

TITLE

Fighting Corruption: A Principled Approach
The C² Principles (Combating Corruption)

CITE

"Fighting Corruption: A Principled Approach: The C2 Principles (Combating Corruption.), *Cornell International Law Journal*, 33(3): 595-628, with David Hess, Spring 2000.

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[Corruption] deepens poverty; it debases human rights; it degrades the environment; it derails development, including private sector development; it can drive conflict in and between nations; and it destroys confidence in democracy and the legitimacy of governments. It debases human dignity and is universally condemned by the world's major faiths.

-The *Durban Commitment to Effective Action Against Corruption*, signed by 1,600 delegates from 135 countries at the October 1999 Anti-Corruption Conference sponsored by Transparency International.

Corruption is widely condemned, yet widely practiced. Firms establish procedures to make sure their employees are not bribed by others, while simultaneously using bribes to obtain business. Firms from countries where domestic corruption is minimal play a major role as bribe-payers into corrupt environments.¹ Many explanations may be offered for these seemingly inconsistent actions by private firms. Their participation in some forms of corruption may be explained by a variety of factors including competitive necessity, respect for local cultural norms, extortion, and an inability or unwillingness to control rogue employees. At the same time, public opinion appears to be turning strongly against corrupt practices and demanding that something be done about bribery. A confluence of factors have produced a changing environment in which corruption is now viewed as seriously problematic. If these trends continue, managers will do their shareholders a disservice if they fail to take aggressive steps to ensure that their firms are not perceived as contributing to corruption. Yet firms face the pragmatic problem that they may find themselves at a serious disadvantage if they refuse to pay bribes while others continue to do so.

In this article we describe in detail one viable strategy for firms: a commitment to Sullivan-like anti-bribery principles. We present a specific set of principles, called the C² Principles², for voluntary adoption by firms. These principles require firms to implement

¹Interestingly, there are a few countries for which the opposite is true. In some cases, firms from more corrupt home environments are perceived as relatively less likely to pay bribes in foreign transactions. *See infra* Part I.B (discussing the empirical evidence on which countries' firms are paying bribes).

²We use the term "C²" principles to emphasize that they are focused on and limited to combating corruption. We expect that they will be endorsed and supported by one or more academic centers and/or business organizations. When that occurs they may be identified with the endorsing organization(s).

procedures to prevent the payment of bribes and to publicly disclose their progress and efforts towards these ends.

Part I of this article documents the costs of corruption on society and reviews empirical evidence on the importing and exporting of corruption in international business. Part II discusses the emerging world view that corruption is a problem that must be eradicated and its implications for corporate management. Part III considers possible explanations and justifications by business persons for paying bribes. Part IV discusses a Sullivan-type principles approach and presents the C² Principles for adoption by firms.

I. The Paradox of Corruption.

Our analysis is limited to coarse bribery of public officials by representatives of private sector firms. We use the term “coarse” to distinguish clearly harmful bribery from common practices involving social gifts and entertainment and cases where payments may constitute an authentic and accepted method of compensation. Although such provincial bribery may indeed be damaging, particularly when considered as a slippery slope leading to coarse bribery, it is not our primary concern here. We define coarse bribery as the promise or payment of a benefit which induces a public official to breach a duty pertaining to a significant community interest. Thus, our definition is somewhat more narrow than the definition used by the World Bank: “the use of public power for private benefit.”³ In most cases, coarse bribery involves the payment of substantial sums of money or its equivalent in goods. But in some cases, it may involve a relatively small sum of money, as for example, in the case of an official in a developing country taking a relatively small sum of money to allow violations of important environmental or construction code regulations. We will generally refer to coarse bribery as “corruption”. Tanzi indicates that corruption is particularly likely in regard to investment projects, procurement

³Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, 45 IMF STAFF PAPERS 559, 564 (1998).

spending, and extra-budgetary accounts.⁴ Our concern is with corporate bribe payers, so we will not consider the role of government policies except as relevant to our limited focus.⁵

Scholars studying the phenomenon of corruption have noted a unique paradox: corruption is universally disapproved, yet universally prevalent.⁶ This paradox continues even though the 1990s saw corruption become one of the most important policy issues in the international economy. The invigorated focus on corruption is highlighted by the 1997 signing of the anti-corruption convention by the nations belonging to the Organization for Economic Cooperation and Development (OECD).⁷ At this same time, however, one-third of the respondents to Transparency International's 1999 survey of private sector leaders in fourteen emerging market economies estimated that corruption has increased over the past five years.⁸ How are we to understand these contradictory trends? In this section we provide an overview of the impact of modern corruption and the manner in which corrupt practices flow between regions of the world.

A. The Costs of Corruption

The level of corruption that persists is staggering in scope, with enormous sums of money involved. While it is impossible to determine the current, precise level of coarse bribery,

⁴ *Id.* at 568-69.

⁵For an excellent discussion of the issue of corruption in government with emphasis on solutions focused on bribe receivers *see generally* Susan Rose-Ackerman, CORRUPTION AND GOVERNMENT (1999) (analyzing the corruption cleansing potential of better pay for officials, criminal enforcement and civil service reforms). For a review of both supply-side and demand-side solutions to international bribery, *see* Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L. J. ___, Part III (2000).

⁶Francois Vincke, *The Business Community's Attitude Towards Corruption: Special Focus on Private-to-Private Corruption*, Paper Prepared for Presentation at the 8th International Anti-Corruption Conference, Lima, Peru, September 7-11, 1997 (available online at <<http://www.oecd.org/daf/nocorruption/pdf/vincke.pdf>>) (citing an article by Professor Bruno Oppetit of the University of Law, Economics, and Social Sciences of Paris).

⁷ As of this writing, 20 countries have enacted domestic legislation in compliance with the convention. Beverly Earle, *Bribery and Corruption in Eastern Europe, the Baltic States and the Commonwealth of Independent States: What Is To Be Done?*, 33 CORNELL INT'L L. J. __ (2000).

⁸*The Transparency International Bribe Payers Survey*. 1999. (available online at <<http://www.transparency.de/documents/cpi/bps.html>> [hereinafter *Bribe Payers Survey*]. In addition, 25 percent of respondents stated that corruption has decreased, 22 percent stated that corruption has stayed the same, and 20 percent did not know. *Id.*

a 1997 estimate by the World Bank placed the total involved in international trade at \$ 80 billion per year.⁹ A recent World Bank survey of 3,600 firms in 69 countries found that 40 percent of businesses pay bribes.¹⁰ In industrial countries 15 percent of businesses were found to pay bribes, but in the former Soviet Union this figure jumped to over 60 percent.¹¹

The tremendous level of corruption imposes many costs on societies. Corruption limits the ability of governments to perform vital functions and may even threaten their overall effectiveness. The *Financial Times* recently reported that “deep corruption [in China] is corroding the exercise of state power.”¹² Falsified accounts used to cover up this corruption have the effect of rendering China’s official statistics “virtually meaningless.”¹³ In Ecuador, it is estimated the government could pay off its foreign debt in five years if corruption was brought under control.¹⁴ In Argentina, corruption in the customs department defrauded the government out of \$ 3 billion in revenues.¹⁵ Officials estimated that 30 percent of all imports were being under-billed and approximately \$ 2.5 billion of goods were brought into the country under the guise of being labeled “in transit” to another country, thus illegally avoiding import taxes altogether.¹⁶ Corruption also influences government spending, moving it out of vital functions such as education and public health, and into projects where public officials can more easily

⁹James Walsh, *A World War on Bribery*, TIME, June 22, 1998, at 16. The World Bank estimate is based on the assumption that bribery makes up five percent of all foreign direct investment and imports into countries with high level of corruption. *Id.*

¹⁰Thomas Omestad et al., *Bye-Bye to Bribes: The Industrial World Takes Aim at Official Corruption*, US NEWS & WORLD REPORT, Dec. 22, 1997, at 22.

¹¹*Id.*

¹²James Kyngé, *China uncovers falsified accounts in state groups*, FIN. TIMES (London), Dec. 24, 1997, at 7.

¹³*Id.*

¹⁴Transparency International, *Corruption Reports* (available online at <<http://www.transparency.de>>). It is estimated that corruption costs the country \$ 2 billion every year. *Id.*

¹⁵*Argentines give import to fraud crackdown*, FIN. TIMES (London), Dec. 3, 1997, at 5.

¹⁶*Id.*

extract bribes.¹⁷

The personal financial gains secured by corrupt public officials shows why these problems persist. In Mexico, suspicions surround the ability of Raul Salinas, the brother of former President Carlos Salinas, to amass a fortune of over \$ 120 million while a public official.¹⁸ Two former presidents of South Korea were convicted of developing a fund of over \$ 900 million while they were in office in the 1980s and 1990s.¹⁹ At the local level, in Grenoble, France, the city mayor was convicted for personally receiving \$ 1.8 million in 1989 while selling the city water system.²⁰

Corruption also imposes tremendous costs on business. While American companies complain of lost contracts due to the FCPA,²¹ other countries complain of the bribes their firms must pay to obtain those contracts. For example, German companies are estimated to pay an aggregate of over \$ 3 billion a year in bribes to obtain business contracts abroad.²² In Indonesia, it is estimated that 20 percent of business costs are bribes to bureaucrats.²³ In Albania, approximately one-third of potential profits are lost to bribe payments that amount to eight percent of inventory turnover.²⁴

¹⁷Tanzi, *supra* note 3, at 585-86; Paolo Mauro, *Corruption: Causes, Consequences, and Agenda for further Research*, 35 FINANCE & DEVELOPMENT 11 (1998) (finding that corruption lowers government spending on education and public health services);

¹⁸Walsh, *supra* note 9, at 16.

¹⁹Ken Guggenheim, *Corruption, Not Revolutions or Coups, Topples Governments These Days*, L.A. TIMES, Oct. 6, 1996, at A-4.

²⁰*Id.*

²¹Former US Trade Representative Mickey Kantor stated that between April 1994 and May 1995, the government was aware of almost 100 contracts (valued collectively at over \$ 45 billion) that US firms lost due to competitors' bribes. *US Eyes International Measures to Combat Bribery*, JAPAN ECONOMIC NEWSWIRE (available in Lexis/Nexis), March 7, 1996; Marlise Simons, *U.S. Enlists Rich Nations in Move to End Business Bribes*, N.Y. TIMES, Apr. 12, 1996, at A10.

