Chapter 13
In the best interest of the child:  
International regulation of transnational corporations *

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** This study presents the views of its authors and not the official UNICEF position in this field.
1. Introduction

Globalisation has allowed individual corporations to extend far beyond national boundaries – and beyond the reach of national regulations. The speed at which companies have grown has been aided by the global move towards neo-liberal economic policies backed by powerful institutions and governments. There has not, however, been a corresponding growth in legally-binding international regulations. Though transnational corporations may have legal restraints within individual countries, there are few checks on their practices internationally. Children are among the victims of unchecked corporate activities.

This chapter builds on the general case for regulation at national and international levels. It examines attempts by public institutions to create international regulations to mitigate some of the more harmful corporate activities in a global context of increasing corporate power. It demonstrates that market failures, such as imperfect information, can move unwanted – and even dangerous – costs onto society. While there are many examples of attempts to regulate public “bads”, this chapter focuses on the International Code of Marketing of Breastmilk Substitutes and the proposed World Health Organization Framework Convention on Tobacco Control. These two cases illustrate the strengths and weaknesses of existing tools for regulation of transnational corporations. They also exemplify the need for national regulation backed by international mechanisms to protect the health and well-being of children in accordance with international health concerns.

2. Regulation of transnational corporations: historical overview

Ensuring that corporations benefit society – or at least do no harm – has long been a key societal issue. In most democratic countries, government regulations have evolved over the years to protect the population. While these may vary from country to country, there are – in most industrial countries at least – minimum, legally-binding standards. In contrast, many developing countries have neither the capacity nor the commitment to implement such legislation. As more corporations have expanded their operations beyond national borders, however, the ability of an individual state to hold corporations accountable and safeguard public interests through national regulation has diminished.

Recognizing this, developing countries and civil action groups have demanded a strong international regulatory regime to hold transnational corporations (TNCs) accountable to citizens wherever they operate. But the changes in international economic and political spheres in recent decades have prevented the emergence of an effective web of binding laws at international level.
In the 1970s there were intense debates within various UN fora on the need to regulate corporations, but the 1980s saw strong opposition to industry regulation. The election of influential conservative political leaders, particularly in the USA and UK, introduced an era of international economic policy-making based on a neoliberal framework. Their policies ostensibly called for deregulation of markets but led to “re-regulation” in the interest of transnational corporations and financial industries (Hildyard 1998:1; 3-6).

In the early 1990s the focus shifted to industry associations – which had repeatedly opposed external international regulation and had advocated self-regulation. Many governments, particularly in poorer countries, gave up demands for international regulation. Many of them were – and still are – deeply in debt and needed the investment of transnational corporations. Others had developed their own industrial sectors and did not want these subjected to international regulation.

The picture was further complicated in 1995 by the establishment of the World Trade Organization (WTO), whose purpose is to implement international rules on trade such as the General Agreements on Tariffs and Trade (GATT). Both GATT and WTO have been criticized for the influence of transnational corporations in their decision-making processes – an important issue as the WTO has the authority to enforce its decisions by means of sanctions, making it an extremely powerful institution (cf. e.g. UNDP 1999, Koivusalo 1999).

By the end of the millennium transnationals had gained a great deal of economic and political power while nations lost much of their decision-making power to these same corporations. At the international level, decision-making power has been shifting away from inter-governmental UN agencies towards the less accountable Bretton Woods Institutions and the WTO. Meanwhile, civil society organizations have become increasingly active in the international policy-making arena.

There has been a resurgence of calls from within the UN for universal standards to govern corporate conduct. The current debate, however, has focused less on how to ensure democratic control over corporations that transcend national boundaries – many of them with annual turnovers in excess of national budgets – and more on how best to attract corporate investment and sponsorship. More often than not, binding public regulation is overlooked in return for promises of corporate responsibility and good governance – concepts that appeal to good intentions but tend to overlook skewed power relationships.

3. Democratic global governance

The shift of the early 1990s from ‘confrontation’ to ‘dialogue’ and ‘partnership’ has continued into the new millennium. Moves towards self-regulation or non-binding co-regulation have been supported by two beliefs. First, that the growing number of industry codes demonstrate greater corporate responsibility and that, therefore, society no longer needs to insist on externally-defined binding international regulation.

1 cf. e.g. (UNRISD 1995; UNDP 1999)
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Second, that transnational corporations have so much power that it is impossible to regulate their activities by externally-defined rules. Voluntary agreements are seen as more ‘pragmatic’ than antagonising them with binding international regulation. But do ‘dialogue’ and ‘partnership’ represent adequate political processes in making TNCs accountable? While there are areas where corporations see the benefits of effective international regulation and may, therefore, cooperate in regulation, recent research suggests that the ‘win-win’ situations sold as opportunities for corporations to ‘turn ethics into profit’ are less common in environmental protection, for example, than usually implied in discussions on ‘voluntary initiatives’. (cf. e.g. Utting 2000:21-22). There will always be areas where there is a need for binding, industry-independent regulation in the public interest and where confrontation cannot be avoided. One example is the long process of creating international regulation of the marketing of breastmilk substitutes.

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Why regulate? The myth of the self-regulating market
De-regulation is a key word in current economic policy discourse. Many policy-makers today follow the neo-liberal economic school of thought, arguing that unfettered markets deliver goods and services most efficiently and are therefore best left alone. It also argues that the ‘invisible hand’ of pricing mechanisms takes best care of societal welfare.

The market certainly does many things well. But until some 20 years ago, economists and policy-makers were well aware that there are goods that market mechanisms do not and cannot deliver, such as universal access to health care, or goods that they do deliver but should not, such as pollution and misleading or harmful statements about commercial products, including tobacco, alcohol, pharmaceuticals and breastmilk substitutes.

There has always been, and continues to be, a need regulate the market. The key question is: what type of regulation allows differing markets to do their best while preventing undue harms to societies? In democratically-minded societies, which in principle are based on the primacy of the needs and values of people over abstract economics, the answer to this question is political. From this perspective, the question becomes: why have societies decided to establish regulatory measures? What are the commonly accepted justifications for limiting market mechanisms?

Today, public regulation is often portrayed as an obstacle to the optimal functioning of a supposedly perfectly self-regulating market. In cases where the need for regulation is accepted, it is now argued that regulation through market incentives is preferable.

Despite the current free market discourse, most industrialised countries accept that the state has a duty to provide for rules-based systems to prevent any potentially harmful

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2 Some commentators advise building on industry offers to behave in a more socially-responsible manner but against a background of externally-defined binding regulation should such co-regulatory arrangements fail.
impacts of corporate activities. Paradoxically, this principle is rarely accepted for international regulation, even though many of the practices of transnational corporate and financial actors are beyond the control of any individual nation state. (Gleckman and Krut 1994:10).

Like many economists, the United Nations Research Institute for Social Development (UNRISD) shares the view that the ‘invisible hands’ of the market will not achieve optimal social outcomes. Its analysis of ten years of corporate self-regulation and ‘voluntary initiatives’ in the international policy arena concludes that:

“Left to their own devices, TNCs are likely to fulfil their responsibility in a minimalist and fragmented fashion. Their strategies may be conducive to economic growth and the stability of their operating environments, but not necessarily to sustainable human development. They still need strong and effective regulation and a coherent response from civil society.” (UNRISD 2000:90)

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4. Breastmilk substitutes

4.1 ‘Commerciogenic malnutrition’: ‘Bottle Baby Disease’

By the 1960s, breastfeeding was in decline in many parts of the world. In the USA, bottle-feeding with commercial infant formula was standard and the rate of breastfeeding newborns halved between 1946 and 1955. By 1967, only one-quarter of babies born in hospitals were breastfed when their mothers took them home. (Palmer 1993:220)

This trend has been connected, in part, to the promotional methods to boost demand for commercially-produced infant foods. Infant food companies claimed that their products were equivalent or even superior to breastmilk – claims that were complemented by the images used on cans of infant food, suggesting that feeding infants with particular brands would result in chubby babies.

Another technique involved salespersons dressed as nurses visiting mothers of newborns in maternity wards or at home to promote bottle-feeding and to distribute samples. A Nigerian survey showed that 87 per cent of mothers using breastmilk substitutes did so in the belief that a health worker had recommended them. (Baumslag 1995:150) And many genuine health workers did, indeed, promote the products. Large amounts of free and ‘low cost’ supplies were sent to maternity wards creating a medical seal of approval for early infant feeding with commercial foods. Gifts and sponsorships were given to health professionals.

Corporations also exploited women’s fears of not producing enough milk. A radio jingle in the Belgian Congo, for example, crooned, “The child is going to die because the mother’s breast has given out. Mama, O Mama, the child cries! If you want your child to get well, give it Klim milk”. (Printer's Ink 1958)
The promotion and indiscriminate use of breastmilk substitutes did little to benefit infants. Feeding with formula interferes with women’s milk production and a mother’s fears about her ability to breastfeed can reduce the flow of her milk. The use of bottles and teats, moreover, may interfere with babies’ ability to suckle. When infant formulas began to be promoted widely, both mothers and health personnel were quick to call these effects ‘insufficient milk’ indicating a permanent ‘inability to breastfeed’. In the 1970s, it was not widely known among medical professionals that difficulties in breastfeeding could be reversed through encouragement, more frequent feeding and skilled help with positioning the baby at the breast.

It was widely known, however, that the use of artificial baby milk deprived babies not only of the best possible nutrition, but also of the immunological protection provided by antibodies in their mother’s milk. Moreover, at the end of the 1970s, no large infant food manufacturer could claim to be unaware that preparing artificial infant formula in poor conditions might be detrimental to the health and lives of the ‘end-consumers’ of their product.

