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Getting from Salbu to the “Tipping Point”: The Role of Corporate Action Within a Portfolio of Anti-Corruption Strategies

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I. INTRODUCTION: SALBU’S BIG QUESTIONS

Salbu’s “big questions” identify core issues for scholars on bribery and corruption. Salbu asks: (1) when may it be ethical to pay a bribe, (2) whether the Foreign Corrupt Practices Act’s (“FCPA”) provisions on “routine government action” permit us to distinguish between appropriate and inappropriate facilitative payments, (3) whether non-governmental organizations (“NGOs”) should supplant the role of governments in fighting corruption, and (4) whether corporate principles can have an impact in the fight against corruption. Our focus is primarily on the latter question, but encompasses all of them. Implicit in Salbu’s list is the question of whether a single magic bullet can be identified as a likely solution to the problem of corruption, e.g. whether NGOs should “supplant” governmental action. Instead of phrasing the question in terms of either-or, we would ask: What is the appropriate mix of strategies to most effectively combat corruption? The choice is not choosing between strategies, but finding the right mix of strategies to capitalize on their synergies and most effectively combat corruption from all sides. We argue that a portfolio of strategies will be the most efficient route to conquering corruption. Over time, new strategies

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may emerge and the relative importance of strategies will shift within an anti-corruption portfolio.

Among the current portfolio of strategies, we believe that corporate action, both individually and on a coordinated basis, can have a significant impact on the levels of corruption in international business. In addition, such an approach can provide a way out of the "routine government action" problem Salbu identifies. Within the realm of possible corporate strategies we have proposed a Sullivan-like principles approach which we believe can constitute an important weapon in the overall anti-corruption portfolio. Salbu critiques our approach and we respond.

Finally, Salbu's first question on the ethics of paying bribes raises further questions about the normative foundations of the battle against corruption. We argue that a sufficient normative foundation is essential for success in fighting corruption, and we offer some thoughts on the nature of adequate normative justification.

II. A PORTFOLIO APPROACH TO COMBATING CORRUPTION

None of the individual strategies discussed by Salbu—the FCPA, the OECD convention, NGOs, corporate principles and programs—by themselves will be sufficient to eliminate corruption. Each has significant limitations. Many have questioned the overall effectiveness of the FCPA.¹ The government's enforcement of the FCPA has been spotty, and its deterrence effect is undocumented, if not undocumentable. As a stand-alone strategy of even a major economic power it is not likely to overcome the coordination problems inherent in fighting corruption. Firms from other nations will pay the bribes and disadvantage those hamstrung by the FCPA. With respect to the OECD convention, these same criticisms apply but in a broader context. For example, there is the real issue of the effectiveness of a Western legalistic approach across many different cultures.² Likewise, a corporate principles approach by itself will likely not work.³

There is a growing consensus that what is needed is a portfolio approach. An effective anti-corruption system requires complementary strate-

¹ See Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229 (1997).

² See Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419 (1999); see also Bryan W. Husted, *Wealth, Culture, and Corruption*, 30 J. INT'L BUS. STUDIES 339, 355 (1999) (arguing that a FCPA-type approach may work well in countries characterized by masculinity and low uncertainty avoidance, but may not work in countries characterized by high uncertainty avoidance).

³ See Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 283-285 (1999). Nichols argues that codes of conduct are by themselves not sufficient for two reasons. First, bribery is a crime not limited to corporations, and such codes obviously will only reach corporations. Second, the strong incentives to commit bribery may overwhelm a corporation's voluntary code.

strategies used simultaneously to attack corruption from all angles. Peter Eigan, Chairman of Transparency International, argues for a tripartite attack involving the government, the private sector, and civil society.⁴ Such an attack requires simultaneous use of criminal laws, the removal of tax deductibility for bribes, reforms in government procurement policies that require greater transparency, a strong free press, private sector reforms on accounting and auditing practices, and other strategies.⁵

The International Chambers of Commerce ("ICC") argues that the battle against corruption is analogous to the idea of a "tipping point" in the field of public health.⁶ Efforts to combat a disease may make little progress for a long period of time until suddenly the synergy of various efforts materializes, and the disease is brought under control rapidly. Likewise, in the battle against corruption, the goal is to find the right mix of anti-corruption strategies that will bring us to the "tipping point," after which the decline of corruption is accelerated.

A portfolio approach requires modification of Salbu's questions. Salbu explicitly focuses on an either-or single bullet approach in his question concerning whether NGOs should supplant government action. An either-or tone is implicit in other sections of his article, e.g. the limitations of government action versus corporate principles. Our approach necessarily recognizes the limits of each individual strategy within the portfolio while seeking to understand their potential synergies and relative roles. In the next section we discuss the role of corporate action within a portfolio of anti-corruption strategies.

III. THE ROLE OF CORPORATE ACTION WITHIN A PORTFOLIO OF ANTI-CORRUPTION STRATEGIES

From our perspective, one of the most important questions that Salbu raises is the role of corporate action in battling corruption. Salbu asks "can corporate *principles* [emphasis added] effectively battle corruption?"⁷ However, his analysis goes well beyond such a limited focus. Referencing the work of Timothy Fort, Salbu discusses whether corporations can serve as mediating institutions in the battle against global corruption.⁸ Salbu's in-

⁴ See Sahr J. Kpundeh & Irene Hors, *Overview to CORRUPTION AND INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES* (Sahr J. Kpundeh & Irene Hors eds., 1998), available at <http://magnet.undp.org/Docs/efa/corruption.htm> (Apr. 1998).

⁵ See Fritz Heimann, *The Synergy between Corporate Codes and Government Reforms, in FIGHTING BRIBERY: A CORPORATE PRACTICES MANUAL 86-90* (Francois Vincke et al. eds., 1999).

⁶ See *id.* at 87.

⁷ See Steven R. Salbu, *Transnational Bribery: The Big Questions*, 21 NW. J. INT'L L. & BUS. CITE PAGE (2001).

⁸ *Id.* at CITE PAGE.

attention is to pose questions, not answer them, so he does not suggest a definitive resolution to this question.