²²Guggenheim, *supra* note 19, at A4; *Honest trade: A global war against bribery*, ECONOMIST, Jan. 16, 1999, at 22 [hereinafter *Honest Trade*].

²³*Honest Trade*, *supra* note 22, at 22.

²⁴*Id.*

B. Importing and Exporting Corruption

Just as it is difficult to determine the levels of bribery and corruption, it is equally difficult to determine which countries are producing the greatest supply and demand of corruption. Secrecy is a defining characteristic of corruption. As Noonan has noted no one boasts publicly about the bribes that they have paid or taken.²⁵ Transparency International has led the way in attempting to determine which countries are the home of bribe-takers, that is, public officials who are abusing their position for their own personal profit.²⁶ Every year Transparency International publishes the Corruption Perception Index (CPI), which is a ranking of countries based on the perceived level of corruption in those countries. The countries' rankings are based on 17 different polls and surveys of business people, risk analysts, and the general public, conducted by a variety of organizations.²⁷ The 1999 CPI ranked 99 countries, with Denmark being perceived as the "cleanest" country and Cameroon the most corrupt. The United States ranked 18th in the index, placing it as more corrupt than Canada, Singapore, the United Kingdom, and Germany, but less corrupt than Japan, Italy, and Mexico.

Not surprisingly, the CPI created a significant amount of controversy among the countries that ranked low in the index. An outspoken critic of the CPI was Malaysian Prime Minister Mahathir Mohamad. Mohamad argued that the countries that appeared clean in the CPI poll (mostly European and North American countries) were just as much to blame for the level of corruption in the countries at the bottom of the CPI due to their "exported corruption."²⁸

To address these concerns and to look at the supply side of corruption, in 1999 Transparency International and Gallup International conducted a survey of almost 800 business

²⁵John T. Noonan, BRIBES (1984).

²⁶*New poll shows many leading exporters using bribes*, October 26, 1999 (Transparency International Press Release available online at <<http://www.transparency.de>>).

²⁷No country in the index is included in all 17 surveys. A country must be included in at least three surveys to be included in the index.

²⁸Greg Steinmetz, *Swedish Concerns Place Well, But Belgium, France, Italy Fare Poorly in New Survey*, WALL ST. J., Aug. 25, 1997, at 9A.

executives in fourteen emerging market economies asking them to rank the likelihood of companies from the nineteen largest exporting countries to pay bribes. The results of this survey created the Bribe Payers Index (BPI).²⁹ In the BPI, Sweden, Australia, and Canada are perceived to have the cleanest corporations, while China, South Korea, Taiwan, and Italy have corporations that are the most likely to pay bribes. The United States ranks right in the middle of bribe payers.³⁰ His study included the 18 largest exporters and 87 importing countries. This 1997 study found that firms from Belgium (including Luxembourg), France, Italy, and the Netherlands, were the most likely to pay bribes, while Malaysia, Sweden, Austria, Australia, and the United States were the least likely. The most striking difference between this attempt and the BPI is Malaysia's ranking as the most clean in Lambsdorff's study, but one of the most likely to pay bribes in the BPI. Lambsdorff's study also ranked Belgium as having the highest level of bribery, while the BPI has it in the middle.

Table 1 compares both the CPI and BPI rankings of the nineteen countries included in both indexes. Comparing each country's supply and demand of corruption reveals important variations. Sweden and Canada are the cleanest on both dimensions (i.e., rank the highest on both indexes), while China, South Korea, Italy, and Malaysia, have both a high demand for and high supply of corruption. Some countries seem to have a double standard for corruption, discouraging it at home, but engaging in it abroad. For example, Singapore ranks number three in the CPI among the nineteen countries, but number eleven in the BPI. Conversely, certain countries have corruption at home, but their companies are perceived as less likely to pay bribes. Belgium and Austria stand out as this type of country. The United States, which we would expect to rank highly on the BPI, because until the OECD Convention it was the only country to

²⁹*Bribe Payers Survey*, *supra* note 8.

³⁰An initial attempt to determine which countries' corporations were paying bribes was conducted by Johann Graf Lambsdorff, an economics professor at Goettingen University in Germany and collaborator on the CPI index. Lambsdorff used a regression analysis to determine the propensity of a certain country's business firms to pay bribes based on their level of exports to corrupt countries, after controlling for other influencing factors, such as language barriers, geographic proximity, and the composition of products traded. This study relies on the assumption that corporations with an inclination to pay bribes have an advantage over cleaner corporations in countries that have a high level of corruption. Jennifer M. Freedman, *Study Shows Bribery An Everyday Element Of World Trade*, DOW JONES ONLINE NEWS, Sept. 8, 1997 (available in the Dow Jones Interactive database).

criminalize bribery, ranks right in the middle of both indexes. In fact, the United States ties with Germany on the BPI, a country that until recently allowed the tax deductibility of bribes.³¹

[Insert table comparing the 19 countries—Attached at end of document]

II. An Emerging World View on Corruption and Bribery

Throughout the world there is evidence of changing attitudes about corruption and bribery. Governments, NGOs, and seemingly even the general public are starting to recognize the damage caused by coarse bribery and therefore the need to take aggressive steps to control it. In September 1997, World Bank president James Wolfensohn, said,: "Only 18 months ago, the word corruption was never mentioned. Today, there is a publicly expressed revulsion, on moral, on social, and on economic grounds."³² This emerging world view is reflected in efforts by international governmental and non-governmental organizations to combat bribery. While it remains to be seen if these efforts will be successful or if countries will follow through on their pledges, these efforts do show a recognition that corruption and bribery is an issue "that brings the crowds out on to the streets"³³ and cannot be ignored by governments or business.

II.A. Drivers of the Anti-Corruption Movement

What is the cause of this dramatic increase in the interest to combat bribery? Several changes in the global marketplace over the past several years have combined to make bribery and corruption one of the central issues in international business today. Rather than a single cause, the anti-corruption movement appears to have many parents. The following are some of the likely candidates.

³¹A comparison of these 19 countries based on their actual scores on the two indexes produces the same results as those discussed above.

³²Diane Coyle, *West Targets Third World Corruption*, THE INDEPENDENT, Sept. 21, 1997, at 14.

³³*Honest trade*, *supra* note 22, at 22.

The Growing Global Marketplace. The “borderless” global marketplace is bringing national economies and corporations throughout the world into increasingly greater interdependence. The decade leading up to 1996 saw an 80 percent increase in world trade.³⁴ Issues that can affect the functioning of effective markets in one region of the world can now affect the entire global market, and corruption is finally being recognized as one of those issues.³⁵ Nations are also recognizing that corruption can have a negative impact on the effective functioning of global capital markets³⁶ and any particular country’s access to those markets. Uniform standards of financial reporting and overall transparency are necessary elements of attaining investor confidence in the capital markets. Nations are also recognizing that corruption lowers foreign direct investment in their country³⁷ and can rob the country of significant sums in import tax revenue.

High-Profile Cases. Many high-profile cases in the 1990s also increased the attention placed on corruption. In South Korea, two former presidents were convicted and imprisoned for accepting hundreds of millions of dollars in bribes.³⁸ In Italy, the *Tangentopoli* investigation (meaning “bribe city”) led to the conviction of a former prime minister.³⁹ In both Brazil and Venezuela, Presidents were impeached due to bribery charges.⁴⁰ Similar cases come from

³⁴Lucinda A. Low & Kathryn Cameron Atkinson, *Led by the U.S., the World Wages War on Corruption*, NAT’L L. J., March 3, 1997, at B9.

³⁵See Barbara Crutchfield George et al., *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Towards the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT’L L. 1, 25 n.150 (1999) (noting the impact of the Asian financial crisis on U.S. and European industries); Walsh, *supra* note 9, at 16 (noting that: “Hardly anyone paid attention to the cost of corruption when economies grew at double-digit rates, but the economic collapse in Asia has driven home the price everyone pays for such practices.”).

³⁶See George et al., *supra* note 35, at 26 (noting how poor governance can lower investor confidence).

³⁷Research by Harvard economist Shang-Jin Wei shows that corruption is the equivalent of placing a tax on foreign direct investment. *Honest Trade*, *supra* note 22, at 22.

³⁸Guggenheim, *supra* note 19, at A4; Omestad et al., *supra* note 10, at 22.

³⁹Omestad et al., *supra* note 10, at 22.

⁴⁰John Brademas & Fritz Heimann, *Tackling International Corruption: No Longer Taboo*, FOREIGN AFFAIRS 17 (1998).

Mexico, Spain, and Ecuador, among others.⁴¹ Ideas travel, and such cases dramatically demonstrate the seriousness of corruption to all national leaders, policymakers, and the public in general. They give heart to those who would seek to enforce anti-corruption laws or to promulgate stronger policies.

The End of the Cold War. The end of the Cold War permitted increased attention on corruption, but also led to increased opportunities for corruption. The collapse of the Soviet Union and socialist governments in Europe allowed policymakers all over the world to focus their attention on other matters, including corruption and its negative consequences.⁴² In addition, nations no longer felt the strong pressure to support corrupt governments in order to advance other geopolitical interests.⁴³ The end of the Cold War has also increased independence of judges and prosecutors and created a stronger free press.⁴⁴ At the same time, paradoxically, the opening up of markets and the privatization of state-owned enterprises has increased opportunities for corruption.⁴⁵ Increasing involvement in global trade by countries high in corruption, such as China, may also contribute to increased instances of coarse bribery.

II.B. International Efforts to Combat Corruption

The confluence of these factors have allowed for galvanized international efforts to

⁴¹*See Id.*

⁴²George et al., *supra* note 35, at 22-23; Carolyn Hotchkiss, *The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business*, 17 J. PUBLIC POLICY & MARKETING 108 (1998)..

⁴³Stuart Marc Weiser, *Dealing with Corruption: Effectiveness of Existing Regimes on Doing Business*, American Society of International Law Proceedings of the Annual Meeting 99-115 (1997) (presenting the comments of Nancy Zucker Boswell). The pressure to support corrupt governments was the result of a “the enemy of my enemy is my friend” approach to foreign policy. George et al., *supra* note 35; *see also* Tanzi, *supra* note 3, at 560 (noting the political hypocrisy that led to the overlooking of high-level corruption as long as those leaders were in the right political camp).