The relationship between artificial feeding and increased child death and disease rates had been brought to the attention of infant food manufacturers in the 1920s. (Palmer 1993: 207, 210) Yet it was nearly 50 years before doctors and nurses began to issue warnings about the ‘bottle baby disease’, as they called the vicious cycle of artificial feeding, diarrhoea and malnutrition they observed in areas with poor access to safe water. Moreover, because commercial baby foods were expensive, families rarely had the resources to purchase the 40 kilograms of infant formula needed per year to feed an infant adequately. Instead, they over-diluted the powder.

4.2 Industry under public scrutiny

In the 1970s the practices of the infant formula industry were pushed into the spotlight. In 1974, the London-based War on Want organization published *The Baby Killer*, a devastating report on infant food promotion and its consequences. (Muller 1974) Twenty thousand copies were sold, and the booklet was widely translated—including in Switzerland, where the title was changed to “Nestlé tötet Babys” (“Nestlé kills babies”). (Arbeitsgruppe Dritte Welt 1974) Two months later, Nestlé sued the group on four counts of libel. The book, and Nestlé’s response to it, received wide coverage in the international press.

Two days before the first of three hearings in the libel case, eight infant food companies announced the formation of the International Council of Infant Food Industries (ICIFI). One of its first acts was to draft a code of ethics, which was released with much press fanfare two days after the end of the first court hearing. (ICIFI 1975, amended 1976) The ICIFI code was seen as an indication that the industry had voluntarily adopted controls on itself and that it had the ability to enforce them internationally. Closer examination of this voluntary code, however, revealed that it would have allowed most promotional practices to continue.

Just before the last of the three hearings in July 1976, Nestlé dropped three of the four libel charges, leaving just the complaint about the title of the Swiss booklet. The libel
case generated not only broad public recognition but also much additional documentation on Nestlé’s promotional practices. (Clement 1988:352)

It was also in 1974 that the issue of artificial infant feeding entered the USA. Peter Krieg’s half-hour film, Bottle Babies, documenting the conditions and consequences of the use of infant formulas in Kenya, shocked viewers into action.

Concerned about a wide range of TNC practices, the U.S. National Council of Churches founded the Interfaith Centre on Corporate Responsibility (ICCR) in the early 1970s to monitor those TNCs in which churches had invested money. If any particular industry practice was deemed to be against social interests, shareholder power could be used to bring about change. The infant food industry was one of the first on the list for shareholder action.

But some U.S. citizens went further. On 4 July 1977, the Minneapolis-based Infant Formula Action Coalition (INFACT) launched a consumer boycott of Nestlé. INFACT chose Nestlé for three reasons. First, because the company had nearly half the world’s market share of infant food. Any change in its marketing practices would have a positive impact on the health and well-being of children, and other companies could be expected to follow suit. Second, of all the infant food companies, Nestlé was most consistent in its denial of links between bottle-feeding and infant deaths, questioning instead the motives of those trying to change corporate promotional practices. Finally, at the time, U.S. citizens could not exert shareholder pressure against this Swiss-based company. (Chetley 1986:52)

Nestlé’s reaction to the boycott was to contact church leaders across the USA by mailing 300,000 copies of a 24-page publication stating that its marketing practices were ethical and asking churches not to participate in the boycott. Ironically, this is how many churches first heard about the boycott campaign. By the end of 1978, the boycott had spread across the USA and beyond to Canada, New Zealand and Australia and involved a wide array of citizens and organizations. (Chetley 1986:53; Palmer 1993:247)

Citizen pressure prompted U.S. Senator Edward Kennedy, chair of the Senate Sub-Committee on Health and Scientific Research, to hold a public hearing in May 1978 on the promotion of infant formula in developing countries. In his testimony, Nestlé Brazil’s president Oswaldo Ballarin, stated that the boycott was an “indirect attack on the free world’s economic system.” (Ballarin 1978) Senator Kennedy dismissed Nestlé’s interpretation by stating that “a boycott is a recognised tool in a free economic democratic system ... and it is not recognised as being a part of an international kind of conspiracy to bring the free world’s economic system down.” (quoted in Sethi 1994:77) After further discussion with infant food manufacturers, Kennedy concluded that an international solution to an international problem was required. (quoted in Chetley 1986:57)

WHO and UNICEF set October 1979 as the date for a meeting on the broad question of infant and young child feeding – a meeting in which the involvement of civil action groups was key. The infant food industry called the meeting “an abandonment of

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3 For a detailed description of the dynamics of the meeting, cf. [Chetley 1986:57:61-74]
free enterprise” and described the development of an international code of conduct governing its actions as an infringement of states’ national sovereignty. Yet the unanimous consensus of the WHO/UNICEF meeting was that:

“There should be no marketing or availability of infant formula or weaning foods in a country unless marketing practices are in accord with the national code or legislation if they exist, or, in their absence, with the spirit of this meeting and the recommendations contained in this report or with any agreed international code.”

(WHO 1979:29)

4.3 Citizen networks and corporate counteractions

The 1979 WHO/UNICEF meeting was a watershed, putting the formulation of an international code on marketing practices on the agenda of two major UN agencies. It was also a landmark in the broader history of international regulation.

One result was the creation by six NGOs of the International Baby Food Action Network (IBFAN), to monitor global corporate activity relating to infant food and to disseminate information on this issue.

The industry saw the IBFAN network and its influence as a threat. As proposals for an international code on the marketing of breastmilk substitutes became more concrete, ICIFI’s newly-elected president, Nestlé’s vice-president, Ernest Saunders, wrote:

“In view of the overall propaganda campaign now being mounted through IBFAN and the professionalism of the forces involved…It is clear that we have an urgent need to develop an effective counter-propaganda operation, with a network of appropriate consultants in key centres, knowledgeable in the technicalities of infant nutrition in developing countries, and with the appropriate contacts to get articles placed.”

(Saunders 1980b)

4.4 The International Code of Marketing of Breastmilk Substitutes

The formulation of the International Code of Marketing of Breastmilk Substitutes was unprecedented. It involved an extraordinary process of consultation with a wide range of constituencies including consumer action and development NGOs, professional associations and the industry. However, there were two areas of controversy: the drafting process and the legal format.

START BOX 2.

The International Code of Marketing of Breastmilk Substitutes

The Code’s specific provisions, as clarified by subsequent relevant WHA Resolutions, can be summarised as follows:

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1) No advertising or other form of promotion of breastmilk substitutes, feeding bottles or teats to the general public.
2) No pictures of infants or other pictures or text on labels idealising the consumption of infant formula. Labels must state clearly the superiority of breastfeeding and must include preparation instructions and a warning about the health hazards of inappropriate preparation.
3) Information and educational material on infant feeding must explain the benefits and superiority of breastfeeding, the health hazards associated with artificial feeding, and the difficulty of reversing the decision not to breastfeed. Information about the use of infant formula must include details of the social and financial implications of its use. The materials may not contain pictures or text which idealise the use of infant formula, nor may they refer to a product brand name.
4) No free samples, direct or indirect, to mothers.
5) No contact between marketing personnel and pregnant women or mothers of infants and young children.
6) No promotion of products within the health care system, including no free or ‘low-cost’ formula, other breastmilk substitutes or feeding bottles and teats.
7) Product information for health professionals must be limited to scientific and factual matters.
8) No gifts to health workers; samples may be given under very limited circumstances only.
9) Manufacturers should disclose any contribution made to health workers for fellowships, study tours, research grants, attendance at professional conferences and the like; as should the recipients.
10) Unsuitable products should not be promoted for babies.

The International Code recognised the role and importance of corporate responsibility by specifying that:

“independently of any other measure taken for implementation of this Code, manufacturers and distributors of products should regard themselves as responsible for monitoring their marketing practices according to the principles and aim of this Code, and for taking steps to ensure that their conduct at every level conforms to them.” (WHO 1981, Article 11.1.3)

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4.4.1 Code drafting
UNICEF and WHO pointed out to civil society organizations and to industry that they were being invited to ‘consultations’, not ‘negotiations’. But NGO representatives warned of potential problems stemming from a lack of distinction between the party to be regulated (the infant food industry) and the parties involved in the consultations about appropriate regulatory measures (also the infant food industry). They raised concerns that the industry would have undue influence on the process.

The NGOs wanted the Code to spell out its overarching principles and to contain unambiguous and tightly-worded sections detailing inadmissible marketing practices. The industry, on the other hand fluctuated from opposing any external international regulation to supporting an international Code – on condition that it was as loosely

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worded as possible and that its interpretation was left to national governments (in cooperation with industry).

The infant food manufacturers’ most powerful ally was the US government, which sent a letter to WHO calling for a general voluntary code that was not “mandatory on governments or corporations” and asked that “the contents of the documents must be subject to full intergovernmental negotiations.” (both quotes Bryant 1980, emphasis added). Industry favoured intergovernmental negotiations that would be more time-consuming – increasing the likelihood that the resulting code would be more generalized. (Chetley 1986:77; Shubber 1998:21)

WHO Member States settled the issue at the 1980 World Health Assembly. A resolution endorsed the statement and recommendations made by the 1979 Joint WHO/UNICEF Meeting “in their entirety” and reconfirmed the mandate of WHO to prepare an international code of marketing of breastmilk substitutes. Although the USA voted for this resolution, it insisted that “[The U.S.] government does not want this decision to be considered as a precedent for the drafting of codes in other UN agencies.” (quoted in Chetley, 1986:79-80)

4.4.2 The legal format
The legal form of the Code became the next contested issue. Which of the three legal forms allowed under the WHO constitution would it take: a Convention, a Regulation or a Recommendation?

A Convention, which has the strongest legal status, requires a two-thirds majority of the WHA for adoption. The second legal form – a Regulation – has weaker legal status and requires a simple majority of the WHA. It automatically comes into force in all Member countries within a stated period of time, except in those that specifically reject it or attach reservations to it. The third legal form – a WHO Recommendation – may also be adopted by a simple majority of the WHA. It is not binding on Member States in a strict legal sense, but does “carry some moral and political weight, as they constitute the judgement of the collective membership of the Organisation.” (Shubber 1998:30)

The financial power of the USA played a critical role in deciding the legal format. Although every country has one vote at the WHA, the votes of some countries carry more weight. In considering the legal form of the Code, WHO staff were aware that the USA was contributing 25 per cent of the agency’s budget. It was the understanding of WHO that the USA would help to get an unanimous vote from WHA members for a Recommendation, but would oppose any stricter legal format.

