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Corporate Social Responsibility or UN Corporate Governance?: Reflections on the United Nations Draft Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines

Panelists:

- **Mr. John Gardner**, Former General Counsel, USAID
- **Mr. James P. Kelly III**, Chairman, Social and Human Sciences Committee, U.S. National Commission for UNESCO

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MR. REUTER: Good afternoon and welcome. We are going to ahead and get started if we could. Thank you for being here, one at all. My name is Dean Reuter, and I am the Director of the Federal Society's practice groups, and I'm very happy to welcome you here today to our discussion of corporate social responsibility or UN corporate governance. I have pretty strong opinions on the matter, but I'll let the two gentlemen, our speakers, really get into the substance. They're each going to speak for about 20 minutes, and then they'll take questions and we can have discussion among the group here.

We're going to hear first from John Gardner. John is currently Senior Director of the White House Writers Group in Washington, DC. He

served as Deputy Assistant to President George W. Bush and Deputy Staff Secretary and as a special assistant to President George Bush from 1989 to 1992. Perhaps even more importantly for our purposes today, from 2001 until 2005 John served as general counsel to USAID, which I think has pretty much immersed in these issues. He has also served as the United States Representative to the Governance Committee of the Global Fund to Fight AIDS, Tuberculosis and Malaria -- we were talking about at our lunch table -- and he's a founding member of its ethics committees. He's also been in private practice in New York, at the law firm of Davis Polk and Wardwell. So, he has an extensive background. You must be older than you look, John.

Then we're going to hear from Jim Kelly. Jim serves as the Federalist Society's director of international affairs. In that capacity, he serves as the Federalist Society's representative on the US National Commission for United Nations Educational, Scientific and Cultural Organizations, better known as UNESCO. In 2005, Jim was appointed

as the Chairman of the US National Commission's Social and Human Sciences Committee. He's served on the US Delegation to the last two UNESCO general conferences. Jim, of course, has a lot to say on this issue as well.

So, please welcome John Gardner.

MR. GARDNER: Thanks very much for coming here today. Greetings to all of you, not only here, but those of you that are going to be watching on video.

Let me just start by saying, especially for those who are watching video, today is December 11 in Washington, which I say only because yesterday was Human Rights Day, and it's a day to remember people like Aung San Suu Kyi, the leader of the Burmese opposition; the Dalai Lama; the Christians who have been murdered in places like Eritrea and elsewhere; and all those who were denied basic human rights, in particular by the actions of oppressive governments. That's the very reason that the Universal Declaration of Human Rights was adopted.

So, I hope that as we have this discussion, it will be a civil discussion and that all can agree that all parties to this discussion are concerned about promoting basic human rights, including the right to health, which is sadly not enjoyed by so many people around the world today.

So there is agreement on the goal, better access to physical and mental health, but sharp diversions in terms of the best strategy as to how to get there. I approach this from the perspective that in international law, the right to health is a fundamental responsibility of states, not of private actors, and that systems that use market-based incentives and reward innovation will achieve greater access to medicines faster and more securely than systems which are based on excessive regulation, economic redistribution, and takings of property, including intellectual property.

Let's start by looking at international law. In the classic conception of international law, the subject concerns the rights and obligations of sovereigns rather than private

actors. As Hans Kelsen wrote, "International law is regarded as a set of objectively valid norms that regulate the mutual behavior of states." The crucial idea here is the acceptance by states of international law and of norms of international law by which they freely consent to be governed. That's the classic conception. More modern conceptions of international law challenge this assumption, particularly in the area of human rights law.

Some scholars, international officials, and activists, read these treaties broadly and push hard in the direction of seeking to make the ideals contained in the treaties into binding law. As Louise Arbour wrote in one of the most expansive statements of this view, "Socio-economic rights have the status of binding law, bringing them from the realm of charity to the realm of justice, and developing a body of ever-growing jurisprudence by which we can be guided into bringing these vital rights to the reality of people's lives."

While I think most people would agree that that's a very expansive statement on the reach of contemporary international law, I think we can accept from the treaties that there is something of a right to health in international law, even if there is disagreement on the contours of that right. We find the right to health in the preamble of the WHO Constitution and, for those states that have ratified it, Article 12 of the International Covenant on Economic, Social and Cultural Rights, which brings us more closely to today's topic.

Professional Paul Hunt of the University of Essex in England is what is known in the UN system as a special rapporteur. As the UN describes the office, "A special rapporteur is an independent expert appointed to monitor, examine and report on either a particular human rights issue or the human rights situation in a particular country or territory." The concept goes back to the 1980s, and there are now a total of 36 such offices, both regional and thematic.

Professor Hunt is the Special Rapporteur "on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health," his formal title. He is a Professor at the Department of Law and Human Rights Center at the University of Essex in the UK, and also at the University of Waikato in New Zealand. He was appointed in 2002 to the UN Commission on Human Rights. His mandate was renewed for three years in 2005 and then extended in 2006 by the new UN Human Rights Council, as were the mandates of all the other special rapporteurs. By my calculations, therefore, his mandate will expire in 2009.

He recently issued the document that you have in front of you, which is these draft pharmaceutical Guidelines, *Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines*. These were issued on September 19, and they're open for comment until December 31, at which time he has said that he will look at the comments and then try to finalize these Guidelines in 2008. In the short time we have available, I

can only walk through and touch on some major issues with the Guidelines -- sort of basic issue-spotting for those of you who went to law school and are doubtless now reliving many happy memories of the December exam season.

Let's begin with an acknowledgment. The Guidelines do say in the introductory note that, "States have primary responsibility for enhancing access to medicines," which is the classic statement of the law. And in fairness, Hunt does state his "recognition that the right to health is subject to resource constraints and progressive realisation, requiring the identification of indicators and benchmarks to measure progress (or the lack of it) over time." But that is only one part. The Guidelines say very little about the responsibility of states thereafter.

The introductory note also states that in 2000 the UN Committee on Economic, Social and Cultural Rights confirmed that the private business sector has responsibilities regarding the realization of the right to the highest attainable

standard of health. But the footnote to this statement shows that it comes from a general comment, here, General Comment 14, paragraph 42, for that year 2000. This view, therefore, in my view, confuses general comments with binding statements of international law, such as those in the treaties themselves. This argument effectively elevates committees of the UN to the status of states with the power to issue binding interpretation of treaties. Not all actors in the system have accepted the idea that general comments are binding, least of all on states themselves.

Next, the introduction continues to declare that the Guidelines will assist those who wish to monitor the human rights performance of the pharmaceutical sector in relation to access to medicines. I'll have more to say on this later.

The Guidelines began with several general statements, and as I go through this, especially for those of you on video, I will read the relevant portion of the Guideline and try to offer a little bit of commentary. I apologize for having to work

this way, but it's probably the easiest way to cover as many of the Guidelines as I can.