⁴⁴Brademas & Heimann, *supra* note 40; *see also* Tanzi, *supra* note 3, at 560-61 (arguing that the increase of democratic governments and a free press has created an environment where the “discussion of corruption is no longer a taboo”).

⁴⁵Tanzi, *supra* note 3, at 563-64. For example, to obtain a low price on companies and real estate formerly owned by the East German government, a German businessman paid \$ 3.75 million in bribes to an agency official overseeing the privatization. Guggenheim, *supra* note 19, at A4.

combat bribery and corruption ranging from multilateral initiatives to uprisings from the local citizenry. The following sections briefly describe examples of these efforts and demonstrate an emerging world view placing combating corruption as one of the central issues of domestic and global policy.

i. Multinational Organizations

Organization for Economic Cooperation and Development (OECD). The most significant advance in the fight against corruption and the strongest demonstration of its universal condemnation is the OECD's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, which entered into force on February 15, 1999.⁴⁶ This convention requires all its signatories to criminalize the bribery of any foreign public official⁴⁷ and to take steps to prohibit accounting practices that facilitate the payment or concealment of bribes. The United States amended the FCPA in 1998 to bring it in line with the stricter provisions of the OECD convention.⁴⁸ These amendments included expanding the definitions of "bribery" and "foreign public official."⁴⁹

The Convention, which was adopted in 1997, has yet to receive widespread recognition in the private sector, however. Thirty-eight percent of the executives responding to Transparency International's 1999 survey stated that they had not heard of the convention, and another 43 percent stated that they had "only heard about it," as opposed to knowing something about it.⁵⁰ Of the 19 percent of respondents who were familiar with, or at least knew something about, the convention, less than one-fifth reported that their organizations were reviewing practices in response to the convention.⁵¹

⁴⁶The full text of the convention is online at <www.oecd.org/daf/nocorruption/index.htm>.

⁴⁷Signatories are not required to criminalize "facilitating" payments.

⁴⁸Congress passed the International Antibribery and Fair Competition Act of 1998 to amend the FCPA. George et al., *supra* note 35, at 11. The Act is codified at 18 U.S.C. 78dd (1998).

⁴⁹George et al., *supra* note 35, at 11-12.

⁵⁰*Bribe Payers Survey*, *supra* note 8.

⁵¹*Id.*

In January 2000, the OECD released for comment a draft version of its guidelines for multinational enterprises.⁵² In addition to chapters on disclosure, the environment, and industrial relations, among others, the guidelines directly address combating bribery.⁵³ The guidelines not only provide that corporations should not offer or pay bribes, but that they should also establish and disclose compliance systems and employee training programs.⁵⁴

Organization of American States (OAS). The Organization of American States, which consists of 34 nations in the Western Hemisphere, adopted the *Inter-American Convention Against Corruption* in 1996.⁵⁵ This agreement requires all signatories to criminalize bribery by adopting laws that are the “rough equivalent” of the FCPA.⁵⁶ In many ways, however, the Convention goes beyond the FCPA’s provisions. The Convention provides for financial disclosure and transparency in accounting practices, as well as asset seizure, extradition, and international cooperation in the collection of evidence.⁵⁷

Council of Europe. The Council of Europe, which currently has 41 member nations,⁵⁸ established the Multidisciplinary Group on Corruption (GMC) in September 1994.⁵⁹ In 1998, the GMC established the Group of States Against Corruption (GRECO) to monitor the implementation of the *Guiding Principles for the Fight against Corruption*, which was adopted

⁵²OECD, *The OECD Guidelines for Multinational Enterprises*, January 2000 (available online at <<http://www.oecd.org>>).

⁵³*Id.* at 13.

⁵⁴*Id.*

⁵⁵*Inter-American Convention Against Corruption*, Organization of American States, Third Plenary Session, March 29, 1996 (available online at <<http://www.oas.org>>).

⁵⁶Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 234 (1997).

⁵⁷*Id.*

⁵⁸*About the Council of Europe*, Council of Europe webpage (available online at <<http://www.coe.fr/eng/present/about.htm>>).

⁵⁹*Council of Europe’s Fight Against Corruption and Organised Crime*, Council of Europe webpage (<<http://www.coe.fr/corruption/epresent.htm>>). The acronym GMC is from the French translation of “the Multidisciplinary Group on Corruption,” which is *Le Groupe Multidisciplinaire sur la Corruption*.

by the Committee of Ministers of the Council of Europe in 1997.⁶⁰ GRECO's monitoring role includes reviewing member states' efforts in furtherance of the Guiding Principles, and issuing public statements if a member state "remains passive or takes insufficient action" with respect to the principles.⁶¹ The public disclosure approach is consistent with GRECO's statement that the "means of mutual evaluation and peer pressure" allow "flexible and efficient" monitoring of the Guiding Principles.⁶² The Council of Europe has also recently passed the *Criminal Law Convention on Corruption*.⁶³

United Nations. In 1996, the UN General Assembly adopted the *Declaration against Corruption and Bribery in International Transactions*.⁶⁴ The declaration calls for countries to eliminate tax deductions for bribes and to criminalize bribery. It also encourages cooperation between countries in sharing information necessary for criminal investigations and other legal proceedings.⁶⁵

IMF & World Bank. Traditionally, the International Monetary Fund (IMF) and the World Bank attempted to avoid any involvement in a country's internal politics.⁶⁶ In the 1990s, however, they realized that abstention was no longer a feasible approach to attaining their objectives. For example, the World Bank estimated that 20-30 percent of its lending in Indonesia went to corrupt officials.⁶⁷ In response, both organizations have taken active measures to reduce

⁶⁰*Agreement Establishing the Group of States Against Corruption (GRECO)*, Committee of Ministers, 102nd Session, May 4-5, 1998 (available online at <<http://www.coe.fr/cm/reports/cmdocs/1998/98cm54r.htm>>).

⁶¹*Id.* Article 16.

⁶²*Id.*

⁶³*Criminal Law Convention on Corruption*, Council of Europe, ETS No. 173, Jan. 27, 1999 (available online at <<http://www.coe.fr/eng/legaltxt/173e.htm>>).

⁶⁴*United Nations Declaration Against Corruption and Bribery in International Transactions*, United Nations, 51st Session, Resolution No. 51/191, February 21, 1997 (available online at <<http://www.un.org/ga/documents/gares51/ga51-191.htm>>).

⁶⁵*Id.*

⁶⁶*See Omestad et al., supra* note 10, at 22.

⁶⁷*Honest trade, supra* note 22, at 22.

corruption. For example, in Kenya, a country with numerous alleged corruption scandals, the IMF and World Bank suspended over \$ 290 million in loans to the country.⁶⁸

In 1997, the World Bank adopted guidelines on preventing bribery in Bank projects.⁶⁹ The guidelines concern not only borrowers and bidders on bank loans, but also contractors and suppliers involved in the performance of Bank-supported contracts. If the Bank determines that corruption or fraudulent practices have occurred, possible sanctions include rejection of an existing bid, the loss of any remaining funds allocated for a contract already granted, and, for a specified period of time, ineligibility for future World Bank-financed contracts. The guidelines also require a contract provision granting the World Bank the right to inspect the accounts and records of all parties involved in a Bank-supported contract and to have them audited by Bank-appointed auditors.⁷⁰

ii. International Non-Governmental Organizations

International Chamber of Commerce (ICC). In 1977, the International Chamber of Commerce was the first non-governmental organization to establish rules of conduct on bribery. The ICC also established a panel to oversee the application of the rules of conduct.⁷¹ In addition to providing interpretations of the rules, the ICC established the panel to hear alleged infringements. If a firm thought that a competitor was engaging in corrupt practices, that firm could request an investigation by the panel. The basic idea was for the business community to enact self-regulation and also enforce it, although no specific sanctions were contemplated. The panel, however, only heard one case before it was officially disbanded after seventeen years.⁷²

⁶⁸Omestad et al., *supra* note 10, at 22. It was alleged that 20 percent of the Kenyan government's annual spending (approximately \$ 400 million) went to subsidize a business person's exporting of gold and diamonds to Switzerland, even though Kenya has no gold or diamond resources. *Id.* Other allegations include bribes paid for the evasion of import duties. *Id.*

⁶⁹World Bank, *Preventing Corruption in Bank Projects: Procurement Guidelines*, (available online at <<http://www.worldbank.org/publicsector/anticorrupt/preventing.htm>>).

⁷⁰*Id.*

⁷¹Weiser, *supra* note 43, (presenting the comments of Francois Vincke, chair of the ICC's 1994 ad hoc committee on bribery).

⁷²*Id.* Vincke believes that the panel failed because corporations believed in having either a self-regulatory approach

In 1995, an ICC committee issued a report establishing new corporate rules of conduct and providing recommendations to governments and other international organizations. The rules of conduct go beyond the FCPA's provisions by prohibiting any form or technique of bribery and by not making a distinction between public officials and private persons as the recipients of bribes.⁷³ The rules recommend that corporations adopt their own codes of conduct based on the ICC's rules, but adapted to their particular situation. These rules were updated again in 1999 and those provisions are discussed further below.⁷⁴

Caux Roundtable. The Caux Roundtable is an international organization of more than 250 business leaders from over 25 countries. In 1994, the Roundtable published its *Principles for Business* to establish an international standard for responsible corporate behavior. Since their publication, the *Principles* have gained widespread support in North America, Europe, and Japan. One of the seven general principles of business adopted by the members of the organization is the "avoidance of illicit operations," which states in part that "A business should not participate in or condone bribery, money laundering, or other corrupt practices: indeed, it should seek cooperation with others to eliminate them."⁷⁵

Transparency International. Transparency International (TI) is an international non-governmental organization established in 1993 to combat corruption. TI now has chapters in over 60 countries in addition to its main office in Berlin. The 1999 International Anti-Corruption Conference held in South Africa, for which TI was the secretariat, drew 1600 delegates from 135 countries.⁷⁶ At the meeting, the delegates adopted a resolution encouraging the full implementation of the OECD convention and calling for enforceable international conventions to

or a judicial approach, and not both. The panel was viewed as a quasi-judicial process and never completely accepted by the business community. *Id.*

⁷³Vincke, *supra* note 6, at 12.

⁷⁴See *infra* Part IV.C.

⁷⁵Caux Roundtable, *Principles for Business* (available online at <<http://www.cauxroundtable.org/ENGLISH.HTM>>).