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6 Canada had similar reservations put on record. [Chetley 1986:80]
7 Constitution of the World Health Organisation, Articles 19, 21 and 23
8 A Regulation as a concrete legal form under the WHO Constitution should not be confused with regulation in general which is understood in this PAPER as a rules-based regime to ensure that industry practices conform to public interests. Regulation under WHO Constitution is therefore distinguished from more general rules-based regimes by putting the term in capital letters.
Meanwhile, infant food companies intensified efforts to prevent WHO acceptance of the Code at all – or failing that, to weaken its content. (Chetley 1986:85;90-92) At each revision of the final draft, the text became “more unclear on the essential elements of the code and an increasing amount of industry wording, and industrialised country wording found its way into the code.” (War on Want 1980)

4.4.3 The United States’ volteface
Despite expectations of an unanimous vote, at the 1981 World Health Assembly, the US delegation announced that it could not support the Code, even as a Recommendation. Thus 118 states voted in favour of the Code, one against, while three countries (Argentina, Japan and the Republic of Korea) abstained. (Shubber 1998:43)

This sudden change in US position generated much debate, not least because the wish to avoid controversy had helped to shape the choice of the legal format. Taken by surprise, WHA Member States did not insist on discussing whether a Regulation was preferable to a Recommendation, as originally called for in the 1980 Resolution. Given the prevalent mood at the time, however, the WHA might well have voted for the Code’s adoption as a Regulation.

4.5 Implementing the Code

By October 2000 – nearly two decades after the Code had passed through the WHA – just 21 WHA Member States had adopted comprehensive legislation based on the International Code ‘in its entirety.’ Many other countries have opted for weaker regulatory arrangements. While 26 countries do have many provisions in law, others have legislation covering just a few of the provisions, or have adopted non-legally binding, voluntary agreements with industry that leave adherence to the discretion of infant food manufacturers.

4.5.1 Obstacles to Code implementation
One reason for the relatively slow pace of implementation is that the Code – and its implementation measures – was not thoroughly revised at the 1983 World Health Assembly, as originally suggested.

Its loose wording has also created difficulties in translating it into unambiguous legal language. But clarity has not been the only problem. Several companies, including Nestlé, disseminated their own interpretations of the Code and its provisions, which were at variance with its letter and spirit.

In March 1982, just a few months after the WHA adoption of the Code, Rafael Pagan, Jr., President of the newly-founded Nestlé Coordination Centre for Nutrition (NCCN), held a press conference. Journalists were handed a document instructing all Nestlé

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9 Sami Shubber refers to a “hostile campaign carried against WHO, UNICEF and the International Code, carried out, basically by the infant food industry” at the time of discussion of the fourth draft by WHO’s Executive Board. [Shubber 1998:39]
10 For further details about the confusion surrounding the vote, cf. Sokol 1997:12-13; Shubber 1998:42-3
11 For details on how this decision came about, cf. (Chetley 1986:122)
subsidiaries on the Code and a press release stating that Nestlé had completed the Code implementation process. The message was clear: the company had changed its practices and thus the ongoing Nestlé boycott could be called off. (Nestlé 1982)

Widespread criticisms of Nestlé’s original version of the Code led the company to issue a second set of revised instructions in October 1982. These came closer to the International Code, but differences remained. For instance, Nestlé’s instructions referred to Code compliance only in developing countries, while the Code is intended to cover all countries without distinction. (UNICEF 1983).

It is not known to what extent industry interpretations hampered the process of national Code implementation. What is certain, however, is that they did nothing to facilitate Code interpretation for non-experts and the general public.

Changes in the political climate also played a role in slow implementation. As mentioned earlier, the influence of conservative governments in the USA and UK reversed the 1970s push for TNC codes of conduct. Neo-liberal economic policies spread in the absence of meaningful alternative forces.

4.5.2 Moving Code implementation forward
With changes in WHO leadership, it became clear by 1983 that WHO support for implementation of the Code at national level would not be optimal. Progress towards implementation continued, however, as civil action groups and concerned professionals stepped in to fill the void. One important measure was the use of the WHA Resolutions. The biannual reviews of Code implementation status became a major means of strengthening and updating the Code.

Other important measures were undertaken by citizen alliances, in particular by the International Baby Food Action Network, which produced regular monitoring reports on industry compliance. IBFAN also set up an International Code Documentation Centre that established regional and inter-regional seminars to train lawyers and policy-makers on the development of national legislation and the sharing of experiences to tackle potential obstacles at national level. The Centre also developed a model legislation that can be used to translate the international code into enforceable domestic law (Sokol 1997)

4.5.3 A multi-pronged approach
Another important strategy was the pursuit of a concerted multi-pronged international programme to protect, promote and support breastfeeding in general. This included:

A 1989 joint UNICEF and WHO statement ‘Ten Steps to Successful Breastfeeding’, highlighting the need to train staff to support mothers in breastfeeding and calling for the redesign of the medical system to facilitate this practice. The two agencies also launched the Baby Friendly Hospital Initiative, to get health services worldwide to put the ten steps into practice. This was an important policy step to tackle the marketing ties between health professionals and the infant food industry and the lack of knowledge about breastfeeding among health professionals.

The Innocenti Declaration – adopted by high-level policy-makers from 32 countries and 10 UN agencies – called on governments to take concrete action to protect,
promote and support breastfeeding by 1995. The Declaration was complemented by a new citizens’ alliance – World Alliance for Breastfeeding Action (WABA) – to persuade governments to take up the four targets of the Declaration.

The UN Convention on the Rights of the Child – now ratified by every country except Somalia and the USA – has been a decisive factor in linking the Code to human rights. All signatories are legally bound by the Convention and every government that has ratified it must submit regular reports to the Committee on the Rights of the Child on its progress towards implementing the Code.

### 4.5.4 Human rights: The avenue of the future?

Will linking the regulation of the marketing of breastmilk substitutes to human rights help to prevent harmful marketing practices? The answer depends on whether and to what degree nations and UN agencies take their obligations seriously, and on their power in relation to that of large corporations.

One shortcoming of the current human rights regime is that only States can be held accountable to it, not transnational corporations. (UNDP 1999:35) Human rights instruments have, until now, referred primarily to the relationship between individuals and the state. Only recently has there been recognition that TNCs are often beyond the reach of those states wishing to ensure fulfilment of their citizens’ human rights.

How can this vacuum be addressed in international law? One important step was a Resolution adopted in 1998 by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities that called for the establishment of a sessional Working Group on the Working Methods and Activities of Transnational Corporations to adopt “new international legislation and creat[e] effective international institutions to regulate the activities of transnational corporations and banks...”

The Working Group has spent considerable time discussing a draft human rights code for companies. One concern raised by NGOs at the sessions has been that corporate statements of support for non-binding codes of conduct do not necessarily translate into adherence in practice. A number of human rights organizations therefore urged the Working Group to focus on exploring legally binding measures and institutional arrangements, making it possible to more effectively address corporate malpractice and crimes. (Commission on Human Rights 2000:4)

### 4.6. Corporate conduct: socially-responsible marketing?

Corporations now portray themselves as behaving in a more socially responsible manner, as indicated by a multitude of corporate codes of conduct and statements. For instance, ICIFI’s successor, the International Association of Infant Food Manufacturers (IFM), now states on its website that it is committed to supporting the International Code of Marketing of Breastmilk Substitutes. (IFM 1999)

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12 For more information, cf. e.g. Sokol 1997:20-21. For a reproduction of the Innocenti Declaration cf. id. pp. 351
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But is support for the Code translated into practice? Has the infant food industry changed its marketing practices since the adoption of the Code in a way that reflects greater corporate social responsibility?

4.6.1 Corporate practice
In many developing countries, there is less blatant advertising of infant formula to the general public than there was 20 years ago. But direct advertising to pregnant women and mothers is still carried out in some industrial countries via the media and the provision of free supplies in hospitals and maternity wards.

While positive changes are welcome, they are not absolute evidence of greater commitment to the Code on the part of manufacturers. Changes could also be ascribed to close scrutiny by civil society groups, clear international standards set by the Code for inappropriate marketing practices and the negative publicity for companies when Code violations were exposed.

In fact, international and national monitoring reports of corporate practices reveal continued widespread violations of the provisions and spirit of the Code. [e.g. (IGBM 1997a) (IBFAN 1998) (TheNetwork 1998)]. The results of a six-month study in Poland, Bangladesh, Thailand and South Africa – published as *Cracking the Code* in 1997 – found systematic violations of the Code in all four countries. (IGBM 1997b:1) Another IBFAN study published the following year concluded that the infant food industry was not only continuing to ‘break’ the Code, but finding new ways of ‘stretching’ it. (IBFAN 1998).

Evidence of marketing that undermines breastfeeding also comes from recent media reports about the use of innovative advertising techniques to gain access to pregnant women and mothers of infants. In summer 1999, Nestlé received the “Best of Europe Award for Big Brand Direct Marketing” for its successful campaign in Denmark, which targeted mothers with children aged two months to one year.

Companies have also exploited the discovery that some babies of HIV-positive mothers may contract the virus through breastfeeding. Some companies have drawn attention to the ‘risks of breastfeeding’, presenting commercial infant formula as the most suitable way to feed babies of HIV-positive mothers, but have regularly omitted to mention the implications of the use of infant formula. No mention is made of other options for replacement feeding.