The first Guideline states that the company's corporate mission statement should expressly recognize the importance of human rights generally, and the right to the highest attainable standard of health in particular, in relation to the strategies, policies, programs, projects and activities of the company. In essence, Hunt asks companies to explicitly knowledge his, and the UN's, right to be placed within the company's mission. Further, in the next paragraph companies are asked to integrate these human rights into all aspects of the company's activities.

Next, in Guideline 3, the company is asked to join the UN Global Compact. But why is this? No provision is made in the Guidelines for other types of CSR organizations or other types of private activities that the company may and probably already has done on its own initiative. Instead, the company is being pushed into a UN structure even though the UN Global Compact is

described as a purely voluntary initiative by its very nature. To my understanding, Hunt's Guidelines represent the first time in the international system that joining the Compact is being made mandatory -- or strongly suggested, if you will -- rather than voluntary. Once it becomes mandatory, I think it's then legitimate to ask what the next step will be. Conditions on financing? Something else? No one knows.

Guideline 4 states in part that the company should always comply with the national law of the state where it operates, which sounds reasonable and generally is, but which also gets us right into the middle of some of the concerns with the Guidelines. What if, for instance, the host country enacts a law requiring confiscation of intellectual property or mandatory licensing without full compensation? In the world of the Guidelines, the duty of the company would then be simply to comply, to its severe financial detriment.

The next five Guidelines on management form an aggressive strategy on access to medicines policy, including "direct board-level responsibility and accountability for its access to medicines strategy in Guideline 7" and "specific objectives and timeframes" in Guideline 8. I defer to corporate lawyers for an analysis of the degree to which this board involvement may conflict with other clear duties of the board, such as maximizing value to shareholders.

Further, Guideline 10 once again opens the door for the involvement of those outside the company by requiring mechanisms that encourage and facilitate stakeholder -- not shareholder -- stakeholder engagement and participation in the formulation, implementation and management of its medicines strategy. At this point, company management is no longer solely responsible for the management of the company itself. Instead, it is invited to abdicate certain of its responsibilities to outside stakeholders.

Next, the Guidelines continue to address public policy, influence advocacy and lobbying. Guideline 12 proposes to require disclosure of "all current advocacy and lobbying positions and related activities that impact or may impact on access to medicines". This extraordinarily broad standard would go far beyond any duties both under US law and under the regulations governing UN bodies themselves, at least the UN bodies with which I am most familiar. Needless to say, no comparable duty or disclosure requirement is proposed for those who would monitor pharmaceutical companies.

This continues in Guideline 13 to require disclosure of all "financial and other support" not merely to political leaders but to academic institutions, patient groups, and others. One wonders how many universities have already adopted policies along this line for their own researchers as they try themselves to become more active in pharmaceutical research; not just here, but increasingly in the developing world. And in areas where there is likely to be "a significant impact"

on access to medicines, approval by the board of these influence or lobbying or advocacy activities is required. And one is left to imagine why. For instance, for US companies, could this simply open the door to a number of new types of lawsuits?

Next, the Guidelines discuss research and development for neglected disease, in the next four Guidelines. They call on companies to support this research either in-house or, for companies that are not focused on these particular diseases, through an external support. They do not, however, define neglected diseases, leading to the fear that they could be defined, by outside advocates at least, very broadly to include HIV, tuberculosis and malaria, and possibly even as broadly as the so-called WHO Type 1 diseases, which are diseases that affect both the developing and the developed world, as we've seen in the current work of the Intergovernmental Working Group following the Commission on Intellectual Property and Public Health, which is going on right now through the World Health Organization in Geneva. This fear of

a broad mandate and broad definition of neglected diseases is further reinforced by Guideline 18, referring to middle-income countries as well as low-income countries.

This leads quite naturally to the next section, which discusses patents and licensing. In many ways this is the key to the entire document. In effect, the Guidelines are designed to work together with the Intergovernmental Working Group, the Commission on Intellectual Property and Public Health, or CIPPH, processes, and other efforts to dramatically weaken intellectual property protections. For instance, Guideline 19 states that the company should respect the right of countries to use to the full the provisions in the TRIPS agreement, including with respect to compulsory licensing and parallel imports, which is a major shift for those of you who have not followed the trade law developments in this area, towards greater rights for developing countries and to have transactions that are on non-commercial terms.

Also, the company should make a public commitment not to lobby for more demanding protection of intellectual property interests than is required by TRIPS, such as additional limitations on compulsory licensing. I think this should be read for what it is. It's nothing more than a slap by Professor Hunt at the United States for seeking high standards for intellectual property protection in the free-trade agreements that it is negotiating around the world, including with some developing countries. In the absence of a global DOHA round, these FTAs provide some of the best opportunities for developing countries to achieve rapid economic growth. Yet here, companies are not allowed to point this out or support efforts to achieved FTAs. A company that lobbied, for instance, for the recent CAFTA DR Agreement in the United States would thus be, somehow, in violation of the Guidelines.

Similarly, Guideline 21 states that companies should support states and issue compulsory licenses for exports to developing

countries without manufacturing capacity. At this point, the company would simply be manufacturing drugs without any link to its true research and development costs, to say nothing of achieving a return on investment.

Guideline 22 calls on the company not to lobby for developing countries that have until 2016 to grant or enforce patents, to do so, in order words to grant these patents, before that time. This is truly radical, the suggestion that a company cannot encourage countries to understand how the adoption of a strong intellectual property rights, or IPR, regime is in their own interests, as, for instance, to assist in the development of that very same domestic manufacturing capacity which the Guidelines seek to promote.

Guideline 26 states that the company should not extend patent duration or file patents for new indication for existing medicines in low-income and middle-income countries. Essentially, this asks the company to give up all of its rights granted under international law to seek patent

protection in fully 159 of the world's countries, using the World Bank definitions. For clarity, this list, and because the Guidelines do not define it further, I think we have to take the broadest measure possible. It includes Argentina, Brazil, seven countries in the European Union, South Africa, which has a thriving pharmaceutical industry, India, China and Mexico.

Thus, under the Guidelines an American pharmaceutical company should not file a patent in Mexico, a country with which the United States has a free-trade agreement and is seeking closer economic integration, which seems absurd result. Similarly, a French, German or UK company should not seek patent protection even in other member states of the European Union -- a result that, to me at least, seems contrary to European law.

Other Guidelines concern pricing, discounting and donations, which I will unfortunately have to skip for reasons of time.

The two Guidelines on ethical promotion and marketing seem unobjectionable, but of course

companies in the industrial world are already governed in this regard by national law.

Three additional Guidelines concern clinical trials. Again, surely companies have an interest, for both moral and business reasons, to ensure that clinical trials should observe the highest ethical and human rights standards. But this matter, I think, should essentially be regulated at the national, not international level.

