficial information exchange An Annual Local Networks Forum is held every year to enable further networking and learning opportunities Secondly, the Compact organises Policy Dialogues, which allow for intensified exchange of ideas between businesses, government leaders, U.N. agencies, NGOs, academics and other actors. Such dialogues ‘focus on specific issues relating to globalisation and corporate citizenship’; past topics have included ‘The Role of the Private Sector in Zones of Conflict’ and ‘Business and Sustainable Development.’ From these Policy Dialogues, case studies of successful best practices can be sent to the Global Compact Office (Fritsch, 2008: 19). Finally, the Compact uses its website as repository of information. In addition to providing their mandatory annual Communication on Progress (COP), companies can also submit ‘case stories’ detailing specific actions they have taken to further their Corporate Social Responsibility commitments. There is a large public relations incentive for companies to deliver a detailed account of the improvements they have been making in their Corporate Social Responsibility practices: the Compact’s ‘Notable Program’ rewards outstanding COPs by publishing them in a special section on its website.⁷⁶

The principle advantage presented by the learning environment fostered through soft law mechanisms is that it provides scope for the ‘precision’ score of the norms generated to be progressively increased as detailed, universally agreed norms and standards of practice.⁷⁷ Also in this regard the Global Compact may be compared with the Open Method of Coordination governance system (OMC) operating within the European Union (OMC), for which ‘[t]he objective is not to prescribe uniform rules,’ but to organise ‘a learning process in order to promote the exchange of experiences and best practices.’⁷⁸ It is important to highlight that the creation of any detailed best practices would almost certainly be impossible to achieve through a hard law initiative, given the reluctance of companies to bind themselves to precise legal obligations. As companies progressively acquire experience in the field of Corporate Social Responsibility and disseminate this information through the channels that the Compact has put in place, ideas and standards evolve. As Ann Florini notes, ‘[t]he dispute over exactly what... standards should be- and who should decide- has just begun.’⁷⁹ Corporate strategies, structures

⁷⁶ Global Compact (undated) at:

http://www.unglobalcompact.org/docs/networks_around_world_doc/What_is_a_Local_Network.pdf;

(undated) at: http://unglobalcompact.org/COP/case_search.html;

http://www.unglobalcompact.org/COP/notable_cops.html;

http://www.unglobalcompact.org/NetworksAroundTheWorld/Annual_Local_Networks_Forum_page.html; <http://unglobalcompact.org/COP/index.html>;

⁷⁷ Hassel, A. (2008) ‘The Evolution of a Global Labor Governance Regime’ *Governance: An International Journal of Policy, Administration, and Institutions* 21 (2): 246

⁷⁸ Regent, S. (2003) ‘The Open Method of Coordination: A New Supranational Form of Governance?’ *European Law Journal* 9 (2): 190-1

⁷⁹ Florini, A (2003): ‘Business and Global Governance: The Growing Role of Corporate Codes of Conduct’ *Brookings Review* 21: 8

and production processes are subject to constant and fast-paced change. It therefore makes sense to have a malleable, adaptable body of knowledge which can be added to as new norms are generated, rather than a rigid system of legally binding legislation.⁸⁰ The latter system would quickly become obsolete as the principles it espoused became dated and redundant. The Compact therefore adopts the more realistic strategy of attempting to generate consensus around progressively more precise soft law norms.

As multi-stakeholder dialogue continues to become more sophisticated and as managers become more aware of the needs of their constituencies the hope is that different, industry-specific behavioural norms will emerge in a 'bottom-up' fashion and will become embedded within the culture of that particular industry. As Hassel puts it, '[a] plethora of voluntarist initiatives [will] converge over time on a shared understanding,'⁸¹ which will enjoy a great deal of legitimacy and could eventually harden into more formal legal codes.⁸² However, this does not need to be the endgame. Voluntary standards will continue to have value even if they never become binding, given that companies still have a reputation-based incentive to conform to them, or at least attempt to conform.

As the initiative has evolved, 'engagement opportunities' such as Learning Networks, Annual Local Networks Forums and Policy Dialogues have yielded case studies and evolving standards of 'best practice' in various CSR fields. These mechanisms have at the same time created a market for Corporate Social Responsibility (CSR). Accounting Firm KPMG grasped the business opportunity to advise other firms on CSR initiatives and Swiss Bank UBS has issued CSR related investment products, illustrating how business and public policy are increasingly interwoven.