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13 The *Direct Response* magazine reported: “Danish local health authorities … effectively promote breastfeeding and the majority of women breastfeed. As such they are suspicious of communications from companies like Nestlé. Therefore the firm decided to tackle the issue of breastfeeding head on and create a dialogue with health authorities, including midwives and health visitors, mothers-to-be and mothers with small babies. The target audience of the campaign were mothers with children aged from two months to one year. To recruit new members, Nestlé used ads and inserts in the Danish magazine, *Parents and Children*, and carried out quarterly promotional campaigns in supermarkets across the country. More information about baby nutrition and the club was placed in hospitals and maternity clinics. In less than one year, the membership of Nestlé parents club has increased from under 10% to over 75% of Danish parents.” (quoted in Baby Milk Action 1997b)
START Box 3.
HIV and infant feeding
In the late 1980s, it was discovered that the Human Immuno-deficiency Virus (HIV), which is believed to cause AIDS, could be transmitted via breastmilk. Although conclusive data is still not available, studies to date suggest that approximately 15 per cent of infants breastfed by HIV-positive mothers (who are not taking any AIDS drugs) may become infected. (WHO/UNICEF/UNAIDS 2000)

A study in *The Lancet* in 1999 that looked more closely at breastfeeding patterns challenged the statistics. (Coutsoudis et al. 1999) When the infants were three months old, the study did not find a higher incidence of HIV infection among infants who were exclusively breastfed than among those who were exclusively formula-fed. HIV incidence was higher, however, in children who were partially breastfed.14 (Coutsoudis et al. 1999)

The risk of transmission of HIV via breastfeeding needs to be assessed against the risks of using infant formula. WHO estimates that each year about 1.5 million children die because they are artificially rather than breastfed. The risks vary with individual circumstances. Some studies show that, even in optimal conditions, artificially-fed infants suffer five times the rate of diarrhoeal diseases of breastfed infants and have higher rates of respiratory, ear and other infections. (WHO 1998b:8)

Policy makers have been concerned that infant food manufacturers might exploit the situation to push commercial products for all HIV-positive women and that greater promotion might also encourage women of unknown HIV status and uninfected mothers to use commercial infant food.

Their concerns appeared well-founded. Despite IFM assurances to WHO that it would not exploit the HIV infant feeding dilemma, reports indicate that manufacturers are now engaged in ‘educating’ about the ‘risks of breastfeeding’, omitting information about the risks of infant formula use or alternative options for feeding required by the Code.

Many policy-makers feel that this makes the implementation of the Code more important than ever. New policy guidelines have been established to ensure that the nutritional needs of infants with HIV-positive mothers are met; they also recommend the strengthening of Code implementation. (WHO 1998b; WHO 1998a)

Proper Code implementation does not aim to discourage women from using commercial foods if they so decide, but to ensure that their infant is fed in the best possible way, with choices made on the basis of unbiased information. The HIV infant feeding dilemma has not changed the duties of infant food manufacturers.

END BOX 3

Nestlé’s marketing practices have been the subject of two recent rulings by national regulatory bodies. In 1999 in the Czech Republic, Nestlé was given the highest

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14 Data on HIV and infant feeding are contested and changing at a fast pace. These data are as of November 2000 and policy makers, health professionals and individual caretakers are encouraged to explore the latest information on the situations for decision making on optimal infant feeding.
possible fine for violating national consumer protection legislation because its claim that its complementary food was “ideal food” for infants from four months of age was deemed to be “misleading” (Prague 1 Trade Department 1999, Baby Milk Action 1999b). In the same year, the UK Advertising Standards Authority told Nestlé that it went “too far” when stating “Even before the WHO International Code of Marketing of Breastmilk Substitutes was introduced in 1981, Nestlé marketed infant formula ethically and responsibly and has done so ever since.” The company was also asked to revise its claim that “Naturally they do not provide free supplies to hospitals for use with healthy infants” because of evidence to the contrary. (ASA 1999)

Nestlé was recently challenged in a more formal arena to prove that marketing practices have changed. At the first hearing on ‘EU Standards for European Enterprises Operating in Developing Countries’, different parties were invited to speak on the “marketing of infant formula in developing countries according to the WHO rules and the European Council Resolution.” Nestlé officials, who had at first welcomed the opportunity to present their views, chose not attend, citing, among other reasons, objections to the presence of IBFAN and UNICEF as the reason for their absence. (Baby Milk Action 2000a)

There may, however, have been other reasons for non-attendance. Nestlé may have been concerned about having to answer questions about its subsidiary in Pakistan that set sales targets for staff and bribed doctors. Company officials also may not have wanted to answer questions about alleged death threats to Syed Aamar Raza, a former Nestlé sales representative who publicised internal company documents on Nestlé’s sales practices in Pakistan after a physician friend accused him of contributing to the death of babies. (TheNetwork 1999:8-9)

Nestlé’s apparent avoidance of public discussion of their mechanisms for Code compliance raises questions about its ability to defend its Code compliance mechanisms and marketing practices.

4.6.2 Words versus deeds

While there have certainly been changes in specific marketing practices over the past 20 years, it is almost impossible for industry outsiders to be sure that any of these changes are due to a greater corporate sense of ‘social responsibility’. Changes could be assessed in terms of corporations fulfilling their legal and moral obligations.

What matters for the infants of this world is that regulatory policies are based on a solid assessment of concrete practices. Monitoring reports and advertising news and rulings indicate that – while the industry does seem to respect certain Code

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15 In relation to corporate conduct, UNRISD’s Peter Utting observes that “…one of the main factors to respond to environmental and social issues is, in fact, government regulation or the threat of regulation … Pressures associated with NGO activism, including consumer boycotts and environmental campaigns, the threat of litigation, critical media attention or public opinion may also figure prominently. Other sources of pressure such as so-called ethical investors of shareholders have also emerged in recent years.” (Utting 2000:22)

16 Corporations prefer the notion of responsibility to that of duty and obligation. This word can be better used for image enhancement (and is also useful in replacing the notion of corporate ‘accountability’ to the public).
requirements – breastmilk substitutes are still promoted in ways that interfere with the practice of breastfeeding. Despite assertions to the contrary, the International Federation of Infant Food Manufacturers (IFM) seems to be either unwilling or unable to ensure that the marketing methods of all its members conform to the letter and spirit of the Code.

From the industry perspective, one difficulty comes from ‘free riders’. If just one member company decides not to follow agreed standards, others may feel compelled to lower their standards as well to compete. When rules governing corporate conduct conflict with corporate profit making, effective outside regulation is the only way to create a so-called ‘level-playing-field’.

Infant food manufacturers that want to assume greater social responsibility could support the immediate and universal implementation of effective regulatory measures based on the Code and subsequent Resolutions – the best way to ensure a global ‘level-playing-field’ in which no competitor could pressure them to lower their standards.

Although voluntary regulation can improve corporate practices, it cannot prevent harmful practices by the worst offenders. (European Parliament 1999:17) What is needed from a societal perspective is a coherent web of laws and other regulatory measures that are also binding for trans-national corporations.

### 4.7 Corporate Conduct: Acceptance of outside regulation?

Monitoring reports suggest that infant food manufacturers are either unwilling or unable to ensure that their practices conform to the International Code of Marketing of Breastmilk Substitutes and subsequent WHA Resolutions. Are we talking about non-compliance with a few particular provisions of the Code? Or is the industry more fundamentally opposed to external regulation *per se*?

#### 4.7.1 Interference with national Code implementation

Reports received by UN agencies and civil society organizations indicate that the industry does not interpret its role in the implementation process as ensuring its compliance with the Code and with measures agreed upon by national authorities. Instead, corporations have used a number of tactics to interfere with national Code implementation:

First, they have lobbied for legislation that is weaker than the Code and subsequent Resolutions. Some companies have taken the proactive approach of presenting an industry version of marketing legislation when national legislation was being considered or prepared. In Russia, for example, Nestlé provided the authorities with a Russian language draft law that was much weaker than the International Code and subsequent Resolutions. The draft would have allowed infant food companies to advertise directly to mothers in maternity wards. (Baby Milk Action 1997c)

Second, corporations have been using trade threats to further their interests. For example, when in the early 1990s the Guatemalan Ministry of Health told Gerber that before registering their infant food product they would have to remove the baby
picture on the label, Gerber challenged this in the national courts and lobbied the U.S. government for support. The U.S. threatened to challenge Guatemala’s legislation as a violation of the GATT and to withdraw Guatemala’s preferential access to the U.S. market for its exports under the Generalised System of Preferences (GSP), which would have resulted in a loss of valuable income for the country.

Trapped, the Guatemalan Supreme Court of Justice finally decided that the prohibition of infant pictures on labels applied only to locally manufactured complementary foods, not foreign ones – a decision that accorded ‘preferential treatment’ to a trans-national company over those that were nationally-based. (for details cf. Sokol 1997:127-129)

Third, corporations portray marketing regulation as a violation of ‘freedom of commercial speech’ – a recurrent complaint. However, commercial communication, does have ethical and – in most industrialized countries – well-recognised legal limits, the most basic being that it should not be misleading. Additional regulatory requirements are often instituted in areas where disinformation and manipulation of the consumer may have particularly severe adverse effects, such as the marketing of tobacco, alcohol, pharmaceuticals and food stuffs.

Other tactics include enlisting health professionals to oppose strong legislation, challenging legislation in courts, participating in drafting legislation, monitoring industry compliance (allowing ‘the fox to guard the chicken coop’), and lobbying Member States to oppose further WHA resolutions.

4.7.2 Issues for effective national Code implementation
How can the weakening of the ‘rule of the law’ by industry lobbying be prevented? One way is to revive public debate on how to ensure that those being regulated do not have undue influence on the measures needed to protect the public interest. It is particularly imperative in the case of the marketing of breastmilk substitutes. Ultimately, it is the world’s babies and young infants who pay for lax Code implementation.