⁷⁶*Transparency International Press Release*, October 15, 1999 (available online at <<http://www.transparency.de>>).

reduce money laundering and to facilitate returning to developing countries any money illegally obtained by corrupt public officials. This is a dramatic change from 1993, a year when “few governments or institutions would openly confront the issue of corruption,” states Transparency International official Nancy Zucker Boswell.⁷⁷

II.C. Public Uprising Against Corruption

Perhaps the most significant of all the anti-corruption efforts and trends is the fact that the general public appears to have lost its tolerance of corruption and bribery. Recent headlines in leading newspapers and magazines show how strong these attitudes are. The *Los Angeles Times* reports that “Corruption, Not Revolutions or Coups, Topples Governments These Days,”⁷⁸ while the *Economist* reports that “corruption is now an issue that brings the crowds out on to the streets.”⁷⁹ In the 1990s, in Italy, Brazil, Pakistan, and Zaire, national governments fell in part due to public uprising against corruption in government.⁸⁰ This demonstrates the point that, contrary to the apparent beliefs of many business persons operating in the less developed regions of the world, bribery and corruption is not a publicly accepted fact of life.

In the U.S., the public’s condemnation of bribery is being reflected in the government’s enforcement of the FCPA. Between 1977 and 1995, the Department of Justice (DOJ) brought only 16 prosecutions for bribery under the FCPA.⁸¹ In 1998, however, it was estimated that the DOJ had over 75 cases under investigation.⁸² In 1995, a regional vice-president of Lockheed became the first person jailed for a FCPA violation. In 1996, the Securities and Exchange

⁷⁷Nancy Zucker Boswell, *The Law, Expectation, and Reality in the Marketplace: The Problems of and Responses to Corruption*, 30 L. & POLICY INT’L BUS. 139 (1999).

⁷⁸Ken Guggenheim, *supra* note 19, at A4.

⁷⁹*Honest trade*, *supra* note 22, at 22.

⁸⁰*Id.*

⁸¹Jonny J. Frank & Wendy C. Schmidt, *Steering Clear of the Bribery Trap When Buying Abroad*, MERGERS & ACQUISITIONS J., October 1, 1998.

⁸²*Id.*

Commission (SEC) filed its first civil enforcement action of the FCPA in ten years, which was soon followed by other actions.⁸³

The investment community is also taking a stand against corruption. Noted corporate law attorney Ira Millstein recently stated that there is a market-based movement against corruption.⁸⁴ He finds that investors and lenders are making their investment decisions based on the country or region's record for transparency, corruption, and bribery. Due to their size, large investors, such as pension funds, require a well-diversified portfolio, which includes international securities. Accordingly, these investors are "using their capital to demand good governance."⁸⁵

This is consistent with the idea that moral desires are embodied in capital, consumer and labor markets. This "morality in markets" results from the aggregate expressions of participants' moral desires⁸⁶ in their choices as consumers, investors and job-seekers. That people are influenced by their moral desires in economic transactions is reflected in the recent growth in socially screened mutual funds, social cause marketing by consumer product firms, and human resources programs allowing employees to engage in volunteer or pro bono work. Sometimes groups of individuals target particular firms as symbols of their concerns. Thus, Monsanto has become the object of protests and boycotts pertaining to genetically modified seeds.

Dunfee has recently argued that the existence of discernible morality within markets relevant to firms creates obligations for corporate management as follows:⁸⁷

1. There is a presumption that all corporate actions must be undertaken to maximize shareholder wealth.

⁸³Hotchkiss, *supra* note 42.

⁸⁴*Investors demand good corporate governance free of corruption*, International Chamber of Commerce News, Feb. 29, 2000 (available online at <<http://www.iccwbo.org>>).

⁸⁵*Id.*

⁸⁶Their views about the acceptability of bribery, environmental practices, the treatment of animals, and so on.

⁸⁷Thomas W. Dunfee, *Corporate Governance in a Market with Morality*, 62 L. & CONTEMPORARY PROBLEMS 129(1999).

2. Managers must respond to and anticipate existing and changing marketplace morality relevant to the firm that may have a negative impact on shareholder wealth.
3. The presumption in principle 1 may be rebutted where clear and convincing evidence exists that marketplace morality relevant to the firm would justify a decision that cannot be shown to directly maximize shareholder wealth.
4. Managers must act consistently with hypernorms (manifest universal norms and principles.)

Obligation number 2 is most salient in the context of firms devising strategies to combat bribery. When managers fail to anticipate changing attitudes within the markets they serve and use, they may end up making decisions that have a negative impact on shareholder wealth. This happened to the tobacco companies when they failed to appreciate changing attitudes about marketing cigarettes to children, to Shell Oil when it failed to understand the nature of the non-scientific environmental concerns that existed with reference to their plans to sink an old oil rig in the North Sea,¹ and to Nike when it failed to appreciate and respond early to the concern that many of their customers had about whether their shoes and wearing apparel were being produced under sweatshop conditions.

For our purposes, the question is whether the apparently changing public attitudes about corruption discussed at length above will ultimately play out in the same manner as did the changing attitudes about tobacco products, the environment, and child labor. If it does, then firms that are associated in the public's mind with the phenomenon of bribery may suffer. Just as was the case on these other issues, some firms may have greater exposure. Industries such as arms and defense and public works construction, where large value projects are allocated by

¹Thomas Donaldson & Thomas W. Dunfee, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* (1999).

public officials, carry with them greater vulnerability to pressure for corrupt payments.² Companies in this set which appear cavalier about such practices may be particularly susceptible to public disapproval. The confluence of interest in this issue among governments, international public organizations, non-governmental organizations, and professional groups signals a potentially powerful wave of public opinion. Managers who fail to anticipate this change do their shareholders great disservice.

III. Understanding the Paradoxes of Corruption and Practice

As illustrated above, coarse bribery is paradoxical in several dimensions. There is a growing movement against the practice, yet there is no hard evidence as of yet that the level of corruption is declining (and it may even be increasing). Firms aggressively seek to prevent the corruption of their own employees while simultaneously approving of attempts to corrupt the employees of potential suppliers. Firms from countries that have reputations for being relatively clean of corruption are thought to be major sources of corruption into other countries. This section of the article will evaluate alternative explanations for the behaviors underlying these paradoxes.

We wish to consider four possible explanations for behavior supporting persistent corruption. First, that such behavior may be explained by competitive necessity, that is, engaging in selective corrupt payments can be seen as a sensible business strategy. Second, that making corrupt payments may be explained by wide-spread extortion. Third, that a non-trivial amount of corrupt payments may be due to the independent actions of employees who act contrary to the announced policies of their employers. Finally, that bribe payers view such payments as ethically justified because they respect local culture and avoid moral imperialism.

²See *Bribe Payers Survey*, *supra* note 8 (reporting survey results that show these sectors are the most likely to have high levels of corruption).

A. Competitive Necessity

Can the practices that underlie the paradoxes be explained on the grounds that they constitute a sensible, profit-enhancing business strategy? Consider the case of two firms that each operate multiple business lines and therefore are in the position in which each can sell products to the other. On first impression, it might appear to be a sensible business strategy for one of the firms to try to bribe the purchasing agents of the other firm to buy their products, particularly if they believe that they cannot otherwise obtain the business. At the same time, they would be on their guard to try to preclude any possibility that the other firm would bribe their own purchasing agents. The tendency to adopt such a strategy might be even greater if the other firm was from a different culture.

Conversations with managers produce anecdotal evidence in support of the proposition that in particular cases, making corrupt payments is essential to be successful in certain markets. Testimony in support of liberalizing the Foreign Corrupt Practices Act in 1988 emphasized the claim that U.S. businesses in general were at a competitive disadvantage as a result of the enforcement of the Act.¹

Ultimately, whether bribery is justifiable as a competitive strategy is a factual claim. Some firms argue that they have a competitive advantage because they have a reputation for not paying bribes. Firms such as General Electric and Honeywell may be able to obtain contracts not available to others and may have lower costs due to the avoidance of payments.² Similarly, it is suggested that if a firm such as Coca Cola, which has a reputation for eschewing paying bribes, either refuses to come into a particular market or leaves without a sound business reason, those actions are a signal that the local officials are corrupt.³

¹Salbu, *supra* note 56, at 243; *see also Id.* at 255-57 (presenting the arguments of those claiming the FCPA puts US businesses at a comparative disadvantage).

²Business for Social Responsibility website (<<http://www.bsr.org/resourcecenter/index.html>>).

³Frank Vogl, *Curbing Corruption: Making Progress with the Bribe-Givers*, 3 ECON. PERSPECTIVES (November 1998) (an electronic journal of the U.S. Information Agency available online at <<http://www.usia.gov/journals/ites/1198/ijee/ejtoc.htm>>) (stating, "What leader in any country is willing to risk a

The existing evidence as to the overall status of the competitive necessity claim is mixed,⁴ and it is very difficult to obtain definitive data because of the secrecy that surrounds coarse bribes. Two conclusions appear to be warranted. First, there may be specific situations in which making a payment is profit enhancing for the bribe-paying firm. Second, the massive amounts of bribery that apparently exist produce serious cooperation problems for certain firms. If they do not make the payments, they will be seriously hurt in a particular market. Yet, if they do, they are contributing to the continuation of a system that works to disadvantage them. From the view point of such firms, the adoption of criminal statutes that apply to corrupt payments helps to provide a level playing field.

As an important caveat, we must note that even if a factual case can be made that competitive necessity requires the payment of a bribe, that alone will still not suffice for a full ethical justification. We would not allow a defense of competitive necessity to justify murder or a dangerous and unsafe workplace. The major issue, however, one that we discuss at length in the last section, is whether there are voluntary actions that firms may take singly or in cooperation with others, that can help to resolve this cooperation problem by reducing the chances that other firms will “defect” and pay bribes to get a competitive advantage.

We should also note that consumers and investors may be increasingly willing to punish firms that are perceived as corrupt by boycotting their products or shares. If this becomes generally the case, then although making corrupt payments may have once been a viable competitive strategy it might cease to be so.

B. Extortion

Some instances of bribery are the result of direct and personal threats of physical harm to the bribe-payer or her family. As Lindgren notes, “[a]lthough the morality of giving in to a coercive extortion threat has been debated for centuries, capitulating is often not illegal.”⁵

public announcement by Coca-Cola that it is quitting the country rather than pay a fat bribe to the head of state? So far, none.”).