The standards, coupled with the annual COPs, have thus served both, detailed examples of how Compact participants can best achieve the principles to which they are committed and new business opportunities for adhering firms. The Compact has boosted the 'precision' score of its norms since 2005 by providing detailed examples of what constitutes a learning network and what constitutes a misuse of its name and logo. The GC's norms on the precision scale have moved from an initial position where it was extremely difficult to identify what conduct did or did not constitute compliance with GC principles (given their vagueness and the initial lack of guidelines), to a position where detailed standards have developed in a number of different fields. We therefore argue that the evolution of these non-binding norms shifts them from a low to a moderate 'precision' score.

Delegation

⁸⁰ Ruggie, J. (2002) 'The Global Compact as a Learning Network' *Journal of Corporate Citizenship* 5: 32

⁸¹ Hassel, A. (2008) 'The Evolution of a Global Labor Governance Regime' *Governance: An International Journal of Policy, Administration, and Institutions* 21 (2): 232

⁸² Ruggie, J. (2002) 'The Global Compact as a Learning Network' *Journal of Corporate Citizenship* 5: 33

The Compact delegates very little dispute resolution authority to third parties. The only mechanism that even approaches such a delegation is the possibility of the Compact initiating legal proceedings against a company in the event of a misuse of its name or logo, and this is articulated in extremely vague terms.⁸³ As a result, it is difficult to give the Compact's norms anything other than a low score for the first element of the 'delegation' dimension.

On the second element, however, the norms score higher. The 'Rule Making and Implementation' scale runs from soft forms of legalization that constitute 'normative statements' to the hardest forms which are 'binding regulations' with 'centralised enforcement'. We would argue that the external 'engagement opportunities' provided by the Compact are no longer simply 'negotiations forums' (right at the bottom of the scale), but have evolved into providing 'coordination standards' to companies in the form of best practices. It has also been shown that in carrying out their 'shaming' function, advocacy networks such as NGOs and the media have been delegated a role of 'monitoring and publicity' (positioned in the middle of the scale) to ensure corporate compliance with the GC principles.

In this context it is important to highlight the value of the 'spotlight effect.'⁸⁴ in keeping Global Compact participants honest. Keck and Sikkink note that once companies have publicly committed themselves to the ten principles, advocacy networks can use their position and command of information 'to expose the distance between discourse and practice.'⁸⁵ Such groups will not accept participants' COPs at face value; they will scrutinize them and apply severe pressure in the event that a high profile company fails to live up to its commitments. Despite its voluntary status, the Compact is able to rely on watchdog organisations such as Corpwatch and Dissident Voice to employ confrontational strategies such as 'documentation of abuses and moral shaming.'⁸⁶ For example, the online publication '*Multinational Monitor*' publishes a notorious annual list of the ten worst companies in that year. Appearing on that list is a public relations nightmare for any company. The beauty of 'moral shaming' as an enforcement strategy is that it costs next to nothing to implement; it simply relies on the scrutiny of advocacy networks that are already in place, and the desire of the actors regulated to be seen as good global citizens. It seems likely that this mechanism accounts for at least some of the extraordinary growth the Compact has achieved since its inception. The number of signatories has risen from an initial figure of 38 at its official launch in July 2000, to a present total of over 4,700.⁸⁷ Overall, therefore, we argue that the Compact has moved from a low to a slightly more moderate 'delegation' score.

⁸³ Global Compact (2010) at: http://www.unglobalcompact.org/aboutthegc/gc_logo_policy.html

⁸⁴ Meyer, W. and Boyka, S. (2001) 'Human Rights, the U.N. Global Compact, and Global Governance' 34 (3) *Cornell International Law Journal* (2001), 504

⁸⁵ Keck, M. and Sikkink, K. (2008) 'Transnational Advocacy Networks in International and Regional Politics' *International Social Science Journal* 51 (159): 97- 98

⁸⁶ Winston, M. (2002) 'NGO Strategies for Promoting Corporate Social Responsibility' *Ethics and International Affairs* 16 (2): 77

⁸⁷ Global Compact (2010):

<http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>

Conclusion

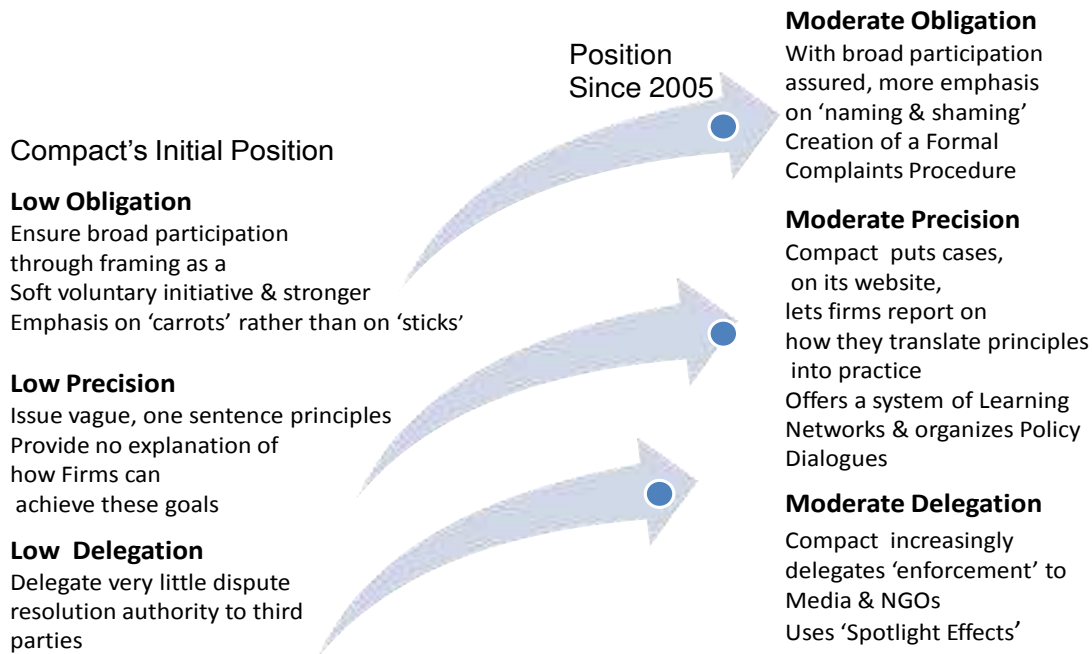
'A Mountain Biker cannot start a journey in sixth gear' - The Global Compact's Governance Structures for Corporate Social Responsibility

The GC at its inception can be likened to a mountain biker at the start of his or her journey. The gears on the bike represent the legalization spectrum; first gear is prototypical soft law and sixth gear is prototypical hard law. The mountain biker cannot start her/his journey in sixth gear; there is insufficient momentum to propel him forward, so he makes little or no progress. A far more effective technique is to move up steadily through the gears as progressively more momentum is generated. In gradually hardening its norms as momentum is gained (i.e. as participation increases), this is precisely what the Compact's strategy has been. It still positions itself as a 'learning network' in order to reap the benefits of soft law that have been referred to in this essay. However, it strikes a balance between embracing business through softer measures, and ensuring the commitment of participants to its objectives, which has required a progressive shift up to more moderate forms of legalization. The GC is trying to push companies as hard as possible to abide by its principles without alienating them from the initiative.

Having attracted corporate participants with its very soft initial legalization and 'voluntary-engagement' discourse, the GC has shifted from a soft to a moderate position on the legalization spectrum, and has reinforced this transition with a 'toughened-stance' discourse. An overall analysis of the GC as a Governance structure of corporate social responsibility through the mechanisms provided by soft law reveals that the initiative has moved from an extremely soft initial position on all three scales, obligation, precision and delegation, to a more moderate stance. The choice between soft and hard law is not binary. Consequently, 'collective action' initiatives laying down norms or regulations will ultimately seek a balanced position on the three sliding scales of obligation, precision and delegation that provides them with the most effective means of attaining their objectives. Put another way, they will look for a 'compromise between the rigidities of hard law and the uncertainties associated with a more discretionary approach.'⁸⁸ The shift in strategy is summarised in the diagram below.

⁸⁸ Cini, M. (2001) 'The Soft Law Approach: Commission Rule-making in the EU's State Aid Regime' *Journal of European Public Policy* 8 (2): 199

Since 2005 the Global Compact Moved From a Low to a More Moderate Position on the Legalization Spectrum



Based on Abbott & Snidal, 2000

It appears that the GC's strategy has involved starting off as an 'engager', attracting companies to the initiative's soft law discourse, before progressively ratcheting up the 'precision' and 'obligation' scores of its norms, binding its participants to stronger, more detailed commitments and becoming more of a 'confronter' (albeit a moderate one) once the initiative secured a broad participation base.

As companies progressively acquire experience in the field of Corporate Social Responsibility and disseminate this information through the channels that the Compact has put in place, ideas and standards will evolve. As Ann Florini notes, '[t]he dispute over exactly what... standards should be- and who should decide- has just begun.'⁸⁹ Corporate strategies, structures and production processes are subject to constant and fast-paced change. It therefore makes sense to have a malleable, adaptable body of knowledge which can be added to as new norms are generated, rather than a rigid system of legally binding legislation.⁹⁰ The latter system would quickly become obsolete as the principles it espoused became dated and redundant. The same philosophy lies behind the Vienna Convention for the Protection of the Ozone Layer, the

⁸⁹ Florini, A (2003): 'Business and Global Governance: The Growing Role of Corporate Codes of Conduct' *Brookings Review* 21: 8

⁹⁰ Ruggie, J. (2002) 'The Global Compact as a Learning Network' *Journal of Corporate Citizenship* 5: 32

framework accompanying the 1987 Montreal Protocol which was commonly recognised as one of the most successful international agreements ever entered into.⁹¹

Soft Law - Not the Poor Relation

In toughening its stance, the GC is getting closer to this limit. Yet by retaining the advantages of its voluntary status, it is an illustrative example of why soft law has been described as ‘one of the most significant institutional features of international relations.’⁹² Critics who scoff at the GC’s soft initial approach and argue that harder law should have been imposed from the outset seem to ignore the harsh truth that companies simply would not have signed up to be bound by harder norms, and the GC would have failed at the first hurdle.

One of the most important lessons to take from the case study is that the use of soft law as a governance structure of international affairs should not be dismissed as a ‘Plan B’ in the event that harder law is not practical. Corporate social responsibility is a relatively recent phenomenon; clear benefits exist in starting an international regulatory mechanism at the softer end of the legalization spectrum, before toughening up later on.

This essay is not holding up soft law as the ideal means to ensure effective collective action on corporate social responsibility. Indeed, detailed research is necessary to explore the extent to which soft law initiatives such as the GC have actually succeeded in changing the day-to-day operating practices of the companies regulated, beyond the rhetoric of the annual company reports. In a perfect world, businesses would be legally bound to engage in ethically sound practices from the outset. However, this essay attempts to make a case for soft law’s immense value in the global governance of corporations, particularly as a starting point for initiatives such as the GC. In this context it should not be seen as merely ‘a poor relation of hard law’; on the contrary, in many instances it is deliberately and consciously selected as the most effective means available to achieve a desired objective.⁹³ Despite the obvious limitations of a softer approach, any project designed to foster collective international action must initially adopt the philosophy that ‘you catch more flies with honey’ to ensure it attracts a sufficient following to get off the ground, before tightening the screw on its participants at a later stage.

⁹¹ Annan, K. (2005), Speech at International Day for the Preservation of the Ozone Layer’, 16 September at: <http://www.un.org/News/Press/docs/2005/sgsm10058.doc.htm>; Esty, D. (2007) ‘Beyond Kyoto: Learning From the Montreal Protocol’ in Aldy, J. and Stavins, R. (eds) *Architectures for Agreement: Addressing Global Climate Change in the Post-Kyoto World*, Cambridge University Press: 260

⁹² Abbott and Snidal, *ibid*: 456

⁹³ Hodson, D. and Mahler, I. (2004) ‘Soft Law and Sanctions: Economic Policy Co-ordination and Reform of the Stability and Growth Pact’ *Journal of European Public Policy* 11 (5): 799 - 801