4.8 Corporate conduct: Engineering of consent, PR and lobby

While many infant food corporations continue to violate the Code and undermine national Code implementation, they are simultaneously pressing for an increased role in matters involving infant feeding. Companies are portraying such ‘public-private partnerships’ as more productive than controversy over marketing practices.

Partnerships with the private sector have been championed since the mid-1990s as the policy innovations of the turn of the century. The major tasks within the ‘public-private partnership’ framework are to build ‘trust’ between the parties involved and to identify ‘common ground’ or ‘win-win’ situations. Through their sheer size, trans-national corporations have gained an almost ‘natural’ right to participate in all kinds of fora.

The growth of TNCs in recent decades has been accompanied by a strategic corporate public relations discipline called ‘international issues management’, or ‘engineering of consent’. Corporate ‘engineering of consent’ is nothing new. Globalisation,
however, has prompted the fine-tuning of this communication discipline and its more widespread use with the aim of making international politics more favourable to corporations.

4.8.1 Corporate PR – a tool of power
Communication scientists see corporate public relations as one of the most important, but least visible, tools of corporate influence. ‘Engineering of consent’ is a pro-active, systematic propaganda campaign usually involving a range of activities.

For example, companies actively engage in intelligence gathering and an assessment of the socio-political climate in which they are operating. One element of this is to assess pressure groups and gain information about them even if this requires extreme tactics – such as infiltrating the organization. (Baskin et al. 1997:80)

If a company can no longer ignore a certain issue, they will initially attempt to suppress it or at least keep it from spreading. Attempts to silence journalists and activists, and even high UN officials, have included implied or explicit threat of libel, loss of employment, and threats of physical harm and even death. 

Withdrawing financial support can also be used to suppress public debates. Industries have lobbied the U.S. government to withhold its contributions to WHO if it continued to meddle with ‘free enterprise’ through its critical work on regulatory codes and corporate activities. In 1986/87, WHO lost a large chunk of its budget because the U.S. withheld contributions when WHO was drawing up ethical criteria for drug promotion. (Chetley 1990:120-121)

If corporations cannot keep an issue under wraps, they may attempt to manipulate public debates in their favour. An important part of issues management PR is image management and transfer. From a corporate perspective, the outward appearance counts more than actual practice. Sponsoring or partnering with civil society organizations or public institutions may boost the positive image of a corporation and can profoundly shift balances of power – providing the corporation with a greater ‘licence to operate’ while potentially compromising the integrity, independence and good name of the recipient or partner.

In addition, corporations may resort to a mix of four communication strategies. First: delay – the announcement of voluntary corporate codes, for example, has been a prime means of preventing, or at least delaying, tougher external regulation of corporate activities. (UNRISD 1995:19)

Second: de-politicize – shift discussions

17 Pharmacologist Milton Silverman’s life was threatened in the mid-1970s in Mexico during his research for his book *The Drugging of the Americas*. (Silverman 1976) This book was one of the first to expose pharmaceutical companies for dumping harmful pharmaceuticals and their double-standards on drug information. Activists, such as Chico Mendes and Ken Saro-Wiwa, are among the numerous reported victims of corporate silencing. cf. e.g. (TheNetwork 1999:8-9; Yamey 2000; Ghauri 2000; Baby Milk Action 2000b; Pallister 2000; Bruno 2000:58; Meintjes 2000:85,97).

18 UNRISD commented in its report on *The Social Effects of Globalisation*: ‘One way in which corporations try to fend off official control is by practising – or at least vowing to practice – self-regulation through establishing codes of conduct. A more solid basis for ensuring corporate responsibility is some form of international regulation. At present the prospects for this seems slim ... The New World Trade Organisation protects the freedom of international trade; it does not protect other freedoms, and so risks exacerbating a fundamental imbalance in global society. International
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to less politicized arenas, such as technocratic issues. Third: divert – defuse public controversy by stimulating discussion on issues of secondary importance. Finally: fudge – pretend to support public demands, but then disseminate a slightly but significantly altered version of the critics’ analysis, policy or proposed code of ethics. Those unfamiliar with the issue may be unable to spot the differences.

Finally, corporations attempt to exclude what they perceive as antagonistic voices from the public debate. Since the end of the Cold War, discrediting social critics by stereotyping them as “communists” has given way to other strategies. Critics are now portrayed as unworthy of participation by being labelled as “anti-industry” or “unprofessional”. Now that TNCs are widely regarded as engines of economic growth it has become easier to assert that anyone who lobbies for corporate regulation is responsible for the loss of jobs and wealth.

Another way of discrediting opponents is through the age-old tactic of divide-and-rule. This often involves inviting carefully selected influential groups and critics to participate in consensus-oriented ‘dialogues’ while discrediting groups that do not participate as incorrigible ‘radicals’ who are ‘confrontational’ for the sake of it. Whilst neutralising critics through negative labelling, companies often refrain from answering the content of the criticisms and from changing their practices substantially.

4.8.2 A new phase of industry lobbying
Recognizing the value of the NGO label, the infant food industry spared no effort in trying to get the status of a ‘non-governmental organisation in official relations’ for its International Council of Infant Food Industries (ICIFI). In August 1980, it hired Stanislas Flache, former Assistant Director-General of WHO, to achieve this goal. The day after his retirement from the WHO (in the midst of the International Code drafting), Flache took up the post of ICIFI Secretary General. Although ICIFI was dissolved, the industry succeeded in gaining NGO status for its International Association of Infant Food Manufacturers (IFM). The infant food industry shared this experience with other TNCs in a specific newsletter on “How companies can gain from NGO status.”

Since then, the industry has shifted arenas. Rather than attempting to influence international politics by using the NGO status and image, TNCs are now asking for a privileged status in international decision-making. Rather than lobbying at UN meetings, the industry is now inviting high-ranking UN and government officials to their own business roundtables, in Davos and Geneva, for instance.

businesses cannot be expected to author their own regulation: this is the job of good governance.” (UNRISD 1995:19)

19 ICC, Business World April/June 1984, for example, wrote in an article "Maucher on Management": “Often, said [Nestlé CEO] Maucher, there are in a particular group a handful of fanatics and a majority of reasonable people. So a company’s strategy should be to convince those who are reasonable and isolate those who are not.” For the divide-and-rule strategy elaborated by the PR Agency Mongoven, Biscoe and Duchin (whose managers used to work with Pagan Jr.’s post-Nestlé consultancy firm Pagan International), cf: (Stauber and Rampton 1995:66-67)


21 For more information on European business-lobby-roundtables, cf. e.g. (CEO 1998) (Balanyá et al. 2000)
4.8.3 Roundtable discussions and Code implementation

Industry’s concerted lobbying efforts to be recognized as privileged partners in global decision-making arenas have coincided with a change of policy approach within many UN agencies. In January 1998, for example, the WHO Executive Board agreed that the global commitment to infant and young-child nutrition, in particular breastfeeding, should be revitalised. Preliminary discussions were held with representatives of consumer groups and the infant food industry in April 1998. In November 1998, roundtable discussions were first held with consumer and breastfeeding groups alone, and then just with infant food manufacturers.

The stated aim of these meetings was ultimately to establish a consultative mechanism for improved implementation of the Code and related WHA Resolutions. (WHO 1998c: 3) NGOs, however, were not persuaded that this mechanism would really move Code implementation forward. They argued that the obstacles to Code implementation were not differences in interpretation, but a lack of will on the part of the industry to comply with the Code in letter and spirit, and industry interference with the legislative and monitoring processes in countries wishing to implement the Code. They also felt that the proper forum for clarifying issues of Code interpretation and implementation should be the World Health Assembly, not a semi-private forum between industry and civil society organizations.22

Companies represented the roundtables with WHO as an initiative to ‘end’ the long-standing controversy. The question as to why industry has not put its house in order in the two decades since the Code was adopted is seen as irrelevant to infant health. The industry has claimed its place at the policy-making table on matters related to infant and young-child feeding.

4.8.4 Corporate engineering of consent and democratic global governance

The place of TNCs in the new architecture of global governance is still under-explored. Political and academic discourses are fraught with contradictions on the appropriate role of TNCs, especially in relation to governance understood as setting rules to ensure socially-responsible TNC practices.

It is not interaction per se between the public and the commercial sector that is at issue. The infant food industry does have a role to play in the infant food arena: To deliver good quality, reasonably priced products—in a way that does not conflict with the Code and subsequent Resolutions. What is at issue is the need to prevent such interactions from being misused by corporations for purposes that conflict with the mandates of public institutions.

The infant feeding case illustrates why it is important not to shy away from controversial debates simply because corporate PR has worked hard to discredit them. Controversy is part and parcel of the democratic process. Many UN agencies, governments and NGOs seem to be acceding to the industry portrayal of ‘constructive dialogues’ and ‘partnerships’ as opposed to ‘counterproductive controversy’. If such a stance were to become more widely-accepted as the appropriate way to conduct debates about international policy, it would pose a great threat to democracy. Indeed,

22 Interview with Nancy-Jo Peck, Scientific Advisor to IBFAN/GIFA, June 2000
efforts to end the unethical marketing practices of infant food manufacturers show that sometimes conflict has to be continued until there is real change.

4.9 Civil society and the code

Over the years, a number of networks, groups and church-based organizations have been involved in the Code debate. The longest-standing and most important international network in this area is the International Baby Food Action Network (IBFAN).

IBFAN was originally founded by six organizations. Today, it comprises over 150 groups, organizations and individuals operating in more than 90 countries. Its aim is “to improve the health and well-being of mothers and their children through the protection, promotion and support of breastfeeding and optimal complementary feeding practices, by pressing for full and universal implementation of the International Code and subsequent resolutions.” (IBFAN 1999:2)

IBFAN and its predecessors played an essential part in putting both the Code and the issue of appropriate infant feeding on the public agenda. Both UNICEF and WHO have commended IBFAN and other non-governmental organizations for their role in Code monitoring. (UNICEF 1997; Türmen 1998:1;3)

Compared to TNCs and their PR resources, IBFAN groups are tiny. Even the network's regional coordinating offices have no more than a handful of staff and many IBFAN members work on a voluntary basis. When international relations scholar Peter Willets investigated how small, often overworked and under-funded groups had managed to change the practices of powerful economic and political actors, he concluded that one of the pressure groups’ greatest assets was their “ability to mobilise legitimacy.” (Willets 1982:24) And, indeed, legitimacy is an important political power resource.