The Guidelines also address associations of pharmaceutical companies, bodies such as PHRMA in the US or IFPMA internationally. The Guidelines, including their provisions on lobbying and financial support, are supposed to apply to these associations as well, and they seek to impose a due diligence duty on companies to ensure that the associations themselves comply, otherwise the company should withdraw from that association.

Finally, the Guidelines propose a fully independent monitoring and accountability function. Again, this is a radical step. The idea is not, as for instance in the case of the Sarbanes-Oxley law,

to protect shareholders but rather to have an independent monitoring function on behalf of outside parties. One could understand and endorse such a mechanism if a particular company had problems with safety or marketing practices; this happens routinely. But the Guidelines propose this as a requirement for all companies, presupposing without warrant that all companies somehow need this. At this point it is not too much to say that the company no longer has control of its own affairs and has passed from private or public ownership into some form at least of partly social ownership. It is meant to involve outside stakeholders in the implementation and management of these various plans.

Guideline 47 proposes "an effective, transparent, accessible and independent monitoring and accountability mechanism that: (1) assesses the impact of the company's strategies, policies, programs, projects and activities on access to medicines, especially for disadvantaged individuals and communities; and (2) monitors and holds the

company to account in relation to the Guidelines. How this would be done is not clear, but companies would be under tremendous continuing outside pressure. For some, any efforts a company makes might never be enough.

The Guidelines, as I hope is by now clear, are nothing if not comprehensive. They represent an extraordinarily ambitious and expansive program. Fully implemented, they would represent nothing less than a massive transfer of wealth from shareholders of industrial nations' pharmaceutical companies to developing countries with no direct international warrant except Hunt's slim mandate of soft law. If the Guidelines were then ever turned into a general comment on the Covenant, that would be an even further step towards internationalization of socio-economic rights.

As I have you seen also, the Guidelines raise a number of questions for consideration. As this is a Federalist gathering, I'll try to keep the focus on some of the legal questions, but I'm

sure my remarks will veer into development policy as well. First, nowhere in the Guidelines does the principle appear that a company is expected to make some return on its investment. As former Prime Minister Tony Blair of the UK told the Davos gathering a few years ago, the first social responsibility of business is to make a profit. That concept is absent here.

Of course, not every drug will work. Many will fail in clinical trials, and the costs of drug development continue to rise. But surely, a private enterprise is entitled to take these into consideration, these costs in the consideration, and to make a return on its investment. That is the fundamental principle of capitalism. And all of this is coming at a time when, as a very recent *Wall Street Journal* article reported, the US pharmaceutical industry in particular is facing renewed pressures as many blockbuster drugs continue to come off patent with a particular bulge in that area starting in 2010. This has two effects. First, drugs that go off patent will

become cheaper and more accessible, including in the developing world. And second, as revenues decline, there are fewer resources available for R&D, which could become a vicious cycle and one which will itself impact access to medicines.

So from one perspective, this proposed form of soft regulation, if you will, is in fact harsher than the traditional model of regulation that has been used for either monopolies or for utilities. The old pre-breakup AT&T or the current power company in many states is regulated strictly but on the basis of its costs and a reasonable rate of return, unlike the approach given here. If the critics respond that this approach is assumed, I think we must in turn respond that if so, it should be stated clearly and directly.

I am also concerned about the potential for soft law to replace hard law. There has been some discussion in various fora in recent years about starting negotiations for an international treaty on pharmaceutical research and development. I would oppose such a treaty if it weakened

intellectual property rights. But at least it would be a treaty agreed by states rather than simply an informal document. At the same time as all of this is happening, of course, regulators and payers in the US are now looking increasingly to control costs. The growth in sales of all types of drugs is slated to grow next year at its slowest rate in decades, according to the IMF's healthcare consulting firm. Access to medicines is but one part, therefore, of a larger picture. In the context of the right to health, one must look at all factors that affect health: sanitation, pollution, health systems infrastructure, so many others.

The Guidelines do reference counterfeiting, but in 2006 the WHO reported that counterfeiting of drugs is a \$40 billion industry, one that cruelly steals lives, especially from the poor. And while, again, the Guidelines do reference the need for the highest clinical standards, appropriately, there should also be a greater focus on stringent regulation at

manufacture, particularly in some countries in the developing world, to assure bioequivalence, safety and the efficacy of drugs. I think part of the solution is for the stringent regulatory authorities in the developed world to redouble their efforts in this area to help their developing world counterparts.

Similarly, while there's nothing in the Guidelines that limit their applications on the face to companies in the developed world, I fear the practical impact would be to do just that. And what would be the impact on state-owned pharmaceutical companies? Would governments in those countries really consent to the kind of independent monitoring that the Guidelines propose? Next, what about companies focusing on production of generics rather than originator drugs? Would they have the same duties? No one knows.

A company that endorses the Guidelines, therefore, without a further explanation of their meaning and their interpretation and their status as law or voluntary regulation or some other type

of hybrid therefore has to seriously consider whether it would *de facto* place itself in a position where it and its boards is no longer truly in control of its own affairs, all because the company chose to research, develop and manufacture pharmaceuticals.

More specifically, the Guidelines in similar projects have revealed potential to hurt innovation and scientific research. They lower the incentives for companies to participate in R&D. In this case, who then will address the challenges of tomorrow, whether diseases like cancer or Alzheimer's, or even diseases such as leishminiasis or Chagas Disease that disproportionately affect the developing world? Because the Guidelines themselves focus so heavily on IP, I have to read them in conjunction with what is happening at the World Health Organization, the World Intellectual Property Organization, and other attempts to weaken intellectual property protection throughout the international system.

Several questions in conclusion. First, which industry is next? Does anyone really believe that the pharmaceutical industry is so unique that this experience would not be repeated? For those of you who doubt me, I would encourage you to read the recommendation on the World Intellectual Property Organization Development Agenda recently agreed at the assemblies of member states, especially Regulation 38, which is basically a mandate to take the Commission on Intellectual Property and Public Health process and apply it to other industries in which there is significant patent protection.

And two final comments. First, comments are open on the Guidelines until December 31. I would strongly encourage anyone interested in them, from whatever perspective, to get their comments in. Sometimes people have an understandable fear of raising their heads above the parapet, but from the perspective of those who want to preserve a high level of protection for intellectual property rights, I have to tell you, this, along with the

CIPPH process, could be a game changing event. If you do not act now, the parapet from which you will then fight could be considerably lower and your position less secure.

And my final question is this: Why have we heard so little about this until today?

Thank you for your attention.

(Applause.)

MR. KELLY: Thank you, John. I appreciate those insights about the Special Rapporteur on the right to the highest attainable standard of health, and what I'm going to be doing is looking at the issue of human rights governance from a broader perspective at the UN and UNESCO level. And in your chairs you will have found a binder. My remarks are behind Tab 1, and you can follow along if you like. And then I'll be referring to additional documents in the following tabs.