⁴Dunfee et al., *Social Contracts and Marketing Ethics*, 63 J. OF MARKETING 14 (1999).

⁵ James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695,

However, giving in to extortion is a violation of the Model Penal Code.⁶ Thus, the dispute as to culpability in law parallels the debate in ethics.

The morality of making an extorted payments depends on the nature of the threat and the circumstances surrounding the payment. Even though it may be inappropriate to expect moral heroism on the part of managers, a certain amount of moral courage should be exercised.⁷ Even though Turow has argued that “bribery can be justified only if the bribe-giver is truly without alternatives,”⁸ there have been widely reported cases of murders and other threats that have occurred within an environment involving corrupt payments.

The problem exists in part because the victim of the extortion often cannot complain to a legitimate authority. Complaining to the local police is not a satisfactory option when the police are in league with those extorting the payments. Instead, what is needed, as will be discussed *infra*, is a credible body whose integrity is unquestioned and whose intervention can be predictably invoked.

Presumably, extortion explains only a very small number of corrupt payments. Extortion exists in part because systemic *coarse* bribery provides the opportunity for the use of force. Here, particularly, the effective rule of criminal law is required to eradicate the demand side of the practice.

C. Rogue Employees

Many firms have recently strengthened and expanded internal compliance and auditing systems designed to detect and discourage the making of corrupt payments. They have also expanded components of ethics programs designed to assist employees in dealing with issues of this sort. For example, many firms have installed “help lines” where employees can call, often

1698 (1993).

⁶Model Penal Code section 2.40.1.

⁷ Dunfee, *et. al.*, *supra* note 93, at 25.

⁸Scott Turow, *What's Wrong with Bribery*, 4 J. OF BUS. ETHICS 249, 251 (1985)

anonymously, to obtain advice on how to handle certain types of recurring situations. Implicit in these actions is the assumption that some employees, freed from monitoring and effective controls, may be tempted to find ways to arrange for corrupt payments in order to get business for the firm. Presumably, the personal incentive for such rogue employees would be to gain recognition or compensation from the firm as a result of obtaining or retaining business on the basis of the corrupt payments. This could be called the bad apple in the good barrel phenomenon. The firm desires that no payments be made but is unable to effectively control remote employees who are unable to resist personal incentives to pay bribes.

An alternative explanation emphasizes problems with the barrel. Under this view some firms are seen as hypocritical. They state publicly that they have an anti-bribery policy and have provisions in their codes of ethics that condemn improper payments. Yet, at the same time, their internal compensation systems reward employees who produce, regardless of how they get the results. These circumstances suggest that the payment of bribes are overlooked by senior managers, who turn a blind eye to anything suspicious. Compensation is granted solely on the basis of results obtained. Incentive schemes put pressures on employees to produce and the firm creates a morally ambiguous environment in which employees are not certain how they are to act. This type of environment may seduce reluctant employees into making improper payments. This could be called the good apple in the bad barrel phenomenon.

For both of these possibilities, the solution seems rather straight forward. Make a genuine, strong commitment to controlling corrupt bribes. Align incentives and evaluations with the firm's policies. Review compensation systems to make sure that they do not provide perverse incentives for bribes. Implement financial and management controls designed to lessen the chances that such payments will pass undetected. Successful firms should be highly capable of implementing such policies.⁹ A persistent failure to do so raises questions as to whether it is

⁹ See Timothy L. Fort and James J. Noone, *A Naturalist Perspective on the Impact of Bribes in Fostering Peace in an E Commerce Age*, 33 CORNELL INT'L L. J. ____ (2000) for a discussion of a naturalist role for corporations to serve as mediating institutions for controlling problematic behaviors. One implication to be derived from Fort and Noone is that it may be necessary to focus on subunits within the organization while at the same time providing all members of the organization a clear understanding of the justifications for an anti-bribery policy.

actually a bad barrel which is producing the “bad” apples.

D. Ethical Justifications for Paying Bribes

One possible explanation for the prevalence of bribery is that many people sincerely believe that the practice is ethically justified.¹⁰ We have heard managers make these claims over the years. Based on this anecdotal experience, we turn to consider whether a plausible case can be made that one of the well established ethical theories supports bribery.

Can, for example, a consequentialist analysis, which considers an action desirable if it produces overall good consequences, be used to support some forms of bribery? The judgment can be made with regard to a particular payment of a bribe, or with regard to a system of bribery within a political or economic system. In the former case, the consequences would be evaluated in reference to a single payment. In the latter, the overall impact of recurring patterns of bribery within a country would be estimated. In both instances, it would be necessary to estimate the impact on everyone directly affected.

Positive consequences deriving from coarse bribes may include benefits accruing to the bribe payer such as increased profits, increased employment and greater security for the bribe-payer’s creditors. The bribe-receiver gains the value of the bribe payment itself. In a very corrupt society the bribe may even overcome inefficient government regulation and provide a more efficient allocation of resources. Offsetting these positive consequences are a host of potential negative consequences.¹¹ These include overall inefficient allocation of resources when decisions are made on the basis of personal benefit to the bribe-receiver and not on the basis of political rules or markets. The secrecy of bribery may reduce the value of price information. Nichols takes an extremely hard line arguing that bribery may diminish the happiness of the

¹⁰We are not aware of current survey data that support such an opinion. Any survey attempting to identify such viewpoints would be seriously constrained by respondents seeking to provide socially desirable answers. Believing that bribery is widely condemned and therefore assuming that those conducting the survey want to hear a condemnation of bribery, individuals whose personal opinion is that bribery is ethical may not be likely to actually say so. There are techniques for controlling for social desirability effect, but they would have to be carefully employed.

¹¹Dunfee et al., *supra* note 93.

citizenry, reduce the credibility and efficiency of government, and increase lawlessness.¹² For example, bribery often requires some manipulation of a firm's financial reports. If this is sufficiently widespread, there can be a system-wide effect as individuals lose confidence in the reliability of financial statements. This in turn can have a serious and deleterious effect on capital markets. As United States Secretary of State Madeline Albright put it: "corruption is not capitalism's natural product, but its perversion."¹³ The examples given in the first section of this article lend credence to these claims. Where bribery results in environmental and safety regulations being ignored, individuals may be physically harmed as a result of hazards. The extreme result is the case of the well-publicized "bean curd bridges" of China. There, state-bank financed projects designed to improve the infrastructure and boost the economy are so riddled with corruption that bridges, buildings, dikes, roads, and other projects are collapsing almost as soon as they are completed, killing and injuring hundreds of people.¹⁴

The emerging view today is that in most cases the negative consequences of bribery will dominate the positive effects, often leading to lower economic growth and sub-optimal government spending.¹⁵ Thus, a rule consequentialist, who in lieu of making calculations for every decision devises rules based on probable outcomes would devise a rule forbidding corrupt payments. On the other hand, as Green suggests, there may be specialized circumstances, particularly where the negative impact of not paying is very large for the bribe payer and the overall impact on others of making the payment is not great, that a bribe may be justified by an

¹²Phillip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 L. & POLICY IN INT'L BUS. 305 (1997).

¹³Nora Boustany, *Anti-Vice Vice President*, WASH. POST, Feb. 26, 1999, at A24.

¹⁴See John Pomfret, *Flimsy Bridges of Qijiang County: Corruption and Incompetence Causing China's Infrastructure to Crumble*, WASH. POST, April 4, 1999, at A11 (stating that in the metropolis of "Chongqing alone last year, 1,600 people died because of shoddy work on construction sites or collapsing infrastructure projects, causing more than \$ 7.3 million in damage"); Henry Chu, *China May Be Heading Down Road to Ruin*, L.A. TIMES, March 1, 1999, at A1 (stating that in one month, two bridges collapsed in different parts of China killing over 40 people and resulting in the arrests of the projects officials for graft).

¹⁵See Paolo Mauro, *Why Worry About Corruption?*, IMF ECONOMIC ISSUES SERIES 9-12 (February 1997) (reviewing empirical evidence). See also Mauro, *supra* note 17, at 11 (discussing corruption's influence on government spending); Cheryl W. Gray & Daniel Kaufman, *Corruption and Development*, 35 FINANCE AND DEVELOPMENT 7 (March 1998) (arguing that the claimed benefits of bribes that have been presented do not outweigh the costs).

act consequentialist.¹⁶ As Dunfee, Smith & Ross¹⁷ suggest, it is very difficult to apply act consequential analysis to bribes. In addition to serious problems with forecasting likely effects, there is a daunting problem of commensurability. Some of the costs, such as lost of trust in a society, or the loss of credibility of financial documents, may be virtually impossible to compare to direct monetary benefits such as the projected profit on a particular contract. Because of these serious problems we conclude that it is unlikely that one can genuinely rely upon either type of consequentialistic analysis to justify a policy of regularly making corrupt payments.

Alternatively, we must consider whether a deontological analysis can be used to justify a pattern of bribery. A deontic analysis focuses on whether there has been an intentional violation of a binding moral duty. In the case of a bribe payer, we must ask whether there is some binding duty that may either condemn or justify a pattern of bribery. A possible justifying duty is that one should respect the norms of other cultures. Bribery is often associated with cultural patterns and its form appears to vary substantially across cultures. Cultural names identify the practice in certain countries or areas of the world: *guanxi*, *blat*, *bakshish*. Although the claim is often made for cultural justifications for bribery, in fact it is very difficult to build a case for the cultural acceptability of coarse public sector corruption. Noonan claims that bribery is criminalized in some form in every country of the world.¹⁸ The fact that coarse corruption is typically kept secret implies a lack of true cultural acceptance for the practice.

In addition, there are other duties that may be identified that require that bribes not be paid. The bribe-receiver will often take the payment in return for violating a duty based in law or in the terms of an employment contract. The bribe-receiver is often an agent who owes a duty to a principal to act in a certain way. The payment which causes the bribe-receiver to act inconsistently with that duty represents an alienation of agency. These more specific duties would often trump any broader duty to respect local culture and would result in an ultimate

¹⁶Ronald M. Green, *When is 'Everyone's Doing It' a Moral Justification?*, 1 BUS. ETHICS Q. 75 (1991).

¹⁷Dunfee et al, *supra* note 93.

¹⁸Noonan, *supra* note 25.

condemnation of coarse bribery. Thus, it is also difficult to sustain a deontological case for bribery.

A third alternative, an ethical analysis based on a consideration of social contracts, obtains the same result. Under this approach, which is one of the more recent additions to the tools of the business ethicist, bribery is unethical if it either violates relevant community norms or is inconsistent with the manifest universal ethical principles one would expect rational actors to adopt for all communities.¹⁹ The essence of the social contract approach is to identify authentic norms of relevant communities that apply to a given business decision. If they do not violate manifest universal ethical principles they constitute a source of moral obligation. Thus, if a host community were to have norms supporting the payment of bribes this might serve as an ethical justification.

Applying a social contract analysis ultimately demonstrates that coarse bribery is unethical. Donaldson and Dunfee argue that it will be quite rare for a pro-coarse bribery norm to be found to be authentic within a local community. Claims that members of a community accept a system of bribery fly in the face of the secrecy typically surrounding bribes. And even if such a norm were to meet the requirements for authenticity, it is likely to be limited to a relatively small sub-community of bribe-payers and corrupt public officials. Such a “pro-bribe” community will almost invariably be nested within a much larger community holding a contrary anti-bribery norm. After all, it is the members of these larger communities that bear the negative consequences of the bribes in the form of less efficient government and capital markets. When two communities with conflicting norms overlap a transaction, it is necessary to determine which one should predominate. Typically, the contrary norm of the broader anti-bribery community should have priority over the norms of the smaller pro-bribery community. Donaldson and Dunfee suggest that one rule of thumb for sorting among conflicting norms from communities relevant to a transaction is whether one of the communities has adopted a prioritization rule itself. The Foreign Corrupt Practices Act, so long as it indeed represents an authentic norm for

¹⁹Donaldson & Dunfee, *supra* note 88.

the United States, would be an example. Thus a firm from a country with extraterritorial legislation of this type would have an additional ethical obligation, based in a consideration of extant social contracts, to eschew paying a bribe. This is so even though the company might reasonably estimate that its bribe payment would not be discovered or successfully prosecuted.²⁰

Even if a pro-bribery community norm were to be assigned priority it would still have to be tested against manifest universal principles. Donaldson and Dunfee argue that coarse public sector bribery, even in the rare situations in which it might be supported by local community norms, violates manifest universal ethical principles whenever it contributes to human endangerment or the substantial diversion of public resources. Concepts of justice and of human rights require condemnation of a practice when its systemic effect is to make it impossible for a country to provide the social goods necessary for minimal standards of living. In support of this conclusion, a World Bank survey indicated that bribery is one of the greatest obstacles to growth and development in developing countries.²¹

Thus, none of the standard approaches recognized by today's business ethicists appear to provide an ethical justification for coarse bribery. It therefore does not appear reasonable that ethically informed businesspeople may believe that they are doing the right thing by consistently paying bribes to corrupt officials.

IV. SEEKING A PRINCIPLED SOLUTION TO THE PARADOX OF BRIBERY

The growing dichotomy between practice and opinion raises difficult issues for firms that are either trapped in a cycle of paying bribes or who find themselves subjected to extortionist

²⁰Community norms for resolving priority should be applied, so long as they do not have significant adverse effects on other humans or communities. Donaldson & Dunfee, *supra* note 88, at 185.

²¹See Aymo Brunetti et al., *Institutional Obstacles to Doing Business: Region-by-Region Results from a Worldwide Survey of the Private Sector*, World Bank Working Paper no. WPS 1759, April 1997 (providing region-by-region results indicating that corruption is one of the greatest obstacles to investment in developing countries). The European Bank for Reconstruction and Development has also recently identified corruption as one of the greatest obstacles to economic growth in former communist bloc countries. Stefan Wagstyl, *EBRD Singles Out Corruption as a Big Obstacle to Progress*, FIN. TIMES, Nov. 9, 1999, at 11.

threats for payments. It also raises the stakes for firms that have devoted insufficient attention to controlling the behaviors of potential rogue employees. The issue goes beyond a question of acting ethically; managers may be neglecting their fiduciary duty to shareholders if they fail to control corrupt payments.

Our focus is on individual firms and the steps that they might take to combat corruption. We believe that individual firm action is a vital component of the ultimate mix of policies and strategies that is likely to make a significant difference in the practice of making corrupt payments²². First, we believe that firms will be truly serious about the problem only when they internalize anti-corruption values. It is only when the idea of resisting corruption is part of the core values of the firm that they are likely to be successful in controlling the phenomenon. If instead the pressure for controlling bribes is seen as coming from an external source, such as government and the issue is seen as primarily one of compliance, then firms may only be half-hearted in their control efforts.²³

We now explore one alternative that firms can take unilaterally, yet which should alleviate the coordination problem facing them individually as a result of potential defections from an anti-bribery regime. Specifically we consider the possibility that firm use of a Sullivan-type principles approach, coupled with the new alternatives for social reporting and auditing, can serve as an important contributor to the reduction of global corruption. For purposes of this paper, we will refer to the specific principles that we have in mind as the C² Principles (for Combating Corruption.)

A. Sullivan-Type Principles for Multinational Corporations

Codes of conduct and sets of principles guide how corporations conduct their business at home and abroad. Almost all corporations have internally developed codes of conduct that govern issues such as discrimination, worker safety, and illicit payments. Such codes vary

²² The role of firms as “mediating institutions” in dealing with corruption is discussed at length in Fort & Noone, *supra* note 98.

²³ See Lynn Sharpe Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., March-April 1994, at 106.

greatly from corporation to corporation in their specific provisions and also in how they are implemented. In addition to individually developed corporate codes, outsiders have proposed sets of principles for corporations to adopt to guide their behavior in morally troubled contexts.²⁴ Well known examples include the Sullivan Principles on doing business in South Africa and the MacBride Principles for conducting operations in Northern Ireland.²⁵ Other codes exist with respect to businesses' impact on the environment²⁶ and human rights.²⁷ In addition to guiding corporate behavior, these principles act as public pledges to promote a unified course of action against particular problems. Working from these experiences, we propose a uniform set of C² Principles to guide corporate behavior and assist in combating corruption and bribery. The C² Principles act as a voluntary, public pledge against bribery, as well as providing a basis for external monitoring of corporate behavior. Before describing these principles in greater detail we briefly discuss the history of the Sullivan Principles.

In 1971, Reverend Leon H. Sullivan, a Baptist Pastor in Philadelphia and member of the board of directors of General Motors, attempted to persuade General Motors to divest from South Africa due to the government's apartheid policies.²⁸ When his proposal was not supported by the other directors, Reverend Sullivan established the Sullivan Principles in 1977 to help promote racial equality in South Africa through the influence of large corporations. The original set of six principles were a voluntary code designed to guide the practices of U.S. corporations

²⁴For a critique of the use and development of codes of conduct in the area of international business ethics, see Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327 (1994).

²⁵For a discussion of the MacBride Principles, see generally Kevin A. Burke, *Fair Employment in Northern Ireland: The Role of Affirmative Action*, 28 COLUM. J. L. & SOC. PROBS. 1 (1994).

²⁶For a discussion of the Valdez Principles, now know as the CERES Principles, see generally Valerie Ann Zondorak, *A New Face in Corporate Environmental Responsibility: The Valdez Principles*, 18 B.C. ENVTL. AFF. L. REV. 457 (1991); Elizabeth Glass Geltman & Andrew E. Skrobback, *Environmental Activism and the Ethical Investor*, 22 J. CORP. L. 465 (1997).

²⁷Principles concerning human rights include the Slepak Principles for doing business in the former Soviet Union and the Miller Principles concerning business relationships with the People's Republic of China and Tibet. See generally Jorge F. Perez-Lopez, *Promoting International Respect for Worker Rights Through Business Codes of Conduct*, 17 FORDHAM INT'L L.J. 1 (1993)

²⁸Perez-Lopez, *supra* note 116.

doing business in South Africa. These principles covered equality in hiring and pay practices, non-segregation in the workplace, the training and promotion of blacks, and improving the quality of life of employees outside the workplace.²⁹

Included with the principles was a system to evaluate a corporation's progress and compliance with the principles. Corporations were required to file reports with the Reverend Sullivan, be audited by a public auditing firm, and provide information on the firm's performance to its employees.³⁰ With this disclosed information, the consulting firm of Arthur D. Little compiled and published reports comparing the performance of the signatory firms.³¹ Corporations were ranked as "making good progress," "making progress," or "needs to become more active."³² The exact methodology behind the grading scheme was not disclosed by Arthur D. Little, however, which raised some skepticism about the evaluation process.³³

²⁹The original six principles stated:

1. Non-segregation of the races in all eating, comfort and work facilities.
2. Equal and fair employment practices for all employees.
3. Equal pay for all employees doing equal or comparable work for the same period of time.
4. Initiation and development of training programs that will prepare in substantial numbers Blacks, and other non-whites for supervisory, administrative, clerical and technical jobs.
5. Increasing the number of Blacks and other non-whites in management and supervisory positions.
6. Improving the quality of employees' lives outside the work environment in such areas as housing, transportation, schooling, recreation and health facilities.

John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 477 (2000).

³⁰*Id.* at 478.

³¹Zondorak, *supra* note 115, at 474; Perez-Lopez, *supra* note 116, at 43. Arthur D. Little was employed by the Industry Support Unit, an organization of the signatories to the Sullivan Principles. *Id.*

³²Perez-Lopez, *supra* note 116, at 43.

³³ Alexandra Bernasek & Richard C. Porter, *Private Pressure for social change in South Africa: the impact of the Sullivan Principles*, 55 REV. OF SOCIAL ECONOMY 172 (1997). Many of the signatory corporations also gave their performance information to the Investor Responsibility Research Center, which then published the information in its periodic newsletters. *Id.*

In 1987, Reverend Sullivan called the principles a failure³⁴ and abandoned them in favor of a call for total divestment in South Africa.³⁵ Even though the principles did not end apartheid within the time frame set by Sullivan, they made significant progress and were likely one of the factors that eventually led to its abolishment.³⁶ Between 1977 and 1982, the number of firms adopting the principles increased from 12 to almost 150.³⁷ By this time, these corporations had provided scholarships to blacks, increased the number of non-white supervisors and managers from a handful to 30 percent of all managers and supervisors,³⁸ and provided over \$ 150 million in funding for health, education, and housing in the community.³⁹ In addition, corporate executives stated that the collection and disclosure of information required by the Sullivan Principles allowed them to learn from the experiences of others on programs for desegregation, training, and employee housing.⁴⁰

Many factors encouraged corporations to adopt the Sullivan Principles. One commentator lists the following factors: “increased media reporting; university hype and rising public interest concerning the role of business in South Africa; the need to improve corporate image and credibility with domestic groups; the growing number of shareholder resolutions calling for adoption of the Sullivan Principles; and the growing use of the Sullivan Principles by investors as a measure for moral determinations regarding their investments.”⁴¹ When Sullivan called for

³⁴Richard T. DeGeorge, “*Sullivan-Type*” Principles for U.S. Multinationals in Emerging Economies, 18 U. PA. J. INT’L ECON. L. 1193 (1997).

³⁵Zondorak, *supra* note 115, at 478.

³⁶For a limited empirical analysis challenging the effectiveness of the Sullivan Principles, see Bernasek & Porter, *supra* note 122.

³⁷Anderson, *supra* note 118, at 478.

³⁸Perez-Lopez, *supra* note 116, at 43. This progress continued throughout the 1980s. The percentage of white workers managed by non-whites increased from 3.1 percent in 1983 to 8.4 percent in 1984. Zondorak, *supra* note 115, at 476.

³⁹Perez-Lopez, *supra* note 116, at 43. During 1988 and 1989, these corporations donated \$ 60 million to programs for minorities. Zondorak, *supra* note 115, at 476.

⁴⁰Zondorak, *supra* note 115, at 475 n.92.

⁴¹*Id.* at 477 (footnotes omitted).

divestment in South Africa, these same factors also encouraged that behavior.⁴²

Today Rev. Sullivan supports and promotes a general set of principles known as the Global Sullivan Principles which are set forth for individual firms to endorse.⁴³ These broad principles represent a general policy commitment by an endorsing firm to ideals of equal opportunity and quality of life. Their coverage far exceeds the more targeted and specific anti-apartheid principles and encompasses respect for intellectual property and a commitment to sustainable development. The only proviso of the Global Sullivan Principles dealing with bribery is as follows: “Promote fair competition ... and not offer, pay or accept bribes.”

B. Developing Anti-Corruption Principles

In order to have an impact on the practice of corruption, any set of principles must (1) emphasize transparency, (2) provide guidance concerning specific practices associated with paying bribes, (3) be relevant to organizational environments, (4) be identified with and supported by an independent entity such as an NGO or an academic center, and, perhaps most importantly (5) be capable of being monitored and assessed by external, independent entities, such as social and financial auditors. Although some of the existing statements of principles that contain references to bribery meet some of these requirements, none that we are aware of meet them all. For example, although the Global Sullivan principles have great credibility in their association with Rev. Leon Sullivan, their generality with regard to bribery provides little guidance to firms concerning specific practices and, most importantly, it would be virtually impossible to determine whether firms are acting consistently with the standard. A firm with an excellent anti-corruption program which meets all of the standards of current practice might still be victimized by a rogue employee and therefore seemingly fail to satisfy the Global Sullivan standard. Similarly, DeGeorge’s proposed standards, discussed briefly below, offer only very general guidance and are not connected with a supporting independent entity.

With the idea that the proposals offered below would be supported jointly by a yet-to-be-

⁴²*Id.* at 479 and n.120.

⁴³The text of these principles is online at <<http://www.sullivanprinciples.org>>.

determined academic center and one or more NGOs, we turn to considering sources for a specific set of principles.

C. Sources for the C² Principles (for Combating Corruption)

The proposed C² Principles draw from the International Chamber of Commerce's rules of conduct, the recent consent agreement between the United States and Metcalf & Eddy, Inc. pertaining to the Foreign Corrupt Practices Act, compliance and control programs already existing at firms, the business ethics literature, and other sources.

In the recent civil case of *United States of America v. Metcalf & Eddy, Inc.*⁴⁴, the defendant was accused of providing an Egyptian government official with travel, lodging, and entertainment expenses to induce that official to grant Metcalf & Eddy two sanitary drainage contracts that were sponsored by the United States Agency of International Development (USAID).⁴⁵ Without either admitting or denying these allegations, Metcalf & Eddy agreed to a settlement with the Department of Justice (DOJ) which required the company to establish an FCPA compliance program. In other settlement agreements, the DOJ has required companies to implement FCPA compliance programs, but this was the first time the DOJ outlined minimum requirements for such a program.⁴⁶ The DOJ developed the compliance program based on the Organizational Sentencing Guidelines which were adapted to the specific case of bribery and to Metcalf & Eddy's situation.

In the compliance program, Metcalf & Eddy is required to clearly articulate a policy against FCPA violations and to establish standards and procedures that are "reasonably capable

⁴⁴Copies of the complaint that was filed and the consent and undertaking were obtained from the Fraud Section of the Department of Justice and are on file with the Authors.

⁴⁵The alleged payments involved two trips the Egyptian official made to the United States. Under the Federal Travel Regulations, Metcalf & Eddy could provide the official with a cash per diem payment to cover certain travel expenses in advance of his visit. On these trips, however, Metcalf & Eddy provided the official with 150 percent of estimated expenses, paid for most of the official's expenses once he and his family were in the United States (the expenses the per diem was intended to cover), upgraded the official's tickets to first class, and had two undocumented cash advances granted to a Metcalf & Eddy official prior to and during one of the official's visits (since unaccounted for, these cash advances were presumed to be cash payments to the official).

⁴⁶Susan Kavanagh, *Minimum Requirements for FCPA Compliance Program*, FEDERAL ETHICS REPORT, January 2000, at 1.

of reducing the prospect of violative conduct.” The company must assign one or more senior officials to oversee the compliance program, including monitoring and auditing systems to detect violations by employees and other agents, and appropriate disciplinary mechanisms for violations (and for those who were responsible for, but failed to detect a violation). The program must also require regular training regarding the company’s compliance policies and procedures for all employees, agents, consultants, and other representatives of the company. A firm should establish a reporting system to allow an employee to report suspected criminal conduct, without having to go through his or her direct supervisor and without fear of retribution. Metcalf & Eddy should establish procedures and a review committee to insure against the delegation of authority to or partnership with individuals or companies with a propensity to engage in corrupt behavior. All contracts with agents and other representatives should include a clause stating that no bribes shall be offered and that the agent will not employ a sub-agent without the prior written consent of a senior official of Metcalf & Eddy. Finally, the company should keep records that accurately reflect all transactions and dispositions of the company’s assets, and maintain a system of internal accounting controls.

In 1996, the ICC adopted *Rules of Conduct to Combat Extortion and Bribery* and encouraged corporations to adopt (and adapt) these principles in their own codes of conduct.⁴⁷ The ICC established the code of conduct as a method of self-regulation. The code provides that no one may directly or indirectly accept or demand a bribe or kickback, including using subcontracts, purchase orders, or consulting agreements to channel payments to others. When using agents, the enterprise must insure that the agent is paid only for services rendered and is not serving as a conduit for paying bribes. The enterprise should also maintain a record of those agents and their terms of employment. Enterprises must properly and fairly record all financial transactions and establish independent systems of auditing. Top management or the board of directors should establish a system of control to prevent the payment of bribes, provide clear policies and training programs, and take appropriate action against anyone who breaches the

⁴⁷International Chamber of Commerce, *Rules of Conduct to Combat Extortion and Bribery in International Business* (1999), (available online at <<http://www.iccwbo.org>>).

code of conduct. Enterprises should also disclose any contributions to political parties.

Richard DeGeorge⁴⁸ has proposed the idea of a set of “Sullivan-like” principles for U.S. Multinationals doing business in Russia and other former Soviet states. He offers five simple principles including “[s]ignatories will not pay bribes or extortion.”⁴⁹ DeGeorge reasons that if a number of companies concurrently take such an approach, they will avoid the onus of individual action and also help to offset the power of the mafia and corrupt government officials. He also suggests that endorsement of the principles would send a signal to U.S. consumers that the signatories are operating ethically in those environments. DeGeorge further argues that the transparency resulting from such an approach would make it difficult for corrupt officials to demand bribes and that it might work to encourage the development of adequate and efficient background institutions (both legal and governmental), which are necessary to support a less corrupt environment.⁵⁰

D. The C² Principles (to Combat Corruption)

The following principles are offered to all firms, wherever situated, and whatever their lines of business.⁵¹ In addition, the principles are applicable to all business activities of the endorsing firms. A corporation endorsing the C² Principles pledges the following:

1. To publically disclose and make widely known its endorsement of the C² Principles.

⁴⁸DeGeorge, *supra* note 123.

⁴⁹*Id.* at 1203.

⁵⁰In 1995, the Clinton Administration published a set of Model Business Principles for corporations operating abroad. Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 DICK. J. INT'L L. 207, 227-228 (1996). This set consisted of five principles, including one which simply stated that corporations should comply with U.S. laws prohibiting illicit payments. These principles gained little attention, as there were very vague and were not publicized by the White House. *See Id.* at 227-228 (discussing a Wall Street Journal article which reported that the principles were unveiled by mid-level officials who did not want their names used, at a location away from the White House, and on paper without any U.S. government identification).

⁵¹This is in contrast to proposals such as those by DeGeorge, *supra* note 123, which are limited to firms from designated home countries and applicable only to certain regions of the world.

2. To establish a clearly articulated written policy against the payment of bribes and “kickbacks” by the firm’s employees.
3. To implement the policy with due care and take appropriate disciplinary action against any employee discovered to have made payments in violation of the policy.
4. To provide training for employees to carry out the policy, and to provide continuing support, such as help lines, to assist employees to act in compliance with the firm’s policy.
5. To fully and fairly record all transactions in accordance with clearly stated record keeping procedures and accounting controls, and conduct internal audits to assure no improper payments are made.
6. To report on an annual basis a statement of the firm’s policy pertaining to bribery and corruption along with a description of the firm’s experience with implementing and enforcing the policy.
7. To have the annual report in principle 6 audited either by an independent financial auditor or by an independent social auditor, or both.
8. To require all agents of the firm to affirm that no improper payments have been or will be made in reference to any business venture or contract to which the firm is a party.
9. To require all suppliers of the firm to affirm that no improper payments have been or will be made in reference to any business venture or contract to which the firm is a party.
10. To establish a monitoring and auditing system to detect any improper payments made

by the firm's employees and agents.

11. To report publicly any solicitations for payments (or report privately to a monitoring organization, such as Transparency International or a social auditor).

12. To establish a system to allow any employee or agent of the firm to report any improper payment without fear of retribution for their disclosures.

i. Policies, Procedures, and Publication

Throughout the C² Principles run the overlapping concepts of policies, procedures, and publication. Policies refer to a firm's avowed commitment to refuse to pay bribes and to train its employees to carry out firm policies to that effect. Firms should not endorse the principles merely for public relations purposes or merely to emulate other firms in their industry. Endorsement should be done only on a voluntary, sincere and genuine basis. Adherence to these principles requires moving beyond merely establishing a code of conduct to proactively guiding the behavior of the corporation's employees and establishing a compliance program to prevent improper payments.

Principles 1 through 4 reflect the concept of policies. By adopting the principles, a corporation signals its full commitment to combating corruption to external stakeholders and to its employees. This is an external affirmation that not paying bribes and fighting corruption are core values of the firm. Establishing this as a core value of the firm also requires making all employees aware of the firm's policies and providing appropriate training and support to guide employees in making decisions consistent with those policies. To establish the legitimacy of these policies requires taking disciplinary action against employees who violate them.

The second concept is that of necessary procedures. Principles 5, 8 through 10, and 12, establish procedures to control payments inconsistent with corporate policy. These procedures work to control bribery from a variety of angles. First, firms need appropriate accounting and auditing practices to insure that all firm expenditures are authorized and accounted for (Principle

5). Principles 8 through 10 focus on controlling common problems firms have in complying with the Foreign Corrupt Practices Act. Agents, particularly those assisting with sales and marketing, have often been the conduits through which payments have been made. In some circumstances, firms may not have known whether the marketing agents have used part of their commissions and fees to make improper payments to public officials. Due to these problems, the DOJ's compliance program for Metcalf & Eddy requires a committee to review the firm's retention of any agents and to exercise due care to insure against the employment of an agent with a propensity to make improper payments. The DOJ's program also requires contract provisions with all agents stating that they will not make improper payments or retain sub-agents without the prior written consent of a Metcalf & Eddy senior officer. The C² Principles are consistent with this compliance program in that they require firms to obtain from their suppliers and agents statements to the effect that they have not and will not make improper payments. Principle 10 goes even farther by requiring that an auditing system be used to detect any improper payments. In addition, principle 12 furthers the ability of employees to report any violations without fear of retribution. This can be achieved by the establishment of anonymous hotlines so that whistleblowers do not have to file reports through anyone in their immediate management.

The third concept, publication, concerns full disclosure of the firm's efforts and performance. Principles 1, 6, 7, and 11, further this concept. As discussed above, principle 1 signals commitment to combating bribery to those outside the firm. Principles 6 and 7 provide for external validation of a firm's actual efforts. Perhaps the most controversial proviso is number 11, which requires that firms commit to public reporting of solicitations for payments, or if that is not feasible because of threats of violence or extortion, to report the request privately to a social auditor or to a monitoring organization, such as Transparency International. Public disclosure is probably the best way to discourage the demand side of bribery.

ii. Coherence and Credibility

To achieve the overall goal of the C² Principles of reducing the supply of bribery, the

principles require coherence and credibility.⁵² Coherence refers to a unified approach towards combating bribery, such as through the adoption of the same set of principles by many corporations. Credibility requires assurances that the corporation is living up to its pledge through independent monitoring and public disclosure.

A coherent approach provides several significant benefits. It “levels the playing field” by insuring that all corporations are playing by the same rules and that government officials are fully aware of these rules. By knowing that its competitors are not paying bribes, a corporation is assured that it does not have to pay a bribe and can compete based on the quality and price of their product or service. Corporations’ efforts to find honest agents, suppliers, and other business partners, are also facilitated by the efforts of other non-bribe-paying corporations, as they are not required to “reinvent the proverbial wheel” on each business venture in a new country or region.⁵³ Overall, it strengthens a firm’s ability to operate bribe-free, as “[j]oint refusal of payment of bribes or extortion lessens the necessary courage, cost, and difficulty of refusal to do so individually.”⁵⁴

On the demand side, government officials are aware that any requests for bribes will be denied and possibly disclosed publicly. As seen from the experience with Transparency International’s Corruption Perception Index, being known as a highly corrupt country can be highly embarrassing for a country’s top government officials (and may also have financial implications from lowered foreign direct investment), and can spur reforms in that country. This is also supported by the Council of Europe’s belief in the means of “peer pressure” to encourage governments to work to reduce corruption.⁵⁵

⁵²See Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL’Y INT’L BUS. 111, 113, 131-39 (1998) (arguing for coherence and credibility in corporate codes of conduct and product labeling schemes to promote international labor rights).

⁵³DeGeorge, *supra* note 123, at 1201 (discussing the problems of attempting to communicate a message of corrupt-free business dealings firm by firm in Russia).

⁵⁴*Id.* at 1206.

⁵⁵See *supra* note 61-62 and accompanying text.

A coherent approach also provides benefits to members of the public who are not direct parties to the contract. Investors, consumers, and other stakeholders of the firm can easily determine if a firm is doing its part to combat corruption and bribery. Without this coherence, an interested stakeholder would have to analyze each firm's code of conduct to determine their stance and approach, if any, to combat bribery.

While a coherent approach requires a significant number of firms to independently adopt the C² Principles to be fully effective--since only by many firms adopting the principles can the problems of defections and free-riding be overcome--there are significant benefits to each individual adopting firm. In addition to the cooperative benefits discussed above, the act of endorsement by a single firm is a means of signaling to the market that it is taking seriously the moral concerns that exist in regard to corruption. Any firm attempting to free-ride on the efforts of others can be easily singled out.

A business principles approach to combating bribery must also be credible. To be credible requires external monitoring and public disclosure. On the issue of disclosure, the firm should disclose its policies, performance, and auditors' reports, as well as its pledge to the principles. These could be free-standing reports disclosing the firm's performance, or they could be incorporated into other reports of the corporation. This requirement of the C² Principles is consistent with current developments in corporate disclosure on social issues. Corporate social auditing, accounting, and reporting (SAAR) is gaining increasing popularity in Europe and is slowly gaining support in the United States. SAAR is similar to financial accounting and reporting, but with a focus on measuring the social performance of a corporation in relation to the expectations of the firm's stakeholders.⁵⁶

The Global Reporting Initiative (GRI) is a major, international effort to improve the quantity and quality of social reports available to the public.⁵⁷ Formed in 1997, the GRI is the

⁵⁶ David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41, 43 (1999). Social reports concern firm performance on such issues as the environment, product safety, employment discrimination, and community involvement. *Id.* at 69-70.

⁵⁷ *Sustainability Reporting Guidelines: Exposure Draft for Public Comment and Pilot Testing*, March 1999 (available online at <<http://www.globalreporting.org>>).

collaborative effort of large accounting firms, non-governmental organizations, corporations, universities, and others. Its goal is to establish a common framework for corporate reporting that allows corporations and their stakeholders to better understand the linkages between a firm's economic, environmental, and social performance. A firm's compliance with the C² Principles could be easily incorporated into reports published under the GRI or some other standard, and could benefit from the SAAR processes a firm must establish to produce a social report.

Whether published as part of a broader social report or as a stand-alone report, a firm's disclosure of its performance on the C² Principles should be published annually to the widest possible audience. For example, making such reports available on a company website would be a cost effective way for the corporation to provide this information to any interested person. By making this information public, we would imagine that monitoring mechanisms would emerge in the same way that occurred with the Sullivan Principles. An entity such as Transparency International, for example, may choose to take on the task of compiling information on corporate performance based upon public disclosures.

The Sullivan Principles used a system of foundation monitoring.⁵⁸ A foundation, funded by the signatories of the principles, used a third-party agent to monitor the firms' compliance with the principles. This approach was less than satisfactory to many, however, as the monitoring agent did not make known their system for rating corporations' compliance with the Sullivan Principles.⁵⁹ This raised significant doubts about the credibility of the system. To avoid these problems, the C² Principles require a clearly independent monitoring agent (or agents) operating under conditions of full transparency. This approach is necessary to insure that corporations have a compliance program in place and are meeting the requirements of all twelve principles.

An effective monitoring system requires trustworthy information. In addition to issues of disclosure, the increased focus on SAAR is also developing the auditing and verification aspects

⁵⁸Liubicic, *supra* note 141, at 135.

⁵⁹Bernasek & Porter, *supra* note 122.

of the social reporting process. During the time the Sullivan Principles were first announced, corporations and accounting firms had little experience auditing these non-traditional aspects of accounting. While C² Principle number 5 concerns more traditional, accepted accounting procedures, the overall goals of the principles are in line with the developments in SAAR. Organizations such as the Institute of Social and Ethical AccountAbility⁶⁰ in the U.K., which are developing auditing standards and an accreditation path for accountants and auditors in SAAR,⁶¹ can provide significant assistance in establishing the credibility of reports filed under the C² Principles.

V. Conclusion

Throughout the world an attitude is emerging that corruption is a serious problem that can no longer be tolerated. Corporations that are not responsive to these attitudes may suffer a backlash in capital and consumer markets. By adopting the C² Principles proposed here, a firm can demonstrate its commitment to fighting corruption. With many corporations adopting the principles, a cooperative, anti-bribery system emerges, which may significantly reduce the supply-side of corruption.

⁶⁰See Institute for Social and Ethical AccountAbility website (available online at <<http://www.accountability.org.uk>>).

⁶¹See Institute for Social and Ethical AccountAbility, *AccountAbility1000 (AA1000): Overview of standard and its applications* (1999).

Table 1

Country	CPI	BPI	Rankings Move
Sweden	1	1	0
Canada	2	2	0
Singapore	3	11	-8
Netherlands	4	6	-2
Switzerland	5	5	0
Australia	6	2	+4
UK	7	7	0
Germany	8	9	-1
Austria	9	4	+5
USA	10	9	+1
France	11	13	-1
Spain	11	12	-1
Japan	13	14	-1
Taiwan	14	17	-3
Belgium	15	8	+7
Malaysia	16	15	+1
Italy	17	16	+1
South Korea	18	18	0
China	19	19	0

The higher the ranking (and lower the number), the “cleaner” the country.