IBFAN continues to regard company campaigns such as the Nestlé boycott and pressure for effective marketing regulation via the Code as important parts of an interlinked and integrated strategy. (Allain 1998:34) This reflects the experiences of citizen groups who want to change corporate practice, not simply corporate rhetoric.

When the infant food issue was raised internationally, business leaders themselves put boycotts at the top of their list of “most effective techniques of the consumer movements to use.” (Sentry Insurance Co. 1977) Almost all public relations textbooks mention the Nestlé Boycott as a prime example from which companies can learn. It was described in 1985 by a PR newsletter as “the largest consumer boycott ever – involving more than 700 churches and activist groups worldwide.” Indeed, it can be argued that direct campaigns for corporate accountability, such as the boycott, together with monitoring and public disclosure of Code violations, has been one of the most effective mechanisms in making corporations change their marketing practices.

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23 Denise Lach, who analysed the role of conflict in the U.S. environmental debate, pointed out: "Contrary to common view that conflict is always a negative force that must be managed to resolution, conflict can be a driving force for social change ... Fundamentally, conflict forces us all to clarify and adapt our perspectives in response to changing human interests and environmental conditions” (Lach 1996:212)
Regulatory debates can also be seen as contests over favourable public opinion. Corporations are sensitive to ‘negative publicity’, to ‘naming and shaming’, which they can now expect if their violations of internationally agreed-upon norms are made public. The infant food industry cares about the possible consequences of such a negative image, one of the most immediate being calls for tighter external regulation.

4.9.1 Codes as means of raising public awareness and debates

The value of an international regulatory code should be assessed not only in terms of the number of countries that have implemented it. Codes also have important functions in terms of raising and maintaining public awareness about particular issues, to help build public pressure on corporations to change practices that are detrimental to society, and to raise a general debate about standards for corporate conduct.

Having a single International Code helped focus the infant food debate on appropriate universal standards for the marketing of breastmilk substitutes and thus helped to focus policy action, and public vigilance and pressure. One other advantage is that the weight of the WHA behind the Code made it easier for IBFAN and others to campaign for Code implementation and allowed national authorities to call on UN agencies for support in their efforts to regulate the infant food industry.

4.9.2 Usurping the role of governments?

The infant food industry has reacted to IBFAN monitoring of its practices by claiming that the network is “usurping the sovereignty of national states.” The industry omits to mention that the rise of trans-national corporations has been a major challenge to the sovereign decision-making powers of states, stimulating the rise of trans-national civil society organizations in response. (Krut 1997:4)

Moreover, the industry’s claim reflects a narrow view of the setting, monitoring and enforcement of rules in democratic societies. Civil society organizations, which strive for the external regulation of transnational corporations, are not usurping the role of states but complementing it. Limiting harmful corporate activities has never been the exclusive domain of governments. Checks and balances on corporations in industrialized states have rarely been established simply because state authorities thought they were needed. In many cases, the need for regulation was first articulated within the public sphere.24

Vigilant, active citizens are the very essence of a democratic society. And their influence increases when they band together to monitor corporate behaviour. If this causes occasional frictions – not only with corporations but also with public authorities – this should not be seen as a problem per se. Such groups can take a dual approach: prompting states and international agencies to take action; and supporting them against industry resistance to regulation.

24 Economist Robert Kuttner says of the role of citizen participation in rule-setting: “… Rule-setting and the correction of market excesses are necessarily public issues ... Norms that encourage informed civic engagement increase the likelihood of competent, responsive politics and administration, which in turn yields a more efficient mixed economy ...”. (Kuttner 1999:331)
One danger of the ‘usurping the state’ argument is advocacy for states to abdicate their rule-setting and monitoring functions altogether. Much current neo-liberal governance discourse implies that, as citizen groups have been successful in influencing corporate practice, this task is best left to them and, better still, performed in cooperation with industry.

There are areas where co-regulation with industry may be sufficient and useful. But there will always be spheres of the economy that need tight and effective outside regulation. Establishing such regulatory systems requires recognition of the role of so-called radical civil society organizations. It also means ensuring that such groups have access to the relevant public fora and a more secure funding base than they have currently. More generally, it means further reflection about global institutional arrangements in which states are effectively backed by a reformulated and strengthened UN and other institutions in efforts to deal with those corporations that have grown beyond their national boundaries. Effective regulation of corporations should not be reduced to questions of economic power. It is, above all, a question of lucid analysis and political will.

The infant food example illustrates general issues about the international regulation of TNCs because it is one of the longest-standing efforts to regulate an industry sector internationally. The Code is one of the few international codes adopted under the aegis of the UN at a time when binding international regulation of TNCs was regarded as a way to make them accountable to the countries in which they operate. By comparison, this chapter now examines attempts to create international regulation of the tobacco industry.

5. Regulating tobacco

There are many similarities between tobacco and infant food companies: both are trans-nationals with budgets larger than that of some countries; both have engaged in deceptive and misleading advertising; both have opposed regulation. The differences between the two lie primarily in efforts to regulate them. The protest against the infant food industry was lead by civil society organizations outraged at the deaths of babies. Smokers, however, do not generate such public sympathy and are rarely seen as victims. Efforts to regulate tobacco came less from the public and more from governments and public health professionals aware of the costs of tobacco use.

Trade liberalization and advances in communications have allowed tobacco companies to expand their very professional marketing operations. As they have done so, the number of smokers world-wide – and the danger to global public health – has increased. And there are no binding international controls on tobacco. Three obstacles have hindered the creation of effective regulation. First, a lack of political will to regulate tobacco companies at the national level. Second, tobacco corporations have used their immense resources to fight attempts at regulation. Third, until recently, there has been little coordinated international focus among those who advocate tobacco control. There is now, however, a move to create international regulations
with the Framework Convention on Tobacco Control spearheaded by the World Health Organisation.

5.1 A global threat to public health

Tobacco companies have expanded across the world in recent decades, increasing their markets and their profits. This expansion has not, however, benefited the public. Tobacco is now considered one of the primary threats to global public health. An estimated 500 million people alive today – more than half of them children – will die from tobacco-related causes. (World Bank 1999) Smoking currently kills one in ten of all people, a proportion expected to rise to one in six by 2040. If current trends continue, it is expected that by 2030, smoking will be the world’s leading cause of death. (World Bank 1999) Today, about 1.1 billion people smoke – around 80 per cent of them in developing countries. (World Bank 1999)

Around half of all long-term smokers will be killed by tobacco and one quarter will die in middle age. As well as increasing the risk of a number of cancers, smoking is the leading cause of emphysema. Smokers face far greater risks of heart attacks and strokes, while non-smokers are also affected – with increased risks of lung cancer and cardiovascular disease. (World Bank 1999)

Smoking has particular consequences for women and children. In the U.S. alone, about three million women have died prematurely since 1980 due to smoking-related diseases. (Surgeon General 2001) Smoking increases female infertility (Ernester et al 2000) and women who smoke during pregnancy are more likely to have stillborn babies. (Ernester et al 2000) Babies that live suffer from health problems such as low birth weight and increased risk of both respiratory disease and sudden infant death syndrome. (World Bank 1999) A 1996 article in Pediatrics found that the prevalence of mental retardation among children whose mothers smoked during pregnancy was more than 50 per cent higher than among children whose mothers did not smoke. This figure rose to 75 per cent when the mothers smoked a pack a day. (Drews et al 1996)

5.2 National reluctance to regulate tobacco

Despite its impact on public health, little direct action has been taken to regulate tobacco at national level. One reason is that many governments are concerned about the economic impact of tobacco regulation.

One argument put forward by tobacco companies and others, is that tobacco controls will lead to unemployment. (Warner 2000) While there is some truth to this argument, it gets more weight than it deserves. First, the industry accounts for less than one per cent of total manufacturing employment in all but a few countries. (World Bank 1999) Second, income spent on tobacco would not vanish – it would be spent on other products and the non-tobacco sectors of the economy would grow. Third, there are a few countries that are heavily reliant on tobacco and a decrease in global consumption would indeed, affect their economies. Decreases in consumption, however, would occur over decades – a more gradual shock than many other industries face at any given time. (World Bank 1999)
Another economic concern is that restrictions, such as increased taxes on cigarettes, will lead to loss of tax revenues and to increased smuggling. However, a model developed by the World Bank concluded that a world-wide excise tax increase of 10 per cent would lead to an increase in tobacco tax revenues of about 7 per cent. (World Bank 1999) While increased taxes could lead to more smuggling, stronger law enforcement could limit this. Lax enforcement – not high taxes – permits smuggling.

Taxing cigarettes is an effective way to reduce demand. Studies show that a price increase of 10 per cent for a pack of cigarettes in the U.S. led to a 4 per cent decrease in demand. (World Bank 1999) Moreover, children and people on low incomes are most likely to be affected by price increases. Although more research is needed on elasticity of demand in developing countries, estimates indicate that a 10 per cent price increase for a pack of cigarettes would lead to a decrease in demand of about 8 per cent. High prices have two additional benefits – they may deter people from starting to smoke and they might stop ex-smokers starting again. (World Bank 1999)

Smoking does not lead to an efficient allocation of a society’s resources. Smokers impose healthcare costs on non-smokers, for example. In industrialized countries it is estimated that smoking consumes 6-15 per cent of healthcare costs per year. (World Bank 1999) Although the effects of smoking have not been fully felt by the developing world, the sheer numbers of people involved, combined with scarce resources for public health will create a heavy financial cost in years to come.

