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ARTICLE: CLUSTER VI: Class, Economics, and Social Rights: Culture and Trans-Border Effects: Northern Individualism Meets Third-Generation Human Rights

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BIO:

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SUMMARY: ... The economic power of the North and West is not much in dispute; the issue is how to control that power as its impacts spill outside the purely commercial domain. ... As illustrations, I offer first the North's insensitivity to culture when it works across borders to eliminate political corruption. ... I. Political Corruption and World-Wide Health Care: the Cultural and Trans-border Impacts of Multinationals Implicate Third-Generation Human Rights ... Given that U.S. multinationals were prohibited from bribing, the United States sought to modify the international marketplace to ensure that no Northern multinational - even if based outside the United States - could bribe a foreign official. ... B. Health Care and AIDS ... Some customers may support the trans-border initiatives for truly generous reasons; others may support the initiatives out of fear that drug-resistant strains will cross borders and further affect the developed world. ... Similarly, a call for the human right to development underscores the multinationals' grasping self-interest as they wield TRIPS in order to demand a nation-by-nation response to the AIDS pandemic. ... This language of human rights can incite more than an ad hoc reformation in a particular circumstance, such as the elimination of political corruption or the treatment of AIDS. ...

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The economic power of the North and West is not much in dispute; the issue is how to control that power

as its impacts spill outside the purely commercial domain. I am proposing a lesson in manipulation of multinationals and, in this connection, make two claims. First, the North (including the West) abuses the South at least in part because the North focuses on individual success, measured in the transnational commercial arena by wealth maximization for North-based multinationals. Second, the discourse of human rights, and in particular of third-generation human rights, n1 is a useful tool to change the North's behavior: it counteracts individual wealth maximization by emphasizing indigenous cultures and, generally, trans-border effects.

As illustrations, I offer first the North's insensitivity to culture when it works across borders to eliminate political corruption. Second, I offer the North's insensitivity to trans-border effects when it focuses on national, intellectual property laws in the face of a health care crisis with world-wide implications. In each case, multinationals, either directly or through their home-base national governments, use their power to pursue their own individual, short-term ends without considering the impact on the more vulnerable.

I. Political Corruption and World-Wide Health Care: the Cultural and Trans-border Impacts of Multinationals Implicate Third-Generation Human Rights

Corruption, in the form of bribery, is the first location where I [*866] explore the impact of the North's economic power. Because corruption provides an unfair advantage to some members of society by tapping into a government official's rent seeking, it is an impediment to democracy. For this reason it is inconsistent with the first generation of human rights, that is, civil and political rights. n2 These rights include the right to vote, n3 but corruption side-steps participation in democratic government since corrupt officials respond to their own private self-interest, and not to the needs of voters. Thus, corruption has a first-generation flavor, although typically such a right is "negative." n4 A state protects first-generation rights by resisting from interfering, for example, by not imposing a poll tax. In contrast, the state must act affirmatively, instead of merely ceasing destructive state actions, to eliminate corruption. n5

The right to health care, the second location I use to explore the economic power of the North, can be viewed as a second-generation right. n6 Not only does it fit under the social-economic rubric, but also, as is typical of second-generation rights, the state must act affirmatively to protect the citizen's right to health care. n7

Both of these concerns - protection from political corruption (with its first-generation flavor) and access to adequate health care (with its second-generation characteristics) - also implicate third-generation solidarity rights, which focus on the good of the group. n8 [*867] Both are intensely trans-border and culturally sensitive. n9 Political corruption compromises the collective right to self-determination both politically and culturally. n10 Politically, corruption evades transparent delegation of power from the voters n11 because of secret deals that effectively disenfranchise those voters. Culturally, an external determination of what is corrupt side-steps local norms. n12 With respect to health care, the right to a standard of living that protects adequate health is closely allied to the right to development, which is both collective and, in this increasingly tight-knit world, is increasingly susceptible to trans-border impacts. n13

It is because third-generation rights draw attention to the collective and the trans-border that I propose them as a corrective for Northern power. The hard, cultural reality about the North - its celebration of individualism - demands minimal governmental interference. n14 Thus, instinctively, the North embraces first-generation rights with their "freedom-from" sensibility; to force the North's attention onto the third-generation of rights is to impose a new perspective.

II. How the North Exercises Its Power

That the North enjoys a surplus of economic power relative to the South is clear. n15 If private entities' sales are compared to nations' gross domestic product (GDP), fifty-one of the one hundred largest economies in 1999 were multinationals, all of which were based in North America, Japan, or Europe. n16 General Motors, the largest company [*868] in the world that year, was the twenty-third largest economy by this measure, and Wal-Mart was the twenty-fifth. n17 These companies' sales were greater than the GDP of Poland, of Norway, and of the fourth most populous nation in the world, Indonesia. n18

Importantly, not only does the North have power, but it exercises it according to its own particular perspective. This perspective includes a law and economics-style

understanding of Adam Smith: the North celebrates the individual - a reality that provides the backdrop for the multinationals' predilection for the first-generation rights. n19 According to neoclassical economics, individuals ultimately benefit society by pursuing and bargaining for their own preferences; at the risk of anthropomorphizing, in the international commercial context the smallest relevant unit - the individual for these purposes - is the multinational.

This essay examines the multinationals' use of power by analyzing their interaction with international corruption and health care. I use these illustrations to explore the multinationals' behavior when their rush to wealth maximization confronts cultural or trans-border impacts.

A. Corruption

Consider, for example, political corruption. By the mid-1990s, the executive branch of the United States acknowledged that, by criminalizing the corruption of foreign officials, the United States had disadvantaged U.S. multinationals compared to other North-based businesses. n20 Basically, the U.S. Foreign Corrupt Practices [*869] Act n21 prevented U.S.-based multinationals from bribing foreign officials; in contrast, other countries such as Germany not only did not punish the multinationals for paying such bribes, but actually allowed the bribes as a tax-deductible expense. n22 The domestic laws of the United States were imposing a competitive disadvantage on the U.S. multinationals.

Unable to repeal the Foreign Corrupt Practices Act because no member of Congress could appear to support corruption, the United States attacked the problem from the supply side. Given that U.S. multinationals were prohibited from bribing, the United States sought to modify the international marketplace to ensure that no Northern multinational - even if based outside the United States - could bribe a foreign official. The United States was interested because U.S. multinationals would no longer be at a competitive disadvantage if non-U.S. companies were similarly subject to anti-bribery strictures. Other Northern countries were interested because prohibiting all bribes reduces costs for all Northern multinationals. In 1997, the Organisation for Economic Cooperation and Development (OECD), whose member nations mostly are developed, joined with five other nations to adopt an anti-bribery convention ("OECD Anti-Bribery Convention"). n23

In this way, the United States and its Northern allies changed the environment with respect to political corruption. The OECD Anti-Bribery Convention

intentionally has trans-border effects since the topic is bribery of foreign officials; however, it does not consider the [*870] host country's cultural realities. To take an example close to home, on April 19, 2001 Italy's highest court handed down a very important decision asserting that influence-peddling in Italy is not a crime. n24 A governmental official can receive compensation to recommend someone for a job, provided that the official truly has influence and truly can be effective. n25 To put this example in context, remember that if a behavior is wholly within the norms there is no real reason to hide it; thus, there should be relative transparency. n26 If there is transparency, the distortions generally attendant to corruption should be absent. n27 Thus, if influence-peddling is an Italian norm, there is no economic reason to criminalize it as corrupt. n28

Imagine a multinational operating in Italy, but based in another country that adheres to the OECD Anti-Bribery Convention. Further, imagine that an Italian governmental official asks the company's agent to recommend the official's nephew or niece for a job with the multinational. The Italian official in this example is making exactly the same kind of request that the official typically receives; we thus could argue that the official is acting wholly within the local, host-[*871] country norms. However, because the official is demanding instead of providing an exercise of influence, the official is technically requesting a bribe. The multinational, by acceding to the request and hiring the official's recommendee is paying a bribe. Thus, the multinational will almost certainly violate its home-country penal laws mandated by the OECD Anti-Bribery Convention n29 if the multinational grants the official's petition. n30

Italy's letter of recommendation scheme has been embedded in Italian culture for thousands of years: apparently Cicero, a very early Italian, was particularly adept at writing such letters. The OECD Anti-Bribery Convention's rigidity in the face of local customs supports the accusation that this convention represents cultural colonialism. n31 This is not an example that pits Italian national sovereignty against the international regime of the OECD. Rather, this is an example of the North's at best thoughtless, or at worst ruthless, pursuit of wealth maximization. With the OECD Anti-Bribery Convention, the North supported the trans-border effects of the individual multinationals' wealth-maximizing efforts without taking into account the host country's cultural reality.

B. Health Care and AIDS

Consider another illustration of Northern power exercised by the smallest relevant unit - the

"individual" in this trans-border context. Here, instead of acknowledging trans-border effects while ignoring [*872] local impact, the Northern multinationals focus on rights that are national in origin while ignoring their trans-border effects.

In March 2001, a conflict erupted between the Northern pharmaceutical companies and the South over AIDS drugs. n32 The specific point of contention was a South African law that encouraged the use of generic drugs in that country. n33 The Northern pharmaceutical companies, with the full support of Northern nations including the United States, strove to protect their own individual intellectual property rights in South Africa. n34 This concerted effort against the South African government was in the face of an international epidemic where effective treatment must necessarily cut across national borders.

The fight took place on a territory defined by the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights, n35 generally referred to as the "TRIPS Agreement." n36 That agreement was included in the Uruguay Round agreements in 1994 n37 on the strong insistence of developed countries in general and the United States in particular. n38 Because TRIPS allows [*873] a WTO member-nation to abrogate intellectual property rights in a few, very narrow circumstances relating to national interest, n39 the agreement configures intellectual-property protection as a nation-by-nation exercise. The relevant playing field, as we will see, is thus balkanized, and the result pits the multinationals' individual rights to intellectual property against the health needs of an afflicted nation's population.

The TRIPS Agreement's defenders respond that, absent impermeable protection of intellectual property rights, the pharmaceutical companies may well make less effort to innovate. n40 AIDS activists challenge this assertion by arguing that even aside from TRIPS, national laws in developed countries provide substantial intellectual-property protection. n41 These activists also point out that many significant innovations have been funded by governments, including the United States, and not by private industry. n42

To focus on the recent lawsuit that the Northern pharmaceutical companies brought and then dropped against South Africa, n43 it is reasonable for South Africa specifically to protect itself. Consider that a quarter of a million South Africans have already died of AIDS, n44 and one in nine South Africans - 4.7 million South Africans, out of a population of about 42 million - are infected with HIV. n45 To put these numbers further in context, South Africa represents approximately eighteen percent of the 25 million

people in sub-Saharan Africa infected with HIV or ill with AIDS.

In order to protect the afflicted, it is not enough to say that South Africa is a developing country for purposes of TRIPS and, thus, has another five years before it is fully under the TRIPS regime; n46 it is not enough to say that because South Africa has granted only seven patents for AIDS drugs, n47 South Africa has the legal right under TRIPS to import many types of generics from another developing [*874] country such as India, n48 and would even have the right to manufacture AIDS drugs at this time; it is not enough to say that South Africa could impose on the Northern pharmaceutical companies a compulsory license for South Africa. n49 It is not enough because the WTO/TRIPS-influenced discourse simply keeps returning to a discussion of nation-members of the WTO, when in reality AIDS is a major trans-border health crisis. n50 Worldwide, this crisis has claimed over 16 million lives, and there are 33 million more lives now waiting to be claimed. n51 Organizations and bureaucracies must develop processes [*875] whereby maximizing profits cedes to the preservation of human lives.

The only way to treat the worldwide AIDS epidemic is to deliver educational and medical services as effectively as possible throughout the world. For example, if pharmaceutical companies offer some antiretroviral drugs to South Africa at very low prices, that is not a solution. Admittedly, to offer a drug cocktail to a developing country for \$ 500 per year is optically better than charging the \$ 10,000 demanded in the United States; however, it is functionally no better in an economy where neither the government nor the population can afford \$ 500. n52 We are dealing with a state where the annual per capita income is \$ 2,336 n53 and the per capita GDP is \$ 2,500. n54 Neither the South African government nor its population can afford to spend 20% of the per capita GDP or 21% of the per capita income on AIDS drugs. n55

Second, even assuming that South Africa could afford the drugs, the country also needs an effective distribution infrastructure. n56 Otherwise, at best, those in need would still not be helped, and, at worst, a new, resistant strain of the virus would evolve because of incomplete compliance with the protocol. n57 These resistant strains know no borders. Thus, the only way to treat AIDS effectively is to treat HIV-infected people wherever they are located. This requires both an adequate supply of, and effective distribution mechanisms for the drugs. n58

[*876] The World Health Organization (WHO) is prodding the WTO in that direction, n59 but the issue

is broader. The goal of the WHO is to shift the Northern perspective from one that focuses solely on wealth-maximization for the smallest relevant unit, to one that appreciates trans-border effects and specific cultural contexts. n60

III. Third-Generation Rights Articulate Encouragement for the Multinationals' Evolution

A. Change Is Hard

In urging a third-generation perspective on the multinationals, we seek to change the multinationals' inherent assumption that, by birthright, they should maximize their own individual wealth. We have to recognize that change is hard, especially change that runs counter to perceived self-interest. Psychology confirms that it will be much harder to convince the multinationals to change their assumed right to maximize wealth if they perceive the change as giving up an advantage rather than as gaining a benefit. n61

Of course, whatever change is proposed to the multinationals, pressure will still need to be brought to bear. That is, however, a separate conversation concerning norm formation, a subject that is treated elsewhere. n62 For now, the critical concept is that a discourse [*877] other than wealth-maximization, a discourse that presents change as a gain for the multinationals, could facilitate the process of change. For example, the multinationals would more willingly modify their behavior if they learn that their customers, wherever they are located, view respect for culture positively. n63

Similarly, if the multinationals appreciate that customers in their most profitable markets would applaud corporate efforts to treat AIDS in the developing world, these companies will more likely embrace the importance of trans-border effects. Some customers may support the trans-border initiatives for truly generous reasons; others may support the initiatives out of fear that drug-resistant strains will cross borders and further affect the developed world. Whatever the reasons, the multinationals could reap positive public relations in their most profitable markets by recognizing cross-border consequences.

B. Third-Generation Rights

What discourse will help sensitize those multinationals from the highly individualistic, wealth-maximizing North to the importance of culture and of trans-border effects? The language of human rights is wonderfully well-suited to the purpose because it emphasizes the importance of cultural differences

(with a universalist undergirding) and it assumes trans-border effects.

To return to the illustrations used above, it is evident that corruption is incompatible with the right to self-determination, but the multinationals have sought to eliminate political corruption only in a culturally callous, economically self-interested way. n64 Similarly, inadequate health care is incompatible with the right to development, but the multinationals have impeded trans-border efforts to treat [*878] and prevent AIDS. n65

The vocabulary of third-generation rights, specifically of the right to self-determination and to development, encourages discussion of both the cultural and trans-border aspects of the multinationals' behavior. With these concepts in high relief, it is easier to apply pressure. For example, although the OECD Anti-Bribery Convention ostensibly is compatible with the right to self-determination, it is inherently inconsistent to speak of self-determination for residents of a host country whose norms are flouted (as in the case of Italy in the example set out above). At the very least, the use of the self-determination vocabulary from human rights reveals, cleanly and simply, the multinationals' hypocrisy. It emphasizes the public relations debacle that thwarted the multinational pharmaceutical enterprises. To avoid this risk of negative repercussions from developing-country workers, and especially from developed-country customers, is a gain for the multinationals. Thus, the human rights discourse articulates the advantage to the multinationals of considering cultural implications instead of considering only the multinationals' individual, short-term wealth-maximization.

Similarly, a call for the human right to development underscores the multinationals' grasping self-interest as they wield TRIPS in order to demand a nation-by-nation response to the AIDS pandemic. This strategy turned world-wide public sentiment against the pharmaceutical companies so forcefully that they were compelled to withdraw their case opposing South Africa's use of generic drugs. n66 Because the language of third-generation rights to development thus expresses the wrong clearly, it necessarily explains how the multinationals can avoid embarrassment by actively supporting, instead of impeding, cross-border efforts to counter AIDS. In this way, the rights offer the multinationals an opportunity for gain.

Once the multinationals have internalized that they derive an advantage from complying with human rights, it will be easier for them to make a change. n67 This language of human rights can incite more than an ad hoc reformation in a particular circumstance, such

as the elimination of political corruption or the treatment of AIDS. It is powerful language because, in the process of adopting the vocabulary of third-generation human rights, the multinationals also acknowledge the very concept of the collective that is inherent in those [*879] third-generation rights. n68 In turn, this concept fundamentally changes the multinationals' point of perspective: collective rights to self-determination or to development are foreign to the social construct that champions individual wealth-maximization.

Admittedly, it is too silly and anthropomorphic to claim that the mere repetition of words inevitably will create a "fraternite" between the multinationals and, for example, the ailing South Africans. n69 There is room for some optimism, however. The repeated use of a concept with approval from the group that the multinationals are seeking to impress may ultimately have a normative impact. n70

IV. Conclusion

The North's economic power is evident in its multinationals, and these multinationals exercise their power according to their expectation that they should maximize their own wealth. From this perspective, cultural differences and trans-border effects are secondary to the multinationals' own wealth maximization.

As a practical matter, this combination imposes Northern definitions of corruption throughout the world for the benefit of developed-country multinationals, no matter the local cultural reality. This combination also purports to justify favoring multinational profits by treating issues of human health on the same nation-by-nation basis that is at the heart of the WTO, no matter that the human health crisis is aggressively trans-border.

Thus, the North's focus on the preferences of the "individual," that is, on the benefit to the smallest relevant unit, trumps culture as well as trans-border effects. The language of third-generation human rights is the tool that, by emphasizing indigenous cultures and trans-border effects, can fundamentally revise the North's point of perspective from individual to collective, and thus modify the way the North uses its power. The human rights discourse has this impact by simplifying the task of framing the following concept: multinationals benefit themselves when they respect other cultures, recognize trans-border effects, and otherwise reach beyond short-term wealth- [*880] maximization. I am proposing that the South embrace for the immediate future this manipulative, even subversive approach.

FOOTNOTE-1:

n1. For a discussion of third-generation human rights, see Berta Esperanza Hernandez-Truyol, *Women's Rights as Human Rights - Rules, Realities and the Role of Culture: A Formula for Reform*, [21 Brook. J. Int'l L. 605, 622-23 n.53 \(1996\)](#).

For a discussion of all three generations, see Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, [32 Am. U. L. Rev. 1 \(1982\)](#).

n2. See, e.g., *The Challenge of Renovation*, TI Source Book 2000, ch. 1 at 3-4,

<http://www.transparency.org/sourcebook/01.html> (last visited July 29, 2001) (explaining how corruption threatens democratic institutions); Press Release, Transparency Int'l, *Bribes to Political Parties An Increasing Threat to Democracy* (Oct. 19, 2000), at <http://www.transparency.org/documents/press-releases/2000/2000.10.19.p<uscore>funding.html> (last visited July 29, 2001) (concerning payments to political parties).

n3. See, e.g., Sohn, *supra* note 1, at 24 (identifying the right to vote as first-generation).

n4. See, e.g., Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 Rutgers L. Rev. 435, 438 (1981) (noting first-generation rights are predominantly negative, although not purely so).

n5. This is not necessary, however, if we view the dishonest and disloyal official as an extension of the state, and thus the official's act is a governmental act to be avoided, which is a defensible interpretation of [Underhill v. Hernandez, 168 U.S. 250 \(1897\)](#).

n6. See Christopher C. Joyner, Book Review, [13 Emory Int'l L. Rev. 615, 618 \(1999\)](#) (reviewing Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (1998)) (referring generally to third generation rights and health care).

n7. See, e.g., Sohn, *supra* note 1, at 42 (referring to a state's "affirmative"

obligation in connection with the anti-discrimination second-generation right). Professor Sohn, however, viewed the right to a standard of living necessary to health as a third-generation, collective right. *Id.* at 60.

n8. See *id.* at 52-56.

n9. David H. Ott, *Public International Law in a Modern World* 244 (1987).

n10. See, e.g., Sohn, *supra* note 1, at 48-52.

n11. See, e.g., Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* 22, 114-16 (1999) (arguing that kleptocrats manipulate governmental and political systems for personal enrichment).

n12. See, e.g., *infra* Part 2(a).

n13. See Sohn, *supra* note 1, at 52-56; *infra* Part 2(b) (exploring trans-border impacts in health care). With respect to trans-border impacts in development, consider, for example, the Mexican peso crisis, brought on in part when non-Mexican investors lost confidence in Mexico's economy, which resulted in a precipitous fall in Mexico's gross domestic product and industrial production, and hundreds of thousands of unemployed workers. See, e.g., Paul Krugman, *The Return of Depression Economics* 52-54 (1999).

n14. See Claire Moore Dickerson, *The Recognition of the Individual: A Human Rights Perspective for International Commerce*, in *Moral Imperialism: A Critical Anthology* 151-65 (Berta Esperanza Hernandez-Truyol ed., 2002) (concluding that the individualism of the law and economics perspective is consistent with first-generation human rights).

n15. Of course, this does not mean that the South lacks power.

n16. Sarah Anderson & John Cavanagh, Institute for Policy Studies, *The Rise of Corporate Global Power* 2, 10-13 (Dec. 4, 2000), at <http://www.ips-dc.org/downloads/Top<uscore>200.pdf> (last visited Aug. 6, 2001) (noting that of the 200 largest corporations in 1999 based on sales, all but five were based in North America, Japan, or Europe). The only

other home-base in the top 200 was South Korea, whose largest company was 100th of the 200. *Id.* at 11. The top 51 corporations thus were all from North America, Japan, or Europe. See *id.* at 2, 9.

n17. *Id.* at 9. To put this in perspective: in 1999, only 22 of the 190 countries in the world, or 12%, had economies larger than General Motors. *Id.* The United Nations has 189 member countries; Switzerland is not a member. See List of Member States, U.N., at <http://www.un.org/Overview/unmember.html> (last visited Aug. 6, 2001).

n18. Anderson & Cavanagh, *supra* note 16, at 9 (ordering companies and countries by size of economy). See also Association of Southeastern Asian Nations, Indonesia, at <http://www.aseansec.org/economic/indonesia.htm> (last visited Aug. 26, 2002) (noting that Indonesia is world's fourth most populous nation).

n19. See generally Robert N. Bellah, Richard Madsen, William M. Sullivan, Ann Swidler, & Steven M. Tipton, *Habits of the Heart: Individualism and Commitment in American Life* 27-51 (1985).

n20. Based on reports from the Central Intelligence Agency, the U.S. Trade Representative at the time estimated lost business opportunities due to the Foreign Corrupt Practices Act at \$ 45 billion in 1994 alone. See Paul Lewis, *Corruption Is Now Under Global Attack*, *The Commercial Appeal* (NY Times News Service), Nov. 29, 1996 at B5, available at <http://n19.newsbank.com/nl-search/we/Archives?p<uscore>action=doc&p<uscore>docid+0EAF959680E2FC32&p<uscore>docnum=1&s<uscore>accuntid=AC0102111419353705447&s<uscore>orderid=NB0102111419352005431&s<uscore>dclid=DL0102111419354805526&s<uscore>username=predita>.

n21. [15 U.S.C.A. 78dd-1](#) to -2 (West 1997).

n22. Since November 1998, Germany no longer permits tax deductions for bribes; indeed payment of bribes to foreign officials creates criminal liability. See *Germany: Review of Implementation of the Convention and 1997*

Recommendation, Organisation for Economic Cooperation and Development ("OECD"), Part B.3, (Dec. 18, 1997), at <http://www.oecd.org/daf/nocorruption/pdf/report/Germany.pdf> (last visited Aug. 8, 2001). Note that this change post-dates the OECD Anti-Bribery Convention described below. See *infra* note 23.

n23. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD/DAFFE/IME/BR(97)16/FINAL*, 37 I.L.M. 1 (1998) (entered into force Feb. 13, 1999) [hereinafter *OECD Anti-Bribery Convention*]. The *OECD Anti-Bribery Convention* was executed on December 18, 1997 by the OECD member-nations plus five others. *Id.* The advice and consent by the Senate was obtained. See generally S. Rep. No. 105-277 (1998). This act is familiarly called "ratification." Christopher R. Wall, James R. Silkenat, & Thomas M. DeButts, *International Convention Prohibits Bribery of Public Officials*, 10/98 *Metro Corp. Couns.* 12:1 (October 1998). The act was implemented in the United States by the *International Anti-Bribery and Fair Competition Act of 1998*, Pub. L. No. 105-366 (amending the *Foreign Corrupt Practices Act* to conform to the *OECD Anti-Bribery Convention*).

n24. The Italian court's decision is particularly interesting given that Italy is an OECD member and ratified the *OECD Anti-Bribery Convention* in February, 2001. *Steps Taken and Planned Future Actions by Each Participating Country to Ratify and Implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, at 5, *OECD Anti-Corruption Unit* (Apr. 2002), at <http://www.oecd.org/daf/nocorruption/annex2.htm> (last visited Aug. 26, 2002).

n25. If the official were to misrepresent the extent of his or her influence, the official would be guilty of fraud. Alessandra Stanley, *Official Favors: Oil That Makes Italy Go Round*, *N.Y. Times*, Apr. 20, 2001, at A4.

n26. See, e.g., Robert Wade, *The System of Administrative and Political Corruption: Canal Irrigation in South India*, 18 *J. Dev. Stud.* 287, 312 (1982) (explaining that

although the Indian engineers never boasted of their bribe-receipts, they did speak openly about the bribes). Emphasis on the lack of boasting suggests some embarrassment, or at least fear of prosecution. See Claire Moore Dickerson, Political Corruption: Free-Flowing Opportunism, Symposium, 14 Conn. J. Int'l L. 393, 395, 395 n.8 (1999). The open communication did mean, however, that everyone knew that the engineers requested and received bribes. At that point, the bribes arguably become a form of direct payment of salary by those who most benefit from the engineers' work. See, e.g., Kim Lane Scheppele, The Inevitable Corruption of Transition, 14 Conn. J. Int'l L. 509, 526-27 (1999) (stating that when Budapest police stop cars and demand a bribe, they are "taxing" the car owners, who both are wealthy and are particular heavy users of the traffic-regulating services the police provides.).

n27. Corruption leads to inefficiencies such as an over-investment in infrastructure projects, at the expense of education, because it is easier to extract bribes from the former. See Paolo Mauro, Why Worry About Corruption?, IMF Econ. Issue Series 9-12 (1997) at <http://www.imf.org/external/pubs/ft/issues/6/index.htm> (Feb. 1997) (last visited Aug. 8, 2001). Corruption affects the amount, type and timing of investment. See Rose-Ackerman, *supra* note 11, at 30.

n28. See, e.g., *id.* at 33 (arguing that, in practice, corrupt officials compromise the values inherent in honestly negotiated contracts by structuring bribery deals to maximize their individual profits).

n29. OECD Anti-Bribery Convention, Art. 1, 1.

n30. Assuming that even the Italian Parliament cannot, for political reasons, overtly approve influence-peddling, the independent judiciary presumably does decriminalize influence-peddling. Thus, an Italian official peddling his or her influence no longer constitutes a violation of the OECD Anti-Bribery Convention. See Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD Negotiating

Conference, at 1, 8, DAFME/BR(97)20, (Nov. 21, 1997), at [http://www.oilis.oecd.org/olis/1997doc.nsf/LinkTo/DAFFE-IME-BR\(97\)20](http://www.oilis.oecd.org/olis/1997doc.nsf/LinkTo/DAFFE-IME-BR(97)20) (last visited July 29, 2001) (providing an in depth commentary and explanation of each provision in the OECD Anti-Bribery Convention). In this regard, the purpose of the convention is to eliminate active bribery by the person offering the bribe; acts that are permitted or required of the official do not violate the convention. An Italian official who is requesting, as opposed to merely making, a recommendation, is demanding a bribe if the request is in exchange for an official act. By making the request described above, the official is not peddling his or her own influence, but is, instead, asking the multinational's representative to exercise influence to hire the official's recommendee.

n31. The early argument was that, in certain cultures, a leader is supposed to take care of the extended family, and that it would thus be entirely within the host locality's norms for the leader to insist that some relative be offered an advantage in exchange for whatever services the leader was supposed to render. Vito Tanzi, Corruption, Government Activities, and Markets, *Fin. & Dev.*, Dec. 1995, at 24-25. Mr. Tanzi is now Director of the International Monetary Fund's Fiscal Affairs Department. *Id.*

n32. See, e.g., Rachel L. Swarns, Fight Ends in S. Africa Over Cheaper AIDS Drugs, *San Diego Union-Trib.*, Apr. 20, 2001, at A1.

n33. See *id.* Two months before they eventually capitulated, the pharmaceutical companies did finally lose support from the United States. *Id.*

n34. See Globalization and Access to Drugs: Implications of the WTO/TRIPS Agreement 19-20, World Health Organization (WHO), Ref. no. WHO/DAP/98.9 (Jan. 1999), at <http://www.who.int/medicines/docs/who-dap-98-uscore>9rev.doc> (last visited Apr. 22, 2001) [hereinafter Globalization and Access to Drugs] (providing background information about the WTO/TRIPS Agreement). A major concern of the North

is parallel imports: Africa itself is unimportant, as it represents less than 1.3% of the pharmaceutical industry's sales. Denise Gellene, *Settlement Does Little Harm to Drug Firms Lawsuit*, L.A. Times, Apr. 21, 2001, at C1; see also World Trade Organization, *Experts: Affordable Medicines for Poor Countries Are Feasible*, Press/220 (Apr. 11, 2001), at <http://www.wto.org/english/news/e/pres01/e/pr220/e.htm> (last visited Apr. 22, 2001) [hereinafter *Press Releases*] (reporting the importance of avoiding imports of cheap drugs into "rich countries").

n35. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter *WTO Agreement*], Annex 1C, *Legal Instruments - Results of the Uruguay Round* vol. 31, 33 I.L.M. 81 (1994), available at <http://www.wto.org/english/docs/e/legal/e/27-trips.pdf> (last visited Aug. 19, 2002) [hereinafter *TRIPS Agreement* or *TRIPS*].

n36. See Emily Miao, *TRIPS Agreement Impacts Pharmaceutical Sector*, 22 Nat'l L.J. C11 (July 24, 2000) (explaining how the TRIPS Agreement allows the pharmaceutical industry to recover some of the costs that they invest in research and development).

n37. TRIPS Agreement, supra note 35. In its turn, the WTO Agreement was agreed to by representatives of the various nations pursuant to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations on April 15, 1994. See *id.*

n38. See, e.g., Dana Williamson, *Addressing Inadequate Intellectual Property Protection in the Uruguay Round*, *Bus. Am.*, Sept. 25, 1989, at 4 (describing the United States as the "major advocate" for the TRIPS Agreement).

n39. See, e.g., TRIPS Agreement, supra note 35, at art. 31(b) ("national emergency"); *id.* at art. 65 (transitional arrangements for developing countries); *id.* at art. 66 (additional flexibility for least-developed countries).

n40. See *Press Releases*, supra note 34, at 4.

n41. See *id.*

n42. Marketing costs are more than 2.5 times research and development costs for GlaxoSmithKline. See *id.*

n43. See Swarns, supra note 32, at 1.

n44. *Id.*

n45. *Where HIV Affects 1 in 9*, Daily Mail, Mar. 22, 2001, available at 2001 WL 14123599.

n46. TRIPS Agreement, supra note 35, at arts. 65-66.

n47. See Gellene, supra note 34, at C3.

n48. Presumably, that legal right exists only under compulsory license. See TRIPS Agreement, supra note 35, at art. 31. South Africa does not have that right now. See Swarns, supra note 32, at A6.

n49. The multinationals fear parallel imports. See Gellene, supra note 34. However, under the exhaustion principle, permitted but not mandated by the TRIPS Agreement, parallel imports are legal because patents no longer apply after the first sale. TRIPS Agreement, supra note 35, at art. 6. Further, even without that principle, Cipla, Ltd., an Indian company, is seeking to export generics to South Africa and has requested a compulsory license from South Africa. *Cipla Seeks S. Africa Compulsory License: Will AIDS Be Named a National Emergency?* Marketletter, Mar. 19, 2001, available at 2001 WL 9077944. The South African Pharmaceutical Manufacturers Association does not challenge--or even object to--Cipla's request for the compulsory license. For its part, Cipla can manufacture the products in India, even if the products are patented elsewhere, because in India only processes, and not products, are patentable. Jeremy Laurance, *The Bombay Copycats Who Sold Treatment for \$ 1 a Day*, *The Independent*, Apr. 20, 2001, available at <http://www.independent.co.uk/story.jsp?story=67666>. Cipla and other Indian producers benefit from this loophole only for another five years, and only because India is a developing country. TRIPS and Pharmaceutical Patents: Fact Sheet, WTO,

at 5-6 (Apr. 2001), at <http://www.wto.org/english/tratop<uscore>e/trips<uscore>e/tripsfactsheet<uscore>p harma.pdf>; see also TRIPS Agreement, *supra* note 35, at arts. 65-66.

n50. Brazil's experience shows that a nation acting with determination can be remarkably successful in combating AIDS. The Brazilian government uses very frank talk to educate the public and combat secrecy. See Patrice M. Jones, *Brazil's Free AIDS-Drug Program Smashes Cases, Earns Global Interest*, Chi. Trib., Dec. 24, 2000, at 5. Further, since 1994, it supports the manufacture in Brazil of generic AIDS medicines which it then distributes free to patients. *Id.* Approximately 0.6% of the Brazilian population is infected. *Id.* However, it also is well known that AIDS crosses national boundaries, which makes national efforts particularly vulnerable when there is significant cross-border movement of humans. The classic example is the effect of men in the transportation industry. See *South Africa Will Use Thailand As a Model for Its Anti-HIV/AIDS Campaign Among Truckers*, Deutsche Presse-Agentur, June 9, 2000, at 23:07:00 (recognizing long-haul truckers as a vector for the spread of AIDS-HIV). The African Medical and Research Foundation ("AMREF") reflects a continent-wide approach to "empower the disadvantaged people of Africa to enjoy better health." African Medical and Research Foundation, available at <http://www.amref.org/whatisamref.htm> (last visited Oct. 16, 2002) As further evidence of the transnational impact of AIDS vectors, AMREF has "set up peer education programmes [sic] with truckers" along the Zambia-Tanzania highway. Photo 001. Joint United Nations Programme on HIV/AIDS, at <http://www.un.org/av/special/aids/photo.htm>.

n51. *AIDS Not Losing Momentum - HIV Has Infected 50 Million, Killed 16 Million, Since Epidemic Began*, Press Release, WHO, WHO/66 (Nov. 23, 1999), at <http://www.who.int/inf-pr-1999/en/pr99-66.html>.

n52. See Gardiner Harris, *AIDS Gaffes in Africa Come Back to Haunt Drug Industry*

at Home, Wall St. J., Apr. 23, 2001, at A1 (quoting a Pfizer official who commented on inadequacy of the per capita income in Sub-Saharan Africa).

n53. Jose M. Zuniga, *International Association of Physicians in AIDS Care, Report from the President*, IAPAC Monthly, Aug. 2000, at 2, <http://www.iapac.org/Text/Aug20001000.htm> (last visited Aug. 23, 2002).

n54. Gellene, *supra* note 34, at c1.

n55. Zuniga, *supra* note 53, at 2 (noting that the average annual cost of taking care of a late-stage AIDS patient in South Africa even without antiretroviral drugs is US \$ 2,600).

n56. See Press Releases, *supra* note 34.

n57. Denise Grady, *Generic Medicine for AIDS Raises New Set of Concerns*, N.Y. Times, Apr. 24, 2001, at F1.

n58. See Theresa Agovino, *Companies Fear Precedent As They Cut AIDS Drug Prices for Africa*, Associated Press (Apr. 20, 2001), available at <https://archive.ap.org/cgi-bin/display.cgi?id=3dd2aa835e2ceMpqaweb1P11018&doc=document.html&F=1&url=http%3a%2f%2fppqacontent1%3a10001%2fservlet%2fcom.infonautics.panama.content.document<uscore>repository.RetrieveDocumentForDisplayServlet%3fpublisherName%3dAP%26publicationName%3dAssociated%2bPress%26providerName%3dAP%26publishingDocID%3dD7BG84Q80>. Jeffrey D. Sachs, the Harvard economist, recommends that "rich countries" contribute \$ 3.3 billion over five years, to be used in Africa for testing and to build an infrastructure. *Id.*

n59. See *Globalization and Access to Drugs*, *supra* note 34, at 39-40.

n60. See *id.* at 39.

n61. See, e.g., Robert H. Frank, *Passions Within Reason* 86 (1988) (observing how the pain of subsequent weight gain does not prevent the dieter from eating the German chocolate cake at hand). See also Daniel Kahneman & Carol Varey, *Notes on the Psychology of Utility*, in *Interpersonal Comparisons of Well-Being* 150-151 (Jon Elster & John E. Roemer eds., 1991) (describing an experiment

illustrating the endowment effect, where students demanded more to sell an ordinary mug than they would have been willing to pay to buy it). See generally Claire Moore Dickerson, Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers, [53 Fla. L. Rev. 611, 643-48 \(2001\)](#) [hereinafter Dickerson, Transnational Codes of Conduct Through Dialogue].

n62. For my earlier writings on norm formation, see Claire Moore Dickerson, Cycles and Pendulums: Good Faith, Norms, and the Commons, [54 Wash. & Lee L. Rev. 399 \(1997\)](#); see also Claire Moore Dickerson, Spinning Out of Control: The Virtual Organization and Conflicting Governance Vectors, [59 U. Pitt. L. Rev. 759 \(1998\)](#); Dickerson, supra note 61. Many other authors have written about norm formation. See, e.g., William W. Bratton, Morten Hviid, & Joseph McCahery, Repeated Games, Social Norms, and Incomplete Corporate Contracts, in *Aspects of Fairness in Contract* 161 (Chris Willett ed., 1996); Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991); Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 *J. Legal Stud.* 115 (1992); Lisa Bernstein, Social Norms and Default Rules Analysis, 3 *S. Cal. Interdisc. L.J.* 59 (1993); Dan M. Kahan, Social Influence, Social Meaning and Deterrence, [83 Va. L. Rev. 349 \(1997\)](#); Dan M. Kahan, Trust, Collective Action, and Law, [81 B.U. L. Rev. 333 \(2001\)](#); Donald C. Langevoort, The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability, [89 Geo. L.J. 797 \(2001\)](#); Lawrence Lessig, The Regulation of Social Meaning, [62 U. Chi. L. Rev. 943 \(1995\)](#); Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 *Am. Soc. Rev.* 55 (1963); Lawrence E. Mitchell, Trust and Team Production in Post-Capitalist Society, 24 *J. Corp. L.* 869 (1999); Edward B. Rock & Michael L. Wachter, The Enforceability of Norms and the Employment Relationship, [144 U. Pa. L. Rev. 1913 \(1996\)](#); Cass R. Sunstein,

Selective Fatalism, [27 J. Legal Stud. 799 \(1998\)](#); Cass R. Sunstein, Social Norms and Social Roles, [96 Colum. L. Rev. 903 \(1996\)](#).

n63. For the importance of pressure from customers in developed countries, with specific reference to child-labor abuses by Wal-Mart's Bangladeshi suppliers, see Dickerson, Transnational Codes of Conduct Through Dialogue, supra note 61, at 614 n.16 (identifying abuses by suppliers of clothes bearing Kathie Lee Gifford's mark, and by suppliers to Nike, Sharper Image, and Kohls).

n64. See OECD Anti-Bribery Convention, supra note 23.

n65. See Globalization and Access to Drugs, supra note 34.

n66. See Swarns, supra note 32. In dropping their lawsuit, the thirty-nine drug makers that sued South Africa conceded that the government's use of generic drugs complied with international regulations. Id.

n67. See supra Part III (A) (discussing the psychological effects of perceiving a gain).

n68. See Sohn, supra note 1, at 61 (discussing third-generation human rights as collective).

n69. UNESCO's Karel Vasak suggested that the first and second generations of human rights supported "liberte" and "egalite," and that the third concerns "fraternite." Id. However, subject to concepts of norm-formation, merely using words obviously cannot guarantee specific results.

n70. See, e.g., John C. Turner, Social Influence 116-21 (1991) (explaining that the experimenter can condition responses by reinforcing them, even if the subjects merely respond to what they believe the experimenter wants). At this point, optimism would seek to implement norm-formation by calling on literature such as that listed above. See Agovino, supra note 58.