Is the work of the Special Rapporteur on the right to health an isolated event, or is it a precursor to a whole agenda of UN global human

rights governance that is here and present and very active? I think that is the case. I'm going to briefly examine the human security origins of the UN global governance agenda. I'm going to look at the role and the methods of UNESCO in pursuing this agenda, and then I'm going to look at the outcomes of UN global governance efforts.

The UN global governance agenda is a product of the UN's human security program, and in Tab 2 you'll see an article that I wrote for our *Engage* law journal at the Federalist Society, "In the Name of Human Security: UNESCO and the Pursuit of Global Governance".

Human security is a term I think you're going to be hearing a lot more of in years to come. In 2003, there was an independent commission on human security, and they delivered their report to then UN Secretary General Kofi Annan, "Human Security Now: Protecting and Empowering People". The human security report explained that human security encompasses all human rights; civil and political rights, which protect people, and

economic, social and cultural rights, which empower people.

The key economic and social rights that comprise the human security agenda are contained in the International Covenant on Economic, Social and Cultural Rights. To name a few, we've talked about the right to the highest attainable standard of physical and mental health, the right to the enjoyment of just and favorable conditions of work, the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions. There's also the right to education and the right to enjoy the benefits of scientific progress and its applications. I think that just the basic nature of these rights without any further clarification of their extent is cause for great concern. And these are the rights that are at the heart of the UN Human Rights Global Governance Agenda.

But can the UN actually globally govern economic and social rights? Twenty years ago, I

don't think that was the case. I'm going to present the case today that they are doing it, that they have been very deliberate about doing it, if not very transparent in doing that. But they had two problems that they had to face. One was a participatory gap. When you start talking about the UN globally governing economic social rights, you say, well, who would govern that? The member states? That's not democracy. How are you going to bring the other "stakeholders", the other partners? And I'm going to explore little bit about how to do that. To close that participatory gap, you're going to have to transform the UN and its agencies from intergovernmental organizations to a tripartite arrangement between civil society, business and the UN member states.

The second problem that they have in terms of globally governing human rights is the operational gap. How do you govern? So, you've got who do you govern and how you govern. And the "how do you govern" has been compensated for by a matrix of human rights global governance networks

that I'll explain further in my talk. But when we talk about, first of all, closing the participatory gap, who will govern? UNESCO has addressed this issue most recently in a civil society forum that took place in Paris at the General Conference. But they did so because in 2004, the United Nations published a report, "We the People: Civil Society, the United Nations and Global Governance". It was a report of a panel of eminent persons on United Nations Civil Society Relations.

The report proposed that the UN do the following. "Empower a range of global policy networks, engage other actors in the liberty of processes, convene global conferences to define norms and targets, form multi-stakeholder partnerships to put the norms and targets into practice, hold multi-stakeholder hearings to monitor compliance, review experience and revise strategies, and innovate with networked governance to identify possible policy breakthroughs on emerging global priorities." That was at the UN level in 2004.

In 2007, UNESCO picked up this ball to continue the effort for creating new forms of governance at the level of the UN. During their general conference, which is held every two years - - it's the equivalent of the UN General Assembly -- UNESCO member states come together to consider and adopt resolutions and programs of actions for the next two years.

This year, for the first time ever, on one of the Wednesday sessions they had an international forum of civil society, UNESCO Partners. And what they did was they devoted the whole day to bringing together the heads of transnational business organizations, civil society nongovernmental organizations, and then some representatives from member states. Alex Zemek, my friend from the US National Commission for UNESCO, was there, as I was, and also Susanna Connaughton who's the Director of the US National Commission. And all day long, people got up and spoke about the need for UNESCO to move more towards this shared partnership arrangement.

And then the session was due to close at six o'clock, and at five o'clock the person running the meeting said, well, you know, we've had such a demand today from participants to memorialize our work here today, we're going to share with you an outcome document that will acknowledge that we need to move more in this direction. And the three of us went into panic mode and we started calling in lawyers and drafting. Basically, they ramrodded a document to the participants, and you'll see that that outcome document of the Civil Society UNESCO Forum calls for UNESCO to continue to act as an interface between the various spheres of civil society and to create necessary forums for dialogue with a view to promoting multi-stakeholder partnerships at the international, national and regional levels through its field offices and in liaison with the national commissions for UNESCO.

So that document was, "adopted" by civil society and transnational businesses and some member states that happened to be in the room, but it really wasn't an official UNESCO document. But

this is sort of the way the agency is working these days in that you have member states meeting every two years to adopt resolutions, and then UNESCO goes away and holds these multi-stakeholder partnership fora in parts around world to discuss different human rights and the aspects of how to implement their human rights agenda.

So, that moves us to the operational gap. How is UNESCO implementing a UN matrix of human rights global governance networks? There is a division within UNESCO, a sector called Social and Human Sciences, and that's the sector with which I've been concerned and our Commission has been concerned through its committee in that area. And that group there, the Social and Human Science Sector, is responsible for the creation of human rights global governance networks. And again, I was talking with John Fonte earlier. This is, you know, 20 years ago. It might have been black helicopters, pie in the sky, but now this has actually happened.

And because I've been able to participate in some of these UNESCO forums on human rights, I've been able to watch this unfold over the past three years and have put together what I see as 10 networks that exist for the further explanation, implementation and enforcement of the human rights agenda at the UN level.

First are the advocacy networks. These consist of national, regional and international nongovernmental organizations and civil society organizations. For example, Amnesty International has formal consultative relations with UNESCO that are "aimed at sustained cooperation with UNESCO in its fields of competence, both upstream and downstream from the organization's programming and priorities." Pierre Sané, who's the Assistant Director General of the Social and Human Sciences Sector, is the former Secretary General of Amnesty International.

The second type of human rights global governance networks are research networks. So, once the advocates have said we want a right to health

in relation to access to medicines, they go to the research networks. This consists of regional social science and policy think-tanks. An example of this is UNESCO has a program called the Management of Social Transformations Program, and their goal is to build a database, a knowledge database, of social science research that will support the human rights policies that they want to see implemented around the world.

They held, in 2006, an International Forum on a Social Science Policy Nexus. They were in Buenos Aires and brought together social science and academics together with policymakers and lawmakers and said wouldn't it be great if we all cooperated in terms of research on human rights and translated them into policies that can then be implemented at the national level. You will see that they adopted, Tab 4, what's known as the Buenos Aires Declaration, calling for a new approach to the social science policy nexus.

After research networks, you have policy networks where you actually take the research and

develop policies with the influential lawmakers from different natures and different regions. And UNESCO, again, has a formal program called UNESCO Forums of Ministers for Social Development, and they meet with the social development heads of countries from around the world on a regional level, and they talk about evolving human rights policies. And then they encourage the social ministers to think about these and to express their delight over them or to tweak whatever social science research and policies have been developed.

Then with that information and that buy-in from ministers for social development, UNESCO then holds its standard setting. And the standard-setting networks consist of intergovernmental international organizations. So, you've gone through the research stage; you've gone through policy development. Now you're ready to articulate the standards. So what happened was, in 2005 UNESCO adopted the Universal Declaration on Bioethics in Human Rights. And you'd think this would be a bioethics document, but really it's more

of a social responsibility, sharing of benefits document.

Article 14 declares that progress in science and technology should advance access to quality health care and essential medicines. If you'll turn to Tab 5, you'll see the actual Universal Declaration. In addition to Article 14 on social responsibility, there is an Article 15 on the sharing of benefits, you know, just talking about, benefits from scientific research should be shared with society as a whole. And it gets into the discussions that we're having today over Paul Hunt's Guidelines regarding access to medicines and the obligations of pharmaceutical companies in that regard.

So once the norms have been adopted by the adoption of what they insist is a nonbinding declaration, and that's the big -- that they insist when they're debating. Since it's nonbinding, there's no need for concern. The United States spent most of its time at this negotiation at which I was present getting "shall" removed from this

declaration. It was a nonbinding document, and every sentence began, "You shall do this. . . You shall do that". And we were just happy coming out of the room with getting a bunch of "shoulds". But the heart of the document is that it was trying to set up norms.

So what happens is after this, they engage their interpretive networks. That's where you have a treaty monitoring body, special rapporteurs and international organization working groups. They then put flesh on the bones of what it means to be socially responsible under this particular declaration, or what does it mean to share benefits, or what does it mean to provide better access to medicines. For example -- and John, you referred to this -- in 2000, the UN Committee on Economic Social and Cultural Rights produced their general comment on the right to the highest attainable standard of health. That's sort of the benchmark.

In 2007, UNESCO, after the Declaration had been adopted, came back and appointed an

international bioethics committee working group on social responsibility and health. They produced a preliminary draft report which states, "The industrial and commercial rationale of the pharmaceutical industry no doubt conflicts with the terms of the Universal Declaration on Bioethics and Human Rights since the excessively high price of medicines put them virtually beyond the reach of the world's poorest communities." So now, they've taken the nonbinding declaration, they've produced a working group that then produces a report that says pharmaceutical companies are now in conflict with this nonbinding declaration that we've propagated. So, on it goes.

And then in 2007, again through this interpretive network, how are they interpreting what they just passed as standards and norms, Paul Hunt published his draft *Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines*.

Moving onto the process to the sixth, the explanatory networks. This is consisting of

international organizational regional office field staff. So the interpretive network, they get together and say, okay, here's what this human right means. Now let's take it and explain it around the world to people so that we have broad-based support for it and we can take some action. UNESCO has the UNESCO ABC Project, Assisting Bioethics Committees, that supports the establishment and operations of bioethics committees in member states. So basically, they take the news of the Declaration, they take the Working Committee's draft on what social responsibility or the sharing of benefits means, and they, through their field offices, go to help people establish in their nations bioethics committees, not to do bioethics *per se* but to pursue this social responsibility and sharing of benefits agenda.

After they explain it in these countries and these bioethics committees are created, they then get onto implementation networks which consist of the national legislatures. So what you have is

UNESCO creating a global ethics observatory, and it establishes a collection of legislative activities such as laws, regulations and guidelines that are implementing the Universal Declaration on Human Rights in order to provide examples to member states. So, UNESCO through its field offices, after setting up national bioethics committees, then says, okay, now we've got the model laws relating to social responsibility and the sharing benefits that we'd like for you to enact in your nation, and one of our field staff will be there to lobby, basically, your national legislature on how to pass laws in these different human rights areas.

So, after the national government or whatever body passes a law governing social responsibility, or in this case access to medicines, how do you enforce those laws? Well, UNESCO is able to rely on enforcement networks consisting of national and regional courts. The European Court of Human Rights obviously is dedicated to the issue of human rights.

The United States Supreme Court -- I think this goes to the danger that John warned us about -- the soft norms being used in a judicial process to enforce rights that aren't clearly binding on member states or nations in any international law. I refer to Justice Kennedy's quote from *Simmons v. Roper* in 2005, where our US Supreme Court held it's unconstitutional to impose capital punishment on crimes committed while in the age of 18. "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." That shows you, I guess, the extent to which soft norms can be relied upon to get the result that the Court might want to in terms of the human rights agenda.

Finally, you have funding networks. And this consists of transnational corporations, private foundations and governments. John referred to the United Nations Global Compact. It asks his corporate members to embrace the -- at Tab 6, there's 10 principles. They ask their members to

embrace, support and enact within their sphere of influence a set of core values in the area of human rights, labor standards, the environment and anti-corruption. Another example of the funding networks is the United States government, which pays 22 percent of UNESCO's annual assessed budget.

It's important to note that, really, in the three or four years since we've gotten back into UNESCO, the Social and Human Sciences Sector has been most aggressive in pursuing its human rights global governance network system, as I've described it here today.

So, in conclusion, what are the goals of the UN human rights global governance efforts? First, they want to transform the UN and UNESCO from intergovernmental organizations controlled by member states into multi-stakeholder partnership organizations in which member states, civil society and transnational businesses share power under the management of UN and UNESCO officials.

Second, they do want to continue to create and manage a system of human rights global

governance networks to promote and protect existing and emerging human rights.

Thirdly, they want to create any human rights catechism through the adoption of normative human rights instruments in the areas of economic and social affairs. You'll see an article at Tab 7 that I wrote, "*Democratic evolution and the Church of the United Nations*".

And then finally, they wish to enhance the justiciability of human rights, the ability to bring legal challenges against nations, against companies, for human rights violations by creating the soft norms contained in nonbinding declarations, treaty body general comments and UN Special Rapporteur Guidelines like Professor Hunt's Guidelines that we've been discussing today.

Thank you for your time and thank you for your attendance. We'd also be happy to take, of course, any questions that you have of John or of me. Or, I know so many of us are involved in this issue of the UN global governance, if any of you wish to just raise things not directly opposed to

us, but for our own edification, we'd appreciate that.

MR. REUTER: Jim, before we begin, did you want to make any other comments on my paper or anything like that?

MR. GARDNER: I have no --

MR. REUTER: Okay. All right.

MR. KELLY: I love your paper.

MR. REUTER: Well, thank you. I appreciate that.

MR. GARDNER: Let me just make two comments sort of as a supplement. One is a supplement to what Jim said, and one is a supplement to what I said. Should I get up for the video? Okay, I can stay here, okay.

The first is about civil society. Let me be very, very clear about this. International development will not take place without the active and strong involvement of civil society. This is not Beat Up on Civil Society Day. The question here -- and in fact, when I was at the USAID, as they said in the introduction, I was very involved

in the Global Fund for AIDS, TB and Malaria, and we worked very closely with Civil Society.

In fact, that organization was designed to raise the profile of civil society in part because they felt that working with patient groups and with other kinds of groups in civil society was an effective way to try to take some of the impetus solely from being on governments in terms of how money was spent. Sometimes, you know, countries had not developed a national AIDS strategy or were misusing the money, or there were problem with corruption and things like that.

So building these country coordination mechanisms with Civil Society was one way that a lot of people felt -- I absolutely strongly agreed with this -- to try to ensure that money would be well spent and that international development would take place by the most rapid means possible and that the money that so many donors were giving would be used to greatest effect to help the largest number of people. So, Civil Society *qua* Civil Society is not the issue.

What I was trying to talk about, and I hope this came out, is that it's when one moves to the question of adopting binding norms in international law that the classic conception is that the position of states, and to a lesser degree of international organizations, has to be preserved. To me, the problems come not when civil society is involved in development. I mean frankly, they should be, and I would take a very broad definition of civil society here, everything from business to NGOs to groups like the Federalist Society to academics, all sorts of types of actors.

The problem comes not when they are involved in development. The problem comes when there is some sort of mechanism giving privileged positions to certain non-state actors that then can be used as leverage against other non-state actors and, the particular danger, against certain states that may not have accepted what could be considered a norm of international law. That has the potential to throw some very serious challenges towards the international system. So, I hope that

that clarifies things a little bit in terms of the place of civil society, at least as to how I look at it both from an international law perspective and, frankly, from a development perspective.

Second, Jim's comment in detail about the Global Compact reminded me of something that I should have elucidated in my remarks. Principle 7 of the Global Compact is about the environment, and states' businesses should support a precautionary approach to environmental challenges. You know, that language is written very broadly. I would hope that an American company that wanted to sign the Global Compact could simply say, well, we plan, we try to have a strategy about minimization of pollution or other types of environmental responsibility, and that's one definition.

I think that there could be another and slightly more dangerous definition, which is if the were "precautionary" were an attempt to substitute the principle in European law of the so-called precautionary principle as opposed to other types of systems such as the US environmental law, which

has a very different approach to environmental protection. So, I think that that is one thing that if the second definition in particular is what's meant here, would give great pause to an American company involved in certain manufacturing activities before deciding to sign the global compact.

Thanks for your time.

MR. KELLY: Any questions at this stage? If you would please.

AUDIENCE PARTICIPANT: John Fonte, Hudson Institute. Just on civil society, let me ask you a very broad, philosophical question. Is there such a thing as global civil society, or is civil society connected to a particular nation-state, national civil society? You mentioned the Federalist Society. Well, that would be a private association but within a nation-state. But we know the UN is talking about global civil society. In this case, actors in global civil society could impact nation-states of which they are not, of

course, members. So if you could go into that little bit. Thank you.

MR. GARDNER: Well, again, with the provision that I said, that the distinction here is about the development of binding norms of international law -- I don't know if Jim is going to agree with this -- but I'm perfectly comfortable saying that there is such a thing as global civil society. Again, I think in the human rights example -- I mean, Jim mentioned amnesty -- whether they should have a privileged position with UNESCO is one question. Whether they should have a right to put pressure on the government of Myanmar or some other countries in the world is something very different.

I think that there are obviously a number of organizations that have set themselves up as international federations that in that capacity do have, if you will, the character of a global civil society. I'd be a little, I'd be reluctant to go beyond that in terms of a definition because I think of some of the dangers that your question is

getting at in terms of, well, all right, why should certain groups have more privileged positions than others? And second, what does it mean to say that something is global versus something is national?

I mean in the legal field, obviously there is an international Bar Association, there are international federations of lawyers and doctors and pharmaceutical companies and anything else one wishes. And for them to have a role in at least monitoring what's happening at the international level, I think is perfectly legitimate. The question is what happens beyond that?

MR. KELLY: Well, I'm not sure that question hasn't already answered. Based on what I've seen at UNESCO, civil society is playing a role in helping set the agenda for what UNESCO might be pursuing in terms of its human rights. I think there is a global civil society. The way I understand it is that level of civil society not necessarily concerning itself with -- or maybe they are concerning themselves with the national issues.

What they also have is their agenda; a partnership arrangement with international organizations to such an extent that they have a place at the table to set the agenda of what human rights are pursued, to work with international organizations to bring pressure on their member states to conform to that agenda. And I think we're past the stage of questioning whether such a global civil society exists.

You know, I've been seeing it work first hand. Austin Ruse is in the room. He's seen it work firsthand for many years, more than me. But I do understand the distinction John makes. I think it's an important one. There's a lot of good civil society organizations doing work at the national level and at the international humanitarian relief effort, but I think we're seeing it much more aggressively in terms of actual governance at the international organizational level.

John.

MR. GARDNER: Did you call up? Yes.

AUDIENCE PARTICIPANT: Just a follow-up on that. Yeah, of course I agree with you that there is such a thing, but I see a danger here. Let's look at particularly the case that John mentioned, which is Amnesty International. They may be monitoring Burma, but I would guess they're mainly interested in monitoring the United States. And rather than being an international organization, I guess I would see them more as a transnational organization which is attempting to use transnational institutions to influence a national democracy by the United States.

These would be American lawyers even in international -- Amnesty International USA not getting what they wanted from the U.S. Constitution, and then seeking not an international forum, but something transnational, not between, in other words, not among nations but something that penetrates the nation's state. I think you might agree with how I'm characterizing this. So that's the danger that I was thinking of here is where an organization is not really international but

transnational and then seeks to operate beyond the Constitution of the United States. This would very much include American lawyers.

MR. REUTER: Thanks, John. Ted.

AUDIENCE PARTICIPANT: Thanks. Ted Frank, AEI. Just a practical question with respect to the human rights guidelines from Paul Hunt, am I right that this is just a single reporter? And if so, what obligation does he have to respond to comments, to address comments, to incorporate comments into his final report. And if there is no such obligation, where is a real firebreak in this process if we want these issues of free markets to be heard?

MR. GARDNER: Well, two comments in reaction to that. I mean, one of the smartest things I did in law school was take a couple of courses on European law, and it's from that that I first learned about the concept of the rapporteur. I mean, the European Parliament uses rapporteurs. I mean, imagine a -- let me analogize it to the U.S. Congress a little bit. The Democrats are in

control of the House and the Senate; a bill passes a committee; the chair of that subcommittee or committee will generally ask one of the leaders of the majority party to write a report on that bill before it goes for consideration. It's a little different in Europe.

In the European Parliament, the rapporteur is -- I believe this is still the case -- expected to take the views of all parties and all discussions into account in preparing the final report. People can disagree as to whether that's a more democratic or a less democratic system.

If the specific question you're asking is what obligation does a special rapporteur have to faithfully reflect comments, you know, I mean strictly speaking, there is no international administrative law. It's not the same as the Department of Labor or the Department of Transportation having a duty, I mean, once it puts something in the *Federal Register* to consider the comments it receives a response to that notice. The special rapporteur reports to the person, in

this case the Secretary General or to the body that appointed him or her, so there's strictly no obligation.

That having been said, one hopes that comments will be considered, and I would just repeat what I said at the end of my own remarks, that the way to ensure that comments get considered is for comments to be made, and the increasing number of comments that are made, the increasing likelihood that those comments need to be reflected in a final report of any special rapporteur. I mean the primary use of this function in the international system is really for countries, that there would be a special rapporteur on human rights in a particular area. The Palestinian territory is an example, Burma is another, where that person then goes and collects evidence and reports back.

As I say, there is strictly no international administrative law yet, and I guess I think that's a good thing. Thanks.

AUDIENCE PARTICIPANT: Hi. Austin Ruse from C-FAM. We work on social policy at the UN.

One of the problems that we run into is the human rights monitoring committees that take documents that have been carefully vitiated by governments and sometimes reinterpret them completely the opposite way from which governments intended them. And then governments must appear before these committees, which are mostly NGOs, and then they get reports which are then used by national courts to force governments to change their laws.

So my question is, I guess, kind of a technical one. At what point may a government file a reservation? And let me ask you what I'm thinking about. The CEDAW Committee, for instance, has interpreted -- there's a General Recommendation 24 which has reinterpreted the document to say that the document which is silent on reproductive health includes reproductive health, and that reproductive health includes abortion for instance. Now, this was not agreed to by governments but by this monitoring committee, which is mostly NGOs.

May a government at this point issue a reservation on that point and say we do not recognize this general recommendation?

MR. GARDNER: I'm going to defer to Jim on the question. I mean, I'm really more to talk about the Guidelines themselves. I have read the CEDAW in the past. I'm not fluent with it --

AUDIENCE PARTICIPANT: I'm not specifically referring to CEDAW. I'm just asking when may a government issue a reservation?

MR. GARDNER: Again, I'm going to defer to Jim on the substantive --

MR. KELLY: Is it on? I'll defer to Terry in a second, but is your question specific to intervening with respect to these draft guidelines or with respect to a treaty itself?

AUDIENCE PARTICIPANT: To a treaty.

MR. KELLY: Okay. Terry? Terry Miller.

MR. MILLER: Thank you. Well, I'm not an international lawyer, but I can certainly tell you, Austin, that in the case of CEDAW, the United States at least would not be in a position to file

any kind of document because the United States is not a party to CEDAW. And indeed, the United States is not a party to many of these bodies that we're talking about.

And one of the things that has puzzled me for a long time is the fact that the United States, through some sort of impulse which I would have to describe as something like feel-good utopianism or something, nonetheless was in on the creation at the beginning of many of these declarations. The declaration on bioethics, for example, that Jim talked about, the US acquiesced in that. The Covenant on International Economic Social and Cultural Rights, the US acquiesced in that at the beginning. The US acquiesced in CEDAW at the beginning, and the Kyoto Protocol, and on and on and on and on. And then the US subsequently seems to want to try to draw a line and stop these at some later point in their development. So, I guess my question would be to ask you gentlemen comment on that.

And then my second point I like to make is that it seems to me that we also have to bear in mind very much the lack of democratic accountability in any of this as it moves forward. In the United Nations as a whole, people often confuse one country/one vote with the democratic system. Well, it's something, but it's not democracy because most of the member states of the UN or UNESCO are not themselves democratic, and so there's no carryover of democratic legitimacy into those decisions of those bodies. And then when you have non-governmental organizations which represent some form of elite public opinion rather than democratically legitimate public opinion, again, you lose Democratic legitimacy. So that seems to be the most important missing element here.

MR. KELLY: I just like to say, you know, Terry raises an important question, and that is, we are now the stage, through these networks, of this whole governance agenda where the United States, both private corporate citizens and the State Department, has to do a lot of soul-searching

about, is this the way that things are going to be moving forward?

You have a nonbinding Declaration on Bioethics and Human Rights, and UNESCO adopts it, and now you basically have the UNESCO bureaucracy and NGOs deciding what it means to be a socially responsible company and what does it mean to share the benefits of scientific research and progress. And what happens to the member state at that stage? Can you throw up the yellow flag and call foul? Can you pitch a fuss? Can you write a letter? I just don't know that it's going to do any good. And so, Terry raises the important question, how do you stop the process of universal declaration of bioethics and human rights from even being adopted at UNESCO? You only have one vote. Are you in? Are you out? Are you complaining? Are you not complaining?

We're at the stage now where this is real. These declarations, these treaties are now being implemented, defined, enforced by civil society, by the Global Compact -- they're kind of

complicit in it -- and then by the international organizations that are supposed to be representing the member states. So I think we're sort of a new tipping point in terms of international governance, and we got to reassess what we can do to, you know, stop these things when they come along.

MR. GARDNER: Yeah, let me just follow up on that and answer another part of your question. At the risk of sounding like either Hugo Grotius or Henry Cabot Lodge, we never ratified the Versailles Treaty, even though President Wilson signed it. I would certainly take the position as an American lawyer that the signature on a treaty is not dispositive of US ratification. President Clinton chose to sign the Kyoto protocol despite an advisory adverse vote in the Senate, and it is not part of US law because it was never ratified by the domestic process for ratification of the treaty, which is, of course, the advice and consent of the Senate.

So from one perspective, I don't know what led to decisions to participate in some of

these treaty negotiations. Maybe there was a view that something might be considered more acceptable, that could be presented to the Senate, or various administrations making decisions or things like that. But again, I would -- speaking as I do from the perspective of the classic conception of international law, I would say that a country is not, and particularly the United States is not, bound by these treaties until such time as the Senate has chosen to ratify them, with or without various reservations.

That having been said, you know, in **, and there's another doctrine of classic international law which is that countries may *de facto* find themselves subject to treaties or other norms of customary international law in one of two ways, either because something has simply become such a norm that it is considered customary international law or through state practice. Some of you who follow arms control, for instance, will recall the debate in the 1980s about whether the US, even though it had never ratified the SALT II

Treaty with the Soviet Union, was nevertheless quasi bound by it because it announced its adherence -- it announced that it would not go beyond its principles. Well, that's an interesting question, and I think it is a question that people may legitimately ask within the framework of classic international law.

Why this is relevant in this context is that there is a term in United Nations parlance, in international development parlance, known as international humanitarian law. That term incorporates a number of conventions, notably the CEDAW, which was discussed earlier, and the Convention on the Rights of the Child, which the United States Senate has never ratified. Could one get into a situation where US acceptance of international humanitarian law means that we have *de facto* ratified these treaties? Again, I don't know. I don't think we're there yet. I hope we're not there yet. But it's an interesting question.

And then the next question would be, well, would a court then find that as a principle

of international law if we hadn't in fact ratified these treaties, which seems to me to be a much harder question. But again, not that I want to advertise myself as Hugo Grotius, but I mean at least from what I know of international law, public international law, that's how I would analyze the questions that you have posed.

AUDIENCE PARTICIPANT: Hi, my name is Evelyn Boyd Simmons, and I'm with Pfizer. And I'm really grateful for this session. It's very educational. One of the things I think I learned today was this notion that UN and UNESCO are interested in moving from an intergovernmental kind of framework to a tripartite, I think you called it, which would include the private sector. And I'm just wondering, how you have seen this played out? Because, and I think I speak for my friend from Merck and maybe others in the room that I don't recognize by face, we have not seen the benefits of the seat at the table that the UN and UNESCO purport to award us. On the other hand, we do seem to be a favorite subject, instead of

entities to be acted upon them to be drawn in. So, I'd be very interested in that.

The second thing I'm wondering is, you know, based on the discussion of the role of the state and the role of the United States in particular, what happened to multilateral diplomacy? I mean, the United States, I feel, has never been quite as good at it as the Europeans. But it seems that today more than ever that's a need. Maybe we're not in the best position at the moment to exercise leverage based on other things that are going on. But how do you see just shoe leather being applied to these kinds of issues? I mean is there sort of a consensus view about what should be done with respect to international organizations and the perception that they've overstepped the boundaries?

MR. REUTER: Which one of you wants to go first?

MR. KELLY: I'll take the first part of who decides who will have a place at the table from civil society as UNESCO and other UN agencies move

forward with this tripartite arrangement that I referred to. Quite frankly, I think it'll be the same process for recognizing what non-governmental organizations get accredited by these international organizations. And Austin's had experience in this. I think anybody from a policy think-tank in DC who has aspired to be formally recognized at some level with an international organization understands that you go through a process of submitting an application, and then your application is reviewed by a committee of people who usually are all aligned with one philosophical viewpoint about the way the world operates. And for some organizations, they will always be on the outside looking in.

As far as civil society goes, I guess it's a question of, if you were discussing the right to water, then you probably were Evian, you probably wouldn't have a seat at the table. If you were talking about the right to housing and you were the world's largest housing manufacturer, you might not have a place at the table. So I don't

know whether they're just going to wind up with nobody left in civil society that they haven't been able to aggressively pursue as far as their human rights agenda.

But for now, I know, and Alice can attest to this, at the civil Society meeting in Paris for the General Conference L'Oreal had a very large presence. You know, I don't see anything in the L'Oreal portfolio -- I don't know L'Oreal; I shouldn't speak out of school -- but I don't know what human right they could possibly be violating that they got a place at the table other than that they're a large French company and perhaps know the people and the bureaucracy there.

So I don't think there's any science to that process. I just think that -- and I don't understand this whole global compact thing right now in the sense that it seems like these transnational businesses that are members or aspire to be members of the Global Compact in some instances are signing, not a death warrant, but certainly just putting the target on their back.

Maybe they think they'll be able to co-opt the process, and if we're members of the Global Compact, you won't come after us if we've agreed to your 10 principles. But at the end of the day, if you're in violation of Paul Hunt's guidelines, whether you're a member of the Global Compact or not, I think the barrier to entry just becomes too great and you either decide I'm not going to be a member or I'm just going to be a bad member. But they haven't come out with processes yet for who's going to be the favored civil society organizations.

As far as the leather and hitting the ground, if you want to tackle that one --

MR. GARDNER: Okay. Well, let me just start. I mean with respect to the Global Compact, despite the comment I made earlier about the uncertain definition of seven, let's remember the Global Compact is a voluntary organization. I think it's great to have Western businesses, businesses in industrial Asia and India and South America and Africa and other countries, other

regions, Russia, signing up for something which says they're going to fight corruption. I think it's great. And frankly, I think the UN definition on corruption is a pretty good one.

AUDIENCE PARTICIPANT: (Off mic.) That's not the issue. What's the place of the private sector in the process because I'm not really seeing any?

MR. GARDNER: Well, right. And that's the thing. I mean, in terms of UNESCO, I think Jim did a pretty good job of that. I mean, I can tell you about an organization that I was involved with, which is, of course, the Global Fund, where private sector had a board seat, one; the NGOs had four. The country coordination mechanisms were explicitly designed to provide a place for the private sector in each of their countries that was not universally adhered to. In fact, one of the things the US did was to force an audit of the country coordination mechanisms to find out, are these things still government dominated or do they actually have patient groups? Do they have NGOs? Do they have

the private sector? Do they have faith-based organizations? These types of things.

I mean, if you ask my preference, I would prefer to say that civil society is a sort of Tocquevillian definition which includes the private sector as opposed to this, well, we're civil society and you're not because you're trying to make money, which -- fine. That having been said, if Jim's somewhat sobering analysis is correct, then maybe we do need to move in a direction more like what the Global Fund was trying to do, of saying there are these distinct interests that should be represented somehow, but that's -- again, that's another, I don't want to say radical, but it's another very different departure in terms of governance.

To answer your question about the Europeans, I mean I've had the privilege to attend a number of international organization meetings, and it is not easy when they start with 31 votes and we start with one. How do I get the 31? You have 27 members of the European Union. Croatia,

Bosnia, Serbia and Macedonia have all signed association agreements with the EU, so they are effectively bound by the common security and foreign policy. If you go to the WHO meeting and they act when whoever is a representative at the presidency delivers the vote, as you know, I'm representing the Republic of Turkey, etc. Okay, fine. So, they do that. They do a better job of that internally, and they have their own internal discussions. I suppose a country has a right to vote against the European consensus. I've seen it happen a couple of times, but it's unusual.

One of the things that struck me at WIPO meeting that I just attended was the regionalization more generally, be it the European group, be it the Asian group, ASEAN in particular, and -- you know, ASEAN, it was the first time I'd seen in the international context. I'm sure it's happened before. It's the first time I've ever seen the presidency of ASEAN take a role the way the presidency of the European Union does.

Somewhat ironically, I mean I hope I'm speaking too far out of school here, but, this year the presidency was Singapore. Singapore is a wonderful, free market, effectively first-world, industrial country. And the presidency, on behalf of the Southeast Asian region, made some comments and took some votes that were, frankly, surprising for those of us that have a high degree of regard for protection of intellectual property rights. And I can only explain that by saying that within the consensus of the 10 member states of ASEAN, that they lost and that they felt an obligation to the regional group rather than simply to their own national interests. We will see more of that in the future, and I don't have an answer for that.

I think you're right that we do need to have more shoe leather. We do need to have a lot more demarches going out a lot earlier from the State Department to the embassies in various capitals, to influence not only the vote itself at the meeting but really the process that leads up to these meetings because regionalization itself means

that the effective decision is taken far before
anyone ever sets foot in Geneva.

So, I hope that answers your question.

MR. REUTER: Well, thank you all again,
one and all, for being here. And thank you, John
Gartner, and thank you, Jim Kelly, for your very
thoughtful comments.

We look forward to seeing you again in
the future.

(Applause.)

(Panel concluded.)