5.3 Neo-liberal frameworks: aiding the expansion of corporations

Through increased cross-border travel and trade and phenomenal new advances in communications, globalization is creating interdependent linkages between states. While countries continue to operate as individual nations, with varied regulatory systems, tobacco companies have mobilized to build a coordinated global strategy.

5.3.1 The global market

One of the characteristics of the current global economy is trade liberalization, involving the reduction or removal of trade barriers. Trade liberalization has two effects. First, imported goods – including cigarettes – become cheaper. Second, markets that were once inaccessible to foreign companies become open – increasing the market for any given product. Just over a decade ago, about 50 per cent of the global cigarette market was open to foreign tobacco companies. By 1998, this had increased to about 98 per cent. (Joossens and Ritthiphakde 2000) Chaloupka and Laixuthai carried out a study on four Asian countries that opened their markets to the USA. The study concluded that levels of smoking in those four countries were 10 per cent higher than if the markets had not opened. (Chaloupka and Laixuthai 1996).

Tobacco companies have maximized the profits from new markets. For example, between the late 1980s and the late 1990s, the international sales of the world’s largest tobacco company – Philip Morris -- doubled, despite little growth in domestic markets. (Joossens and Ritthiphakde 2000)

5.3.2 Advertising in the global market
Cigarette advertising does not provide factual information about the product, but links smoking to a fantasy world with a desirable lifestyle. (Hammond 2000) There is nothing particularly unusual about this – advertisements of all kinds attempt to create such linkages in the minds of consumers. Cigarette advertisements, however, encourage consumers to buy an addictive product that may kill them. There is an immense gulf between the images portrayed by such advertising – healthy and attractive people – and the reality of smoking.

The tobacco industry claims that children are not a focus of its marketing strategies, yet industry documents that emerged as a result of the Minnesota State Attorney General’s lawsuit against tobacco companies reveal quite a different story. A 1975 internal memorandum from R.J. Reynolds stated, “Our attached recommendation...is another step to meet our marketing objective: To increase our young adult franchise. To ensure increased and longer-term growth for Camel Filter, the brand must increase its share penetration among the 14-24 age group which have a new set of more liberal values and which represent tomorrow’s cigarette business.” (Minnesota Trial Exhibit #12,865, emphasis in original) Similarly, in 1981 the Philip Morris Research Center stated, “It is important to know as much as possible about teenage smoking patterns and attitudes. Today’s teenager is tomorrow’s potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens...Furthermore, it is during these teenage years that the initial brand choice is made.” (State of Minnesota vs. Tobacco 1998)

Studies indicate that children are particularly vulnerable to advertising. A 1994 report by the Centers for Disease Control estimated that 86 per cent of underage U.S. smokers prefer Marlboro, Newport or Camel – the three most heavily advertised cigarette brands. (American Heart Association) In 1996, a study in the *Journal of Marketing* found that teenagers are three times as sensitive as adults to cigarette advertising Conversely, a study by the World Bank found that youth seem to be less impacted by information on the negative effects of smoking than older adults. (World Bank 1999)

And children are smoking. The U.S. Department of Health and Human Services estimates that 50 per cent of U.S. smokers begin using tobacco by the time they are 14 years old, while 25 per cent begin by age 12. (American Heart Association) The World Bank calculates that 14,000-15,000 children and young people take up smoking each day in industrialized countries, rising to 68,000 to 84,000 per day in developing countries. (World Bank 1999)

Industry documents show that children are seen as critical to future sales. It is not surprising, therefore that when national regulations on advertising become more stringent, tobacco companies find ways to circumvent regulations.
Although the more blatant efforts continue, such as handing out free cigarettes to high school students, they are increasingly superseded by more indirect forms of advertising. Brand stretching – involving the use of the tobacco companies name on non-tobacco products, such as coffee, clothing and even travel agencies – and sponsorship of sporting, music or art events are two other ways the industry advertises its products. Many such events are broadcast internationally, thwarting national advertising regulations. (Hammond 2000)

Print media, satellite television and the Internet all provide vehicles for the promotion of tobacco products. Even with strict government regulation, many of these media are difficult, if not impossible, to police. The only way to regulate tobacco advertising is through a world-wide ban on advertising. (Hammond 2000)

Modern economic theory assumes that consumers make rational decisions about their purchases based on costs and benefits (World Bank 1999). But many people start to smoke before they are able to assess the true costs of smoking – before they are ready to make such a life-changing decision.

For adults too, smoking is rarely an informed choice. Cigarette advertising says little about the product and many countries do not require warning labels on cigarette packs or on advertisements. A 1996 survey in China, for example, found that 61 per cent of smokers said they believed that smoking did them “little or no harm.” (World Bank 1999) Indeed, industry documents released as a result of the Minnesota trials show that the tobacco industry had deceived the public about the dangers of smoking for decades. (Yach and Bettcher 2000) For many people, the decision to smoke is based on imperfect information that minimizes the strength of the addiction and the risks.

5.3.4 The shift to the developing world
Smoking-related illness and death are on the rise – and on the move. Until recently, this was generally an industrialized country phenomenon. But the number of smokers in developing countries is increasing. It is expected that by 2020, seven out of every ten people killed by smoking will be found in the poorer countries of the South. (World Bank, 1999)

While there is little data on levels of smoking among children in developing countries, three points are worth noting. First, the tobacco industry targets children because they are vulnerable to advertising and, once they start to smoke, they provide a market for the future. Second, developing countries are demographically younger than most industrialized countries. For example, those under-18 in all industrialized countries account for around is 22 per cent of the total population, compared to about 39 per cent of the total population in all developing countries (UNICEF 2000). Third, developing countries generally have fewer regulations – and enforcement – on tobacco. The combination of these three factors indicates that children in developing

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27 Turkish students claim that Philip Morris and R.J. Reynolds handed out free samples outside their high school on a regular basis. See “Drawn to Marlboro’s Buzz, Taste, the Turkish Shun the Local Leaf,” Wall Street Journal, 11 September 1998, quoted in Suein L. Hawng, in Hammond 2000. This is the same strategy used by illegal drug dealers to get new customers. The Campaign for Tobacco-Free Kids has a 1997 photo from Concord, CA of a Marlboro truck and kiosk close to an elementary school. The kiosk was set up shortly before school was let out and offered giveaways with the purchase of cigarettes. http://tobaccofreekids.org/adgallery
countries represent potential markets for tobacco and need the protection of strong international regulation.

Tobacco companies also direct advertising to women. The traditionally low rate of smoking among women in most developing countries is changing. As in industrialized countries, cigarette advertising in developing countries links smoking with sexual attractiveness, glamour and independence. Additional messages are used in developing countries, such as sophisticated foreign models that link smoking to the lifestyle of rich countries. In countries where women have traditionally subservient roles, smoking represents emancipation and the emergence of female individuality. (Ernester et al 2000).

5.4 Preventing regulation

Tobacco corporations have poured resources into fighting both national and international regulation. The internal industry documents made public as a result of the Minnesota trials, reveal that tobacco companies have used their economic power to threaten businesses seen as a threat. For example, when Merrell Dow Pharmaceuticals began to market, Nicorette® -- a smoking cessation aid – Philip Morris withdrew millions of dollars of purchases from the company (Landman 2000) Tobacco companies have also used their muscle against public transportation systems, airlines, insurance companies and advertising agencies who have promoted anti-smoking. Because the industry has such financial power, its efforts can damage or destroy smaller businesses. (Landman 2000)

Tobacco companies have enlisted the support of the U.S. government in threatening countries with trade sanctions. In the 1980s the U.S. threatened four Asian countries, including Thailand, with trade sanctions unless they opened up their markets. (Callard et al 2001). Thailand opened its markets to U.S. tobacco companies, but also put into place strong anti-tobacco regulations. In 1990, the U.S. appealed to a GATT panel of judges, stating that Thailand was violating the GATT. The panel found in favour of Thailand, noting only that its ban on foreign cigarettes was discriminatory. (Bettcher et al 2001)

The Thailand case set an important precedent. It demonstrated that even under free trade conditions, practices and products that harm humans could be restricted. The General Exceptions (Article XX) of the GATT state:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;”

See http://www.ciesin.org/TG/PI/TRADE/gatt.html for GATT text
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Article XX(b) was used to justify Thailand’s strict laws against tobacco by the GATT panel. Although Thailand was not able to implement all of its restrictions, some were allowed to remain. While it could be argued that this was not a real victory, it demonstrates that despite strong resistance to global regulation, there is a measure within the GATT that sets a “floor” to protect, among other things, national public health.

Given the power and determination of the tobacco industry, and the health consequences of smoking, however, this floor is not enough.

5.4.1 The industry and WHO

The tobacco industry has also used more indirect methods to target its opponents. Among other tactics, they have organized congressional investigations, taken opponents to court and formed “front groups” to attack opponents. Nowhere is this more clearly demonstrated than in the industry’s decades long attack on WHO.