We, however, do have a strong view on this issue. We believe that any approach that fails to include one of the direct parties to a bribery transaction is doomed to fall short. Although outsiders may be able to provide incentives and threats seeking to influence the parties directly involved in bribes, any purported solution must specifically incorporate the interests and operating realities of the bribe payers and bribe takers in order to have a chance of success. Furthermore, if the parties themselves are committed to change, it is far more likely to occur. Otherwise, adversarial resistance will overwhelm efforts at reform. It therefore follows that corporate action should be considered a necessary component of any portfolio of anti-corruption strategies as business firms constitute the primary group of bribe payers (i.e., the supply side of bribery).⁹

Salbu discusses the arguments of Fort and Noone that size may limit “the ability of institutions to develop and foster community values.”¹⁰ If this claim is correct, it holds dramatic implications for the battle against corruption. Large firms are often involved in bribery scandals. The litany of famous cases over the years has included such names as IBM,¹¹ Lockheed,¹² and Honda.¹³ They are in the front lines in confronting bribery; and if they are “naturally” incapable of serving as mediating institutions merely because of their size, there is probably little hope for a solution to the phenomenon.

We are not convinced that size inherently limits the role of large firms. Instead, we believe that such firms appear to be well equipped to confront the issue of bribery. Compared to smaller firms, they have more resources internally, particularly in the critical areas of internal audit and human resources. They should also have greater access to external professional support. Most of the Big Five Auditing firms—PricewaterhouseCoopers, KPMG, Ernst & Young, Arthur Andersen, Deloitte & Touche—provide consulting services to help firms deal with integrity issues, particularly the control of illicit payments. The Big Five Auditing firms’ clients are typically Fortune 500 firms. Finally, the very visibility of large firms puts them in the spotlight. IBM suffered considerable embarrassment when they be-

⁹ Salbu further inquires whether non-governmental organizations might supplant governments in the battle against corruption. Government agents are also direct parties to bribing transactions and must be directly involved in any solutions. NGOs alone cannot realistically be expected to control the complex phenomenon of bribery.

¹⁰ See *id.* at PG CITE n.88.

¹¹ See Calvin Sims, *In Argentine Bribery Scandal, an Ex-Executive of I.B.M. Says He Is a Scapegoat*, N.Y. TIMES, Nov. 5, 1996, at D6.

¹² See *Lockheed Pleads Guilty To Bribery Conspiracy; Firm Agrees to Pay \$24.8 Million in Fines*, WASHINGTON POST, Jan. 28, 1995, at C1.

¹³ See Thomas W. Dunfee et al., *Social Contracts and Marketing Ethics*, 63 J. MARKETING 14 (1999).

came enmeshed in a bribery scandal in Argentina. On the positive side, when large firms adopt successful programs, they are transparent to other firms and provide a leadership example for others to follow. Overall, this leads to the conclusion that any successful portfolio of anti-corruption strategies must include the participation of large firms. The following section identifies the potential of corporate actions such as codes of conduct relating to bribery and compliance programs and discusses their potential ability to play a critical role in the fight against corruption.

A. The Role of Corporate Codes

The OECD recently conducted a study of how corporate codes of conduct are used to combat bribery.¹⁴ They examined 246 codes issued by individual firms and business associations.¹⁵ Twenty-three percent of these codes directly address bribery and corruption.¹⁶ This made it the fourth most commonly cited issue, behind labor relations, the environment, and consumer protection. Of the codes addressing corruption, one-third contain only a general prohibition on bribery.¹⁷ Others provide very detailed descriptions of what employees are allowed to do. The aspects of bribery covered also vary significantly. Some codes deal only with bribery to public officials, while others encompass bribery of private employees. Some codes prohibit the giving of bribes but remain silent on the issue of receiving bribes.¹⁸ The authors of the study conclude that there is currently little consensus among corporations on how to define bribery and what to include in their codes of conduct to direct the behavior of employees.¹⁹

Salbu criticizes the use of overly detailed codes of conduct regarding ethical issues lacking universal consensus. Although Salbu appropriately recognizes the existence of a general consensus that bribery is wrong, he finds less consensus on what actually constitutes a bribe, especially across cultural settings. Salbu argues that corporate codes which rigidly define bribery for multinational corporations may appear to "belittle the idea of ethics" or become yet another example of moral imperialism similar to Salbu's view of the FCPA.²⁰ We agree that any attempt to control bribery must be sensitive to local traditions. Likewise, any attempt to structure corporate principles on bribery must allow for flexibility at the level of ac-

¹⁴ See Kathryn Gorden & Maiko Miyake, *Instilling an Anti-Bribery Corporate Culture*, in OECD, NO LONGER BUSINESS AS USUAL: FIGHTING BRIBERY AND CORRUPTION 185-198 (2000).

¹⁵ See *id.* at 186 (stating that a few of the codes in their sample were from NGOs and international organizations).

¹⁶ See *id.* at 187.

¹⁷ See *id.*

¹⁸ See *id.* at 187-89.

¹⁹ See *id.* at 187.

²⁰ Salbu, *supra* note 7, at PG CITE.

tual practice. We cannot expect firms facing diverse market and cultural environments to follow a unified approach. On the other hand, firms need to be precise and clear in promulgating their own core standards to employees.

We advocate that firms delineate precise boundaries for prohibited conduct within the context of their operations.²¹ We realize that philosophers and lawyers may easily quibble over the definitions used, and readily point out hypotheticals likely to produce counter-intuitive results. However, that is not an appropriate test for a corporate definition of bribery. Instead, the question should be whether the definition is capable of producing adequate guidance. The ultimate answer lies in the realm of experience as firms learn whether particular definitions are successful in guiding their employees through corrupt environments.

The benefits of a clearly articulated corporate definition are two-fold. First, a clear definition provides a basis for workplace rewards and sanctions. Employees know what is expected of them, while managers have a basis for discipline and giving raises. Second, written policies made available for review by other firms and interested stakeholders further the dialogue on what constitutes bribery. Over time this should allow a consensus to emerge that takes into account cultural and industry differences.

This section takes a closer look at how this process may evolve by examining current efforts by multinational corporations to define bribery, especially in the gray areas of corruption, which today include facilitation payments, small gifts, entertainment, and travel expenses.

Facilitation Payments. One of the gray areas in bribery is the issue of facilitation payments. These are payments made "to induce public officials to perform their functions, such as issuing licenses or permits."²² These payments are permitted under both the FCPA²³ and the OECD convention.²⁴

²¹ An example of one firm's attempt to define bribery comes from ENI, the Italian energy company, which defines bribery as follows: "accepting money, favors or benefits from persons or firms that have, or intend to have, business relationships with ENI ... to pay or offer, directly or indirectly, money and material benefits of any kind to third parties, whether public officers or private individuals, in order to influence or remunerate the actions of their office. Courtesy objects, such as small presents or hospitality gifts, are allowed only when the value of such objects is small and does not compromise the integrity and reputation of the partners and cannot be construed by an impartial observer as aimed at obtaining undue advantages." Eni, *Code of Practice, Business Conduct*, at <http://www.eni.it/english/panoram/codice/comportamento.html>.

²² See *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, in CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 12 (Apr. 8, 1998) [hereinafter *Commentaries*].

²³ For Salbu's full definition of what is allowable under the FCPA, see Salbu, *supra* note 7, at PAGE CITE n.76.

Salbu identifies the exception for routine government action in the FCPA as a major problem area, arguing that the definition provides firms with little guidance. From an ethical analysis, it may be hard to distinguish between a small payment to a public official to obtain a business permit and a large payment to a public official to obtain a government contract.²⁵ Some may even argue from a "broken windows hypothesis" perspective²⁶, that the law should target such facilitation payments as aggressively as higher-level corruption. Under this hypothesis, the ability of lower level officials to get away with corrupt behavior would encourage higher level officials to believe that they can get away with similar behavior, though at a significantly higher monetary amount and at significantly greater harm to the public. Further, the proliferation of corruption at lower levels of government progresses on to higher levels of government, as corrupt officials are promoted through the system. As a practical matter, however, the OECD recognized that it would be difficult to get all countries to agree to criminalize facilitation payments, or even if they were criminalized, to enforce the law.²⁷

This, then, is an area in which corporate action needs to complement governmental response. Through their codes of conduct, firms seek to provide employees with guidance on what is appropriate behavior. One corporate code states:

[E]ven though such payments may possibly be expected in accordance with area customs and legal interpretations, and would confer no improper business advantage on the company, every effort should be made to avoid them . . . In the event any such payments are considered necessary, it is imperative that they be correctly recorded and accounted for on the company's books.²⁸

An industry-wide norm of accurately accounting for such payments and disclosing them may be one effective means of combating bribery. While this norm is not a prohibition on facilitation payments, it allows other corporations, as well as the local government, press, and citizens, to gauge

²⁴ See *Commentaries, supra* note 22. The OECD recognizes that such payments may be illegal under the laws of the host country, but questions the appropriateness of criminalizing such payments by outside countries.

²⁵ See Heimann, *supra* note 5, at 27. Kaufmann argues that "instead of corruption being the grease for the squeaky wheels of a rigid administration, it becomes the fuel for excessive and discretionary regulations." Daniel Kaufmann, *Revisiting Anti-Corruption Strategies: Tilt Towards Incentive-Driven Approaches?, Corruption and Integrity Improvement Initiatives in Developing Countries*, UNDP-OECD Development Centre, available at <http://magnet.undp.org/Docs/efa/corruption.htm#4> (Apr. 1998). (As a result, in the long-run, making these facilitation payments will actually lead to more time dealing with bureaucratic officials, not less).

²⁶ See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, 249 THE ATLANTIC MONTHLY 29 (Mar. 1982) (where the authors originally develop the Broken Windows hypothesis in the area of policing).

²⁷ See *Commentaries, supra* note 22.

²⁸ Heimann, *supra* note 25, at 30.

the level of corruption in the region and potentially spur on necessary reforms.

Business Courtesies. Another category of potentially corrupt payments where consensus appears to be lacking is gift giving, entertainment, and travel expenses. This is an area that causes significant problems for regulators and business persons—both business persons with good intentions and those attempting to pay bribes under the guise of an innocent gift. Salbu criticizes the ICC's guidelines on distinguishing between bribes and gifts. He suggests that such vague guidelines could actually do more harm than good. He argues, and we concur, that the ones most likely to work are those that are carefully considered.

The OECD study on corporate codes found that multinational companies use a variety of definitions to attempt to define allowable gifts and entertainment expenses. These include, "not excessive in value," "within the business norm," "not seen as an inducement of business," "does not violate the law," and "does not damage corporate image."²⁹ Approximately one-third of codes that deal with bribery require employees to report giving or accepting gifts to their superiors, but this reporting is limited to those gifts that exceed the "business norm."³⁰

Our own review of corporate codes finds that some firms are going beyond these general definitions. Boeing Corporation's code of conduct provides an extensive discussion concerning what Boeing employees may appropriately give to federal regulators. Boeing generally instructs its employees to know and abide by the laws specifying what federal employees may legally accept as a business courtesy. Even if a regulatory agent may lawfully accept a business courtesy, however, Boeing policy may prohibit such a gift. One example of imposing stricter standards than federal regulations is:

Modest items of food and refreshments, such as coffee and doughnuts, may be offered to federal executive branch employees in connection with business activities, provided such refreshments are not part of a meal. Soft drinks and cookies can replace coffee and doughnuts, but other "light refreshments," such as sandwiches, may not be offered to federal executive branch employees.³¹

How much progress will these detailed codes provide in reaching an international consensus on what is an allowable gift? In a previous article,

²⁹ Gordon & Miyake, *supra* note 14, at 189.

³⁰ *See id.*

³¹ *Offering Business Courtesies*, Boeing Corporation Ethical Business Conduct Guidelines, available at <http://www.boeing.com/companyoffices/aboutus/ethics/pro6.htm> (Aug. 21, 1998) (Boeing also provides similarly detailed provisions on what types of courtesies an employee may accept); *see also Acceptance of Business Courtesies*, Boeing Corporation Ethical Business Conduct Guidelines, available at <http://www.boeing.com/companofices/aboutus/ethics/pro8.htm> (Aug. 21, 1998); Lockheed Martin, *Setting the Standard*, available at <http://www.lockheedmartin.com/exeth/html/code/print.htm> (July 1999).

Salbu argues that the subtle differences between what distinguishes a bribe and a gift from culture to culture make it implausible that a uniform set of rules can be developed.³² We are also skeptical of any claim that one set of rules can be developed to define bribery for all contexts and cultural settings. The process we are describing is not simply a matter of translating "coffee and doughnuts" to the local snack foods of the host country. Instead, these codes should be adapted to the local traditions. Detailed codes of conduct can provide a guide to local traditions and best practices for that industry and/or cultural setting. Firms operating in the US and dealing with federal regulators may look to Boeing's code as a guide for their own behavior in that environment. This process makes explicit perceived local norms. These provide mechanisms to develop an understanding of when local traditions are being followed and when they are being abused to improperly to gain favoritism.

For example, in Korea, it is common to give *ttokkap* ("rice cake expenses") around the major holidays.³³ This is a centuries-old tradition that developed out of notions of hospitality and gratitude. In several instances—some involving former Korean presidents and chaebol heads—the Korean courts have found that the giving of *ttokkap* exceeded socially acceptable limits and amounted to bribery.³⁴ Precisely when *ttokkap* stops being a gift and becomes a bribe is unclear, however. Even under the Korean legal system it is unclear when *ttokkap* exceeds the realm of traditional gift giving and enters the realm of bribery.³⁵ In one case, a presidential secretary was convicted based on the receipt of \$ 776,000 in bribes. In the case against him, the police excluded from consideration over \$ 2.6 million in payments made to the secretary by various individuals because they were considered *ttokkap*.³⁶

The appropriateness of gifts in certain contexts, such as with *ttokkap*, may be detailed in corporate codes with the assistance of other corporations based on their experiences, local governments, NGOs, and others. As these codes evolve over time, they may produce consensus standards in a manner

³² See Steven R. Salbu, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?: Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 233 (1999). Salbu argues "there are subtleties in this area that make it difficult to erect clear, uniform boundaries. The lines between acceptable and unacceptable behavior are drawn differently in different settings. Moreover, in the context of cultural pluralism that continues to pervade the global village, convergence on a single set of acceptable rules is highly implausible." *Id.*

³³ See Joongi Kim & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 PAC. RIM L. & POL'Y J. 549, 561-562 (1997).

³⁴ See *id.* at 567-71.

³⁵ See *id.*

³⁶ See *id.* at 569-70.

analogous to the common law. Through this evolution, rules of conduct may develop to guide the behavior of all corporations operating in a certain country, and may provide guidance that is transferable to other countries as well. In addition, these rules or best practices may be supported by NGOs. In that case, a general consensus on appropriate conduct may develop in the same way as is currently happening with norms of appropriate behavior regarding business practices affecting human rights and the physical environment.³⁷

The fact that corporate codes currently lack consensus on how to deal with issues of bribery and corruption demonstrates their potential rather than a major failing. The direction given in these codes reflects the current understanding of what constitutes a bribe in a particular context. The alternative top-down approach to defining bribery is not likely to work. The necessary experience and knowledge does not exist to adequately draft a universal code to apply to multinational corporations wherever they do business in the world. Firms experimenting with the best way to confront bribery allow for the appropriate evolution of anti-bribery norms for different contexts. Obviously, the statement that giving regulators doughnuts is permissible while giving them sandwiches is considered bribery, is not a candidate for a universal rule applicable throughout the world. This rule does, however, provide guidance to other U.S. firms and to multinationals selling to the U.S. government.

In this manner, codes of conduct provide a necessary knowledge transfer mechanism. In determining how to conduct business in South Africa during the early 1980s, many CEOs stated that the disclosure of information under the Sullivan Principles allowed them to learn from the experience of other companies in working towards desegregation and equal opportunity for all.³⁸ In a similar manner, companies need to share information on combating bribery to allow the best practices to emerge, whether these are universal practices (as many accounting practices may be), or practices specific to a region, culture, or industry.

Corporate Compliance Programs. Success at the corporate level, however, must go beyond definitions and formal statements or codes. Programs that simply focus on compliance with external laws are not likely to have an energizing effect on corporate employees. Merely adopting a strong compliance program has many limitations.³⁹ Values imposed on the firm from the outside will not necessarily be seen by members of the firm as legitimate corporate values. Pulling in values from outside the firm could even create an adversarial attitude towards those values; “how far

³⁷ See Gordon & Miyake, *supra* note 14, at 186.

³⁸ See David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach: The C² Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593 (2000).

³⁹ See Lynn Sharpe Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.-Apr. 1994, at 106.

can we go without technically violating the law" may prevail as an attitude over "how can we implement an important organizational value?" Lawyers rather than operating or senior staff management may be in the lead. This may also give credence to adversarial attitudes toward the rules.

In contrast, the ideal program would be an anti-corruption program based on a firm culture of integrity.⁴⁰ Here the focus is on furtherance of core corporate values that are intolerant of corruption. This broader approach involves senior management, reaches to all employees, is consistent with workplace rules and expectations, and is much more likely to be internalized by employees as a core value they personally respect. It is widely believed that programs with these characteristics are far more likely to be successful in eliminating corrupt actions.

Existing corporate anti-corruption programs also reveal significant variations among firms. A recent study of 151 companies from around the world⁴¹ found that 78 percent of the companies claiming to have a well-developed anti-corruption program distributed a statement of their program to all employees, while 32 percent distributed it to their joint venture partners, 29 percent to vendors and suppliers, and 29 percent posted their statement on their website.⁴² The content of these statements also varied. Less than half of these codes' anti-corruption statements clearly acknowledged that adherence to the policy may result in lost business.⁴³ Less than one-half of the companies provided training sessions for all employees,⁴⁴ and only one-quarter of the companies provided employees with case study examples of common ethical dilemmas in international business.⁴⁵ There was also variation concerning which company officers are involved in the development, implementation, and monitoring stages of the program.⁴⁶

Ultimately, the key is the role that individual firms can play in a process of experimentation, benchmarking and peer influence. When firms, each in their own context and environment, try different solutions, superior strategies should emerge over time that will help lead the way to the tipping point against corruption. It is in the development of such programs that we expect to see the most significant benefit in the short-term under the C2 Principles. This is an area where standardization of best practices is likely

⁴⁰ See Ronald E. Berenbeim, *Company Programs for Resisting Corrupt Practices: A Global Study, Conference Board Report # 1279-00-RR (The Conference Board), (2000)*; see also Royal Dutch/Shell Group, *Dealing with Bribery & Corruption: A Management Primer*, (1999), at <http://www.shell.com/royal-en/content/0,5028,25469-50972,00.html> (discussing the efforts at Shell to establish a culture of business integrity).

⁴¹ Berenbeim, *supra* note 40. Approximately one-third of the responding companies were from Europe, one-quarter from the United States, and one-quarter from Asia.

⁴² See *id.* at 24.

⁴³ See *id.* at 25.

⁴⁴ See *id.* at 27.

⁴⁵ See *id.* at 25.

⁴⁶ See *id.* at 22.

to occur most successfully, and NGOs may play a significant role (and some already are). We turn to these issues in the next two subsections.

B. The Role of Third Party Initiators

Within the portfolio of anti-corruption strategies there is considerable room for joint action and cross support among complementary institutions and strategies. Transparency International ("TI") has had a perceptible influence on the perception of corruption. The annual Corruption Perception Index ("CPI") and the more recent Bribe Payers Index ("BPI") have helped establish corruption and bribery as an issue of growing importance in the global economy.⁴⁷ TI also provides significant support to help governments understand the best ways to control corruption in their environment. Attitudes about bribery have changed at the World Bank, the IMF and at many other centers of influence. Both the World Bank and the IMF have taken measures to prevent corruption in the programs they finance.⁴⁸

Organizations such as these can serve as key initiators of corporate action. Heimann argues that the "World Bank could do more than anyone else to accelerate the widespread adoption of corporate codes of conduct."⁴⁹ The World Bank could require any firm bidding on a project they finance to have an acceptable code.⁵⁰ In developing effective codes, the Conference Board and the International Chamber of Commerce are working towards establishing best practices for corporations.⁵¹ They seek to provide practical advice for corporate managers to implement successful compliance programs and draft effective codes of conduct.

C. The Role of the C2 Principles

We now turn to our specific proposal, a Sullivan-like Principles approach to controlling the supply-side of bribery. The Combating Corruption Principles (or "C2 Principles") establish certain practices and procedures for firms to implement to combat bribery and require these firms to publicly disclose their efforts in this area. As with any anti-corruption strategy, however, the Principles will have little lasting impact without the support of government and civil society initiatives, as well as other private sector reforms.⁵²

What is the role of the C2 Principles within a portfolio of anti-corruption strategies? A successful anti-corruption system requires corpo-

⁴⁷ For a discussion of these indexes, see generally Hess & Dunfee, *supra* note 38.

⁴⁸ *See id.*

⁴⁹ Heimann, *supra* note 5, at 89.

⁵⁰ *See id.*

⁵¹ *See* Berebeim, *supra* note 40; Vincke et al., *supra* note 5.

⁵² The Caux Roundtable, an international organization of more than 250 business leaders from over twenty-five countries, has endorsed the C² principles as a recommended means of implementing the anti-bribery provision of the Caux Principles for Business Conduct. *See* Hess & Dunfee, *supra* note 38.

rate action, government action, and the involvement of civil society. In most developing countries, however, the political and economic institutional support for an effective government program may be severely lacking.⁵³ In such situations, the role of the private sector may be invaluable. The OECD Development Centre recently organized a conference to investigate the potential of the private sector to combat corruption in developing countries.⁵⁴ The conference participants concluded that multinational corporations can be essential players in establishing the necessary political coalitions to support anti-corruption efforts, can assist in educating the public on corruption, can compensate for the lack of resources available to NGOs, and can reduce the need for public expenditures to battle corruption through their own anti-corruption efforts.⁵⁵

A corporate principles approach can assist the private sector in many of these areas. For example, the more firms operating in a certain country that have adopted the C2 Principles, the stronger the political support for reform. The C2 Principles can also work to increase awareness about corruption and its harms.

We propose an even broader role for the C2 Principles. The implementation of these principles can play a significant role in the generation of norms of appropriate conduct surrounding potentially corrupt behavior, both among multinational firms and within host countries. Principle Two requires a corporation "to establish a clearly articulated written policy prohibiting any of the firm's employees from paying or receiving bribes or 'kickbacks.'" Although this allows flexibility for firms to define "bribes" and "kickbacks," it also requires some action on the part of the firm. It is not satisfactory to leave the issue of defining bribery to individual employees exercised on an *ad hoc* basis. A key part of Principle Two is the development of a "clearly articulated written policy." Establishing explicit policies and publishing them for review by local governments, other corporations, and other stakeholders, allows a full conversation to develop on the appropriateness of certain actions within a particular context. Ultimately, a consensus should emerge.

The C2 Principles also allow for anti-corruption norms to spread throughout distribution channels. The Principles emphasize that firms require suppliers and distributors to commit to the core firm's anti-corruption policies. The Conference Board study revealed that only 29% of their featured "program" companies and 11% of other companies distributed their

⁵³ See Irene Hors, *Dealing with Corruption in Developing Countries* 161, OECD, NO LONGER BUSINESS AS USUAL: FIGHTING BRIBERY AND CORRUPTION 159-165 (2000).

⁵⁴ See OECD Development Centre, *Fighting Corruption in Developing Countries and Emerging Economies: The Role of the Private Sector, Conference Proceedings, Washington DC*, (Feb. 22-23, 1999), available at http://www.dec.org/pdf_docs/PNACJ721.pdf.

⁵⁵ See Hors, *supra* note 53, at 162.

anti-corruption statements to vendors and suppliers.⁵⁶ Only 33% of program companies and 13% of other companies even had a statement of supplier status with regard to the core firm's anti-corruption policy.⁵⁷ Strategies such as wide-spread adoption of the C2 Principles should improve performance in this critical area.

IV. THE ROLE OF GOVERNMENTAL ACTION WITHIN A PORTFOLIO OF ANTI-CORRUPTION STRATEGIES

Governments are clearly heavily involved in the fight against corruption. Multinational organizations such as the OECD, the Organization of American States, the Council of Europe, and the United Nations, have all taken steps to reduce corruption within their member nations. We would like to focus on the level of local government action, and especially Hong Kong as an example of effective governmental action within the overall portfolio of anti-corruption strategies.

The ICAC and the Fight Against Corruption in Hong Kong. Many commentators have commended the anti-corruption system in Hong Kong, which over a period of years has transformed Hong Kong from one of the most corrupt places in Asia to one of the cleanest.⁵⁸ While a mix of anti-corruption strategies must of course be adapted to the local social environment,⁵⁹ a closer look at the efforts in Hong Kong warrants further attention as it is likely to provide a model that may be used in other parts of the world.

Hong Kong's anti-corruption strategy consisted of several characteristics that led to its success.⁶⁰ First, and most importantly, Hong Kong established an independent agency—the Independent Commission Against Corruption (“ICAC”)—that operated separately from the police.⁶¹ Second, they targeted all forms of corruption, including high-level and low-level corruption, private-public corruption, and private-private corruption. Third, the program required active and constant involvement of the government, business, and civil society.⁶²

⁵⁶ See Berenbeim, *supra* note 40, at 24.

⁵⁷ See *id.*

⁵⁸ See Heimann, *supra* note 5, at 87; Hors, *supra* note 53, at 160-61.

⁵⁹ See Alan Doig & Stephen Riley, *Corruption and Anti-Corruption Strategies: Issues and Case Studies from Developing Countries*, in CORRUPTION AND INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES (Sahr Kpundeh & Irene Hors eds., 1998), available at <http://magnet.undp.org/Docs/efa/corruption.htm> (Apr. 1998).

⁶⁰ See Hors, *supra* note 53, at 160-161.

⁶¹ The ICAC was established as a new agency because the traditional institution for combating bribery, the police, was extremely corrupt. See Michael H. Weihan, *Hong Kong: The Airport Core Programme and the Absence of Corruption*, *Transparency International Working Paper* (1999), available at <http://www.transparency.de> (on file with authors).

⁶² See Hors, *supra* note 53, at 160.

The ICAC was the most unique feature of Hong Kong's anti-corruption system. Established in 1974,⁶³ the ICAC utilized a three-pronged attack.⁶⁴ First, the Operations Department investigated and prosecuted alleged instances of corruption. Second, the Corruption Prevention Department analyzed the practices and procedures of governmental bodies and provided recommendations on how to improve their anti-corruption measures. Third, the Community Relations Department worked to educate the public on corruption and its harms.⁶⁵

Is this approach transferable to other settings? Other countries have also utilized the anti-corruption agency approach to some degree, including Singapore, Malaysia, Botswana, Malawi, South Africa, and Australia, some with much success.⁶⁶ The success in Hong Kong has been exceptional, however, which may be due in part to its unique situation. For example, the ICAC had a significant amount of human⁶⁷ and financial resources,⁶⁸ political support,⁶⁹ and Hong Kong was unique geographically as a tightly contained city-state. The success of this model is currently being tested. In July 2000, Bertrand de Speville, the former head of the ICAC, enacted a twelve month contract to establish anti-corruption reforms and education programs in Indonesia⁷⁰—a country that ranked 96th out of 99 countries in the 1999 Corruption Perception Index published by Transparency International.⁷¹

Corporate action is highly compatible with the anti-corruption approach in Hong Kong. The ICAC developed a system that attempted to work with all sectors of society. For example, the ICAC encouraged members of society to report instances of corruption.⁷² Most recently, the ICAC

⁶³ See Max J. Skidmore, *Promise and Peril in Combating Corruption: Hong Kong's ICAC*, 547 ANNALS ACAD. POL. & SOC. SCI. 118, 122 (1996).

⁶⁴ See Weihan, *supra* note 61.

⁶⁵ The programs range from educating elementary-age school children to developing training programs for corporations. See Weihan, *supra* note 61. A goal of this prong of the attack is to convince people that corruption and bribery is not a customary practice that is inevitable. See Fanny Wong, *Back to the Future in the War on Graft*, S. CHINA MORNING POST, Nov. 29, 1995, at 18. In addition, the ICAC seeks to encourage people to report instances of corruption. See *id.*

⁶⁶ See Skidmore, *supra* note 63, at 122; Jeremy Pope, *The Need for, and Role of, an Independent Anti-Corruption Agency*, Transparency International Working Paper (1999), available at http://www.transparency.de/documents/work-papers/jpope_iaca.html.

⁶⁷ The ICAC has a professional staff of approximately 1350 persons. See Weihan, *supra* note 61.

⁶⁸ See Hors, *supra* note 53, at 161.

⁶⁹ See *id.*

⁷⁰ See Kevin Sinclair, *Indonesian Graft Task Will Test de Speville to the Limit*, S. CHINA MORNING POST, July 24, 2000, at 17.

⁷¹ See Transparency International, *Press Release: New Poll Shows Many Leading Exporters Using Bribes* (Oct. 26, 1999), available at http://www.transparency.de/documents/cpi/cpi-bpi_press-release.html (last visited Feb. 2, 2001).

⁷² See Wong, *supra* note 65, at 18.

and the Securities and Futures Commission in Hong Kong developed a code of conduct to deal with issues such as gifts and commissions in the financial industry.⁷³ These efforts support each other and provide for the most comprehensive attack on corruption.⁷⁴

V. THE NEED FOR AN ETHICAL FOUNDATION FOR ANTI-CORRUPTION STRATEGIES

Some corporate approaches to anti-corruption programs appear to be purely instrumental and are not based upon any specified ethical foundation. This raises the issue of whether a normative grounding is essential for any type of anti-corruption strategy. Is such a foundation merely extraneous window-dressing or does it provide essential roots necessary to withstand winds of controversy? Salbu recognizes⁷⁵ that if “moral distinctions between corruption and grease become sufficiently blurred,” then the very legitimacy of the grease payments exemption may decline. Thus, normative foundations are important. More broadly, Sethi and Williams argue that a major failing of the Sullivan anti-apartheid principles was the lack of a clear normative foundation.⁷⁶ Lacking such a foundation, compromises and instrumental decisions weakened the principles. Ultimately, they were renounced by the Rev. Leon Sullivan himself.⁷⁷ Sethi and Williams conclude that “[a]ny set of principles or framework for corporate conduct must have a cogent philosophy, i.e. *raison d’etre*, that transcends the immediate and direct interests of the current stakeholders.”⁷⁸ We agree.

The alternative to an approach based on a normative foundation is either one with no foundation whatsoever, or, more likely, one based on law. The participants in the Conference Board study felt that a legalistic compliance model was not likely to be an effective model for a corporate anti-corruption program.⁷⁹ These companies believed that a connection to the organization’s leaders and core values was essential.

⁷³ See Enoch Yiu, *Guide Aims to Uphold Finance Industry Ethics*, S. CHINA MORNING POST, November 3, 1999, at 1. Full text of the code is available on Transparency International’s webpage at <http://www.transparency.de/documents/source-book/c/cvK/k5.html>.

⁷⁴ See Heimann, *supra* note 5, at 90 (arguing that actions in the public sector and private sector can mutually reinforce each other in bringing us to the tipping point in the battle against corruption).

⁷⁵ Salbu, *supra* note 7.

⁷⁶ S. Prakash Sethi and Oliver F. Williams, *Creating and Implementing Global Codes of Conduct: An Assessment of the Sullivan Principles as a Role Model for Developing International Codes of Conduct – Lessons Learned and Unlearned*, 105 BUS. & SOC. REV. 169 (2000).

⁷⁷ While a debate on the effectiveness of the Sullivan Principles continues, they did appear to provide some tangible benefits. See generally Hess & Dunfee, *supra* note 38.

⁷⁸ Sethi & Williams, *supra* note 76, at 184.

⁷⁹ See Berenbeim, *supra* note 40, at 7.

But is a normative foundation for a corporate anti-corruption program actually possible? In his initial section, Salbu asks whether it can be ethical to pay a bribe in some situations. In the process, he implicitly discusses the identification of normative foundations against bribery. Salbu explicitly discusses deontological and teleological approaches. His analysis implies that no existing normative framework is sufficient to build an intuitively correct case for a pragmatic strategy against corruption. He goes on to question whether or not the law should recognize what he perceives as an ambiguous status for bribery under the standard ethical theories. We disagree with several points of his analysis.

Salbu's analysis of deontological reasoning fails to adequately treat the issue of conflicting duties. Moreover, his primary example is unrealistic from a business perspective and quite remote from the typical commercial bribes at issue in global business. The payment of a bribe to get donated food through the lines in a civil war is not a run of the mill business situation.⁸⁰ Furthermore, his example is of a category that might be described as a Schindler's bribe. It presents an extremis situation in which there are two or more major conflicting duties. The example is designed so that compelling humanitarian considerations weigh against a policy of not paying bribes; one either pays a bribe or allows a gross violation of human rights to occur.

From Salbu's perspective, deontology has no answer to the issue of conflicting duties. Many deontological philosophers, however, have recognized that duties may be of different classes with higher level duties trumping lower level duties. Kant distinguished between perfect and imperfect duties. Ross discussed *prima facie* duties. Thus, many rights or duty-based approaches anticipate Salbu's criticisms. On the other hand, we share his skepticism as deontological approaches often break down when one starts parsing the respective status of duties.⁸¹

Salbu also uses a teleological approach. Act utilitarian approaches are notoriously difficult to apply. Furthermore, they may be subject to a cognitive bias. The self-serving fairness bias is well known. It involves a subconscious tendency to prefer one's own interests in situations involving extensive ambiguity. For example, a manager who may personally benefit from paying a bribe may have a tendency to assume facts about likely con-

⁸⁰ A more realistic business case might involve a firm that does business in China and has the opportunity to pay a bribe to protect a dissident employee from the Chinese criminal system.

⁸¹ See Thomas Donaldson and Thomas W. Dunfee, *Towards a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 *ACAD. MGMT. REV.* 252 (1994); see also Dunfee et al., *supra* note 13.

sequences supporting his own personal gain.⁸² In addition, these consequences may often be impossible to predict with any certainty regardless of a bias. Thus, there are circumstances in which both teleological and deontological analyses may produce uncertain outcomes concerning specific acts of bribery.

Salbu is also correct in noting that there are circumstances in which teleological and deontological approaches will produce mutually exclusive results. However, the fact that philosophers may disagree, or that a few special cases may produce counter-intuitive results, does not mean that an adequate normative foundation for combating corruption cannot be identified. First, although differences can be identified, there are many cases in which the duty-based and consequentialist approaches converge. When a Chinese official accepts a relatively small bribe to overlook the building code requirements and a "bean curd" bridge is built which later collapses killing dozens,⁸³ both approaches would find the action problematic.

Second, there are ethical approaches not discussed by Salbu that offer great potential for providing a normative foundation for an anti-corruption strategy. One of the most promising of these is the contractarian approach to business ethics. Donaldson and Dunfee have proposed an approach that combines recognition of extant social contracts with a consideration of manifest universal ethical principles known as hypernorms.⁸⁴ In their book, *Ties That Bind*⁸⁵, they apply their contractarian approach to the phenomenon of bribery. They conclude that in most cases, the acceptance of a bribe violates a microsocial norm specifying the duties of the bribe taker to her employing body. Further, they argue that in most cases bribery is not an authentic extant norm in the broader society in which it occurs. Instead, the practices of a small set of bribe payers and bribe takers are wrongly projected as a norm of the broader society. The fact that bribes are typically kept secret is an indication that the practice of bribery is not an authentic norm of the broader community. Thus, they claim that it is inappropriate to say "bribery is endemic in Indonesia." Instead, it is only a norm for a sub-culture within Indonesia, one whose norms cannot prevail against the anti-bribery norms of the broader society. Finally, Donaldson and Dunfee develop, at length, a strong case that hypernorms condemn bribery.

Salbu discusses the Italian tax mores case which has been a favorite class room exercise of business ethics faculty for many years. This case

⁸² See generally, David M. Messick and Max H. Bazerman, *Ethical Leadership and the Psychology of Decision Making*, 37 SLOAN MGMT. REV. 9 (1996) (discussing cognitive limitations in ethical reasoning).

⁸³ See John Pomfret, *Flimsy Bridges of Qijiang County: Corruption and Incompetence Causing China's Infrastructure to Crumble*, WASH. POST, Apr. 4, 1999, at A11.

⁸⁴ Thomas Donaldson and Thomas W. Dunfee, *TIES THAT BIND: A SOCIAL CONTACTS APPROACH TO BUSINESS ETHICS* (1999).

⁸⁵ *Id.*

raises the issue of whether it is ethical to pay *bustarella* within the framework of the Italian system. Under the contractarian approach, a first question is whether the payment of *bustarella* by *commercialistas* is an authentic norm in Italy. Salbu states that it is.⁸⁶ That, however, remains an important question of fact. Yes, it was a norm among tax collectors. But that does not mean that it was more generally accepted among the populace. In fact, subsequent to the time period of the case, there was a severe reaction against political corruption in Italy that resulted in the prosecution and imprisonment of many Italian officials. On the other hand, if Salbu is right that *bustarella* is an accepted norm throughout the government and also Italian society, then the argument can be advanced that Italy has the right to employ a highly inefficient system for tax collection. So long as the system does not restrict the ability of the Italian government to provide the necessary social goods for its population, then, if indeed this is their official policy, it should be given deference. We, however, believe that the system of *bustarella* is not an authentic norm for Italian society. A simple test would be whether the tax collector would be willing to have the payment made public. We doubt that would be the case.

It is not necessary to specify a single normative foundation to be used in a procrustean manner by all organizations. Instead, each organization should develop its own normative approach, one compatible with the organization's core values. In the same manner that consensus should emerge in regard to issues such as the definition and scope of bribery, so should one emerge concerning superior forms of normative justification.

VI. CONCLUSION

The issue of corruption is vitally important. It affects the economic viability of nation states,⁸⁷ endangers the physical well-being of untold thousands,⁸⁸ and unjustly enriches supremely mendacious individuals.⁸⁹ Salbu assists our understanding of the phenomenon by suggesting critical questions in need of resolution. His final question—can world cultures change to place decreasing emphasis on patronage—provides a clue to the ultimate end game. Before there can be major improvements, there must be a dramatic change in today's global culture. Whether or not we are comfortable with the implications, today's culture must be seen as allowing massive levels of corruption to occur, particularly in societies predominately comprised of extremely vulnerable people. We optimistically, and we hope not

⁸⁶ Salbu, *supra* note 7.

⁸⁷ See Robert Frank, *For Corporate Leaders in Manila, Economy Can't Survive Estrada*, WALL ST. J., Dec. 6, 2000, at A1 & A14.

⁸⁸ See Promfret, *supra* note 83, at 11.

⁸⁹ See Hess & Dunfee, *supra* note 40.

naively, believe that there are identifiable beginnings of an important change in global attitudes.

We have argued that research should be focused on ascertaining the most effective portfolio of strategies for fighting corruption. All of the instruments that Salbu mentions will probably play an important role. We advocate an important role for the private sector and believe that corporations are capable of significant influence over the evolution of anti-bribery norms. Not only can they establish an anti-bribery culture among their own employees that will directly affect the supply side of bribery, but they may also act in the political sphere to bring about sanctions against corrupt officials, as is reputedly happening in the Philippines.⁹⁰ Assuredly, NGOs may play an important role, with each making its own unique contribution. The World Bank and the IMF have powerful levers at their disposal. The threat of a cut-off of future funds may not only serve as a deterrent to future corrupt payments, but may also initiate investigations to identify those responsible for any sanctions. Organizations such as Transparency International are limited to conducting and publicizing research, lobbying, and using moral suasion. Yet, TI, which is in fact a small organization of able and committed individuals, has been able to have a major impact in this arena. We suspect that Salbu may ultimately be a neo-Hobbesian⁹¹ seeking some modern Leviathan capable of forcing an end to corrupt behavior.

Salbu is undoubtedly right in arguing that flexibility is essential in the fight against corruption. Universalizing the approach of the United States or that of Singapore, or of Denmark is not likely to work. That is why we believe that a market like interaction among private firms is likely to help move us toward the critical tipping point against corruption. Each firm and society has its own special contexts and constraints that must be considered in the design of effective strategies. Constructive ideas such as transparent bidding arrangements, publicizing rankings of bribe paying countries, or using a Sullivan-like strategy of a large number of global companies jointly committing to transparent policies, procedures, and principles, must be tested and vetted. Probably, the most effective weapons against corruption have yet to be identified. They are likely to come sooner in an environment in which there is disclosure and open sharing of strategies.

⁹⁰ See Frank, *supra* note 87, at A1 & A14.

⁹¹ See Manual Velasquez, *International Business, Morality, and the Common Good*, 2 BUS. ETHICS Q. 27 (1992).