The World Health Organization’s role in spearheading tobacco control efforts, has led tobacco corporations to view the WHO as one of their greatest enemies. Tobacco corporations have gone to great lengths to undermine WHO’s reputation, scientific reports and tobacco control activities. Philip Morris went so far as to create a multi-pronged attack on WHO, known as the Boca Raton Action Plan. A 1989 report from Philip Morris provides a glimpse of the industry’s perspective of WHO. (WHO 2000)

“How’s impact and influence is indisputable…Countermeasures designed to contain/neutralize/reorient the WHO require three elements…specific strategies and plans to blunt their programme initiatives…We need to identify the three countries in each region that the WHO will be targeting…allocate the resources necessary to stop them in their tracks…We need…a well-developed strategy for a number of issues to which WHO has given priority status. Examples include: women and smoking, juvenile smoking, tobacco tax earmarking/ sponsorship buy-outs, developing countries/marketing practices.” (Philip Morris 1989)

How did the industry seek to stop WHO “in its tracks”? Since WHO is dependent on external funding, tobacco companies often tried to cut off financing both from governments and from private sources while providing large contributions to organizations or activities that would counter WHO. An internal memo of the British American Tobacco (BAT) notes that WHO was unwilling to expand its Tobacco or Health programme for fear of offending the U.S. – its largest financial contributor. BAT notes the ongoing power of the tobacco lobby in the U.S. Congress, “a body that loses no opportunity to threaten the UN system with cuts in funding.” (WHO 2000) The disproportionate financial power of the U.S. to sustain WHO’s

30 For details see WHO 2000
budget is known and exploited by U.S.-based transnationals via their contacts in Congress. Companies also tried to take advantage of under-funded regional offices by offering to make financial contributions to various programmes. (WHO 2000)

The tobacco industry attempted to establish relationships with WHO staff to influence policy. In some extreme cases, tobacco companies had their own consultants working in WHO to undermine any activities that would harm the tobacco industry. For example, British American Tobacco paid large consultancy fees to Paul Dietrich, the then head of the Pan American Health Organization (PAHO), who successfully diverted the focus of PAHO away from tobacco to vaccination and AIDS. (WHO 2000)

The industry also paid academics to write pieces for respected journals while also using academic institutions and journalists to question the mandate of WHO. Ties with the tobacco industry were never mentioned. (Yach and Bettcher 2000)

One form of lobbying was to convince developing countries that tobacco control would devastate their economies and that it represented an industrialized country agenda. (WHO 2000) Although recent economic studies such as the World Bank Report on tobacco and the joint World Bank/WHO report, Tobacco Control in Developing Countries may dispel some of the misinformation spread by tobacco companies, the myth of economic dependence on tobacco remains strong.

The strategies mentioned here are by no means exhaustive, but provide an overview of some of the ways in which the industry sought to undermine WHO. It demonstrates the scale of the resources available to the industry, and the lengths to which it will go to prevent binding international regulation. It is to be expected, therefore, that the recent WHO initiative to create a Framework Convention on Tobacco Control will face similar problems.

5.5 Framework Convention on Tobacco Control

Although there have been calls for international tobacco controls since the early 1970s, the move gained real impetus within the UN system in the 1990s. In 1999, the WHO Executive Board adopted resolution EB 103.R11 to begin the development of a Convention on tobacco control. (Onzivu 2000) In May 1999, the 191-member World Health Assembly (WHA) unanimously backed a resolution calling for work to begin on the Framework Convention on Tobacco Control (FCTC). (WHO 2001)

A Framework Convention is a binding multilateral treaty that contains a series of regulations that can be implemented over time. Countries will implement the legal parameters, or framework, and then add the protocols incrementally. As mentioned earlier in the chapter, a Convention, which is legally binding, must be passed by a two-thirds majority within the WHA. The move towards a Framework Convention falls well within the mandate of WHO. Article 19 of the WHO Constitution empowers it to initiate development of Conventions to protect public health. (Onzivu 2000)

It is anticipated that the FCTC will be adopted by no later than 2003 (WHO 2001). The FCTC has the potential to cover many issues, ranging from advertising bans to taxation. Given its importance as an international legal instrument, it is expected that
the tobacco industry will attempt to prevent its implementation or at least weaken its content and scope. In April 2000, tobacco companies met in Nairobi to discuss this issue. (Yach 2001)

The importance of the FCTC as the first binding international regulation on tobacco cannot be overstated. Its value will lie first in its formal legal status. As a binding treaty it will allow countries to create effective standards against tobacco and access support from the UN system. The FCTC will also provide an international focal point that will help to keep tobacco as an issue for public debate.

The FCTC provides a critical opportunity for the world to place severe restrictions on the tobacco industry. Political will is essential to ensure that the FCTC does not go the way of the International Code of Marketing of Breastmilk Substitutes, which was severely weakened during discussions in the final phase prior to its adoption.

6. Conclusions

As of today, the task of drawing up and implementing a coherent regulatory web for trans-national corporations remains an unfinished agenda in international public policy-making. Many national lawmakers, on the other hand, shudder at the thought of international laws because of the challenge they raise to national sovereignty. Yet international laws already exist – the World Trade Organization has the power to make binding decisions, backed by threat of trade sanctions. Ostensibly, international trade laws exist to protect global economic well-being. How much greater is the case for international laws that protect the well-being of people, especially children. Although there is a need for continued debate and discussion on these issues, a number of lessons may be drawn from these two case studies.

First, there is an increasingly urgent need for global regulation of trans-national corporations for the following reasons: They are operating on a worldwide scale and can bypass national regulations by various means. Wherever there are no international regulations on their operations, they can remain a few steps ahead of national regulations. The two industries examined in this chapter have used vast resources to overcome potential obstacles to profits. Piecemeal regulations that vary from country to country – and that do not take the power strategies of TNCs into account – are no longer effective against such entities.

Concerns for national sovereignty are cited as a reason to avoid international regulation. But unlimited national sovereignty is increasingly elusive in the age of disappearing boundaries and increasing interdependence. National sovereignty has already been severely limited by international trade laws. The WTO is just one example of an international regulatory instrument. However, international health regulations, such as the future Framework Convention on Tobacco Control have two advantages over the already-existing trade regulations. They are created through a transparent forum involving broad national representation and once ratified, countries will have the option to adopt additional protocols. Countries will thus retain far higher levels of sovereignty than they do with accepted international trade regulations.
Second, the trend towards industry self-regulation and co-regulation for trans-national corporations needs re-examination. Effective industry self-regulation is not really possible when industry self-policing interferes with profit. Nor can corporations truly police themselves and each other and create what industry calls a ‘level playing field’. There is a need for a critical distinction between the party to be regulated and the parties involved in the process of drawing up and implementing the regulation. The prevention of ‘regulatory capture’ by corporations, however, is ultimately a question of power, the awareness and civic-mindedness of the relevant public institutions and civil society groups, and of the civic behaviour of corporations themselves.

Third, the depiction of rule-setting as a harmonious process between equal partners should be replaced by a more realistic picture of extremely political processes with high stakes. Controversy and healthy distrust can be just as valuable and often, unfortunately, more appropriate, than cooperation and trust in the creation of regulatory systems.

Fourth, criteria for measuring corporate practices within the context of a regulatory arena need to change. Corporate actions, rather than stated intentions, must provide the standard by which they are judged. Whether or not corporations put resources into philanthropic efforts must not distract from examination of their daily practices in their core activities. Corporations are legal entities that exist to make money and, therefore, international policy efforts should shift from a framework based on reliance on “corporate responsibility”, “trust” and “mutual benefit” to more clearly defined standards of accountability such as “legal obligation”, “transparency” and “public interests”.

Fifth, the current international regulatory system is skewed towards free trade rather than human well-being. For example, violations of free trade – or even perceived violations – can be taken to an international body with the authority and power to back its rulings. No such powerful body exists for violations against human well-being or health. Under the current international legal system, member countries can initiate proceedings to judge violations of WTO rules. The burden of proof rests on the defending party. No system exists where those trying to protect public health can initiate a process where the burden of proof lies with those who harm public health. Although there are international standards, none are enforceable to the degree that the WTO is able to enforce its trade-related decisions. As demonstrated by the GATT case in Thailand, some protection for human health is incorporated into trade rules. This, however, is only a passive protection. It cannot be raised as an issue in its own right, rather, it can only be raised in connection to a trade ruling that is underway.

The current framework, therefore, does not favour human health. This needs to change. WTO member-countries should actively lobby for increased numbers of exceptions to free trade rulings to protect public health. Not only are a greater number of exceptions needed, but their type and depth must also be increased if threats to public health, such as increased tobacco use, are to be mitigated.

32 Such as Philip Morris’ recent, well-advertised funding of shelters for battered women.
Sixth, the spread of trans-national corporate activity not only necessitates increased global regulation, but also increased harmonization between the mandates of different international institutions. As free trade has a growing impact on human well-being – including health – there is a greater need for organizations that have not worked together before to begin to do so. For example, the WTO recognizes the WHO mandate to protect global health, but there is scope for greater rational coordination between the two organizations. And there is also a need for harmonization between international agreements. For example, countries that have signed the UN Convention on the Rights of the Child may also agree to terms detrimental to the well-being, such as loan agreements that may reduce resources for child health programmes.

A broad-based debate should be encouraged on the appropriate institutional and political arrangements to ensure that TNCs do no harm to public interests. This would require an examination of proposals to re-evaluate the role of UN agencies and other key global policy players; encouragement for debate on the criteria by which corporate behaviour should be judged and how these criteria could increase corporate social accountability. Transparency and democratic decision-making should be the paramount guiding principles in this process.

Control of trans-national corporations becomes more feasible if democratic policy-making – with its conflicts, debates and challenges – is at the centre of the debate. Only when international agencies, national governments and civil society organisations work together can they create regulatory frameworks that effectively work in the best interest of the world’s children.
REFERENCES


American Heart Association Website. [http://www.americanheart.org/Heart_and_Stroke_A_Z_Guide/cigk.html](http://www.americanheart.org/Heart_and_Stroke_A_Z_Guide/cigk.html)


Campaign for Tobacco-Free Kids, [http://tobaccofreekids.org/reports/](http://tobaccofreekids.org/reports/)

Centers for Disease Control and Prevention, [http://www.cdc.gov/](http://www.cdc.gov/)


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State of Minnesota Plaintiff Trial Exhibits. [http://www.tobacco.neu.edu/mn_trial/index.html](http://www.tobacco.neu.edu/mn_trial/index.html)


WHO. (1998c.) *WHO Round Table Discussions with Consumer and Community-Based Nongovernmental Organizations*, 19 November, WHO, Geneva:


