Whistleblowing, MNC's and Peace

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I. Introduction

Globalization of business is an accepted fact as is the growing power of multinational corporations (MNCs).[1] A desire for peace also seems to be globally accepted.[2] What is less certain is whether the power of multinationals can be harnessed to help achieve peace. Desire is not enough. Practical policies and procedures must be implemented to help reach this goal. Discussions of peace through commerce mention certain preliminary conditions such as justice, good governance, transparency and giving individuals voice as necessary requirements.[3] A tool increasingly being discussed and implemented to deliver and maintain these conditions is whistleblowing.

Whistleblowing is a procedural way to reinforce the transparency necessary to free trapped capital,[4] encourage foreign investment and move economies, especially transitional ones,[5] away from reliance on personal relationships and bribes.[6] To the extent that there is a positive correlation between corruption, poverty, and violence,[7] the need for whistleblowing is reinforced. Empowering individuals to combat cronyism and call into question economic

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[1] *See generally*, DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD (1995); Phillip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 260-61 (1999) (calling economic and commercial globalization "the most powerful force shaping the world as it enters the twenty-first century; he also cites political fragmentation, or decision-making at the local level, as a complementary force); Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429 (1997).

[2] *See* Timothy L. Fort, *Corporate Makahiki: The Governing Telos of Peace*, 38 AM. BUS. L. J. 301, 310-11 (2001); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 83-84 (1980).

[3] *See, e.g.*, Prince of Wales Business Leaders Forum, *Responsible leadership in action*, in RESPONSIBLE BUSINESS, A FIN. TIMES GUIDE, Dec. 2000, at 13; Norsk Hydro, a member of the PWBL Forum, advertises that openness, accountability, and honesty are at the heart of their business practices. *Wouldn't it be better if we worked together?*, ad in RESPONSIBLE BUSINESS, A FIN. TIMES GUIDE, Dec. 2000; Fort, *supra* note 1, at 309; Timothy L. Fort & Cindy A. Schipani, *The Role of the Corporation in Fostering Sustainable Peace*, VAND. J. TRANSNAT'L L. (forthcoming 2002).

[4] *See* Peter Wonacott, *Chinese Corruption Has Sliced Up to 16% Off GDP Over Decade, Study Estimates*, WALL ST. J., Mar. 8, 2001, at A18; Fort & Schipani, *supra* note 3, at 16. It can do this in two ways--by reducing bribery and giving citizens a voice in their government.

[5] *See* John Reed & Erik Portanger, *Bribery, Corruption Are Rampant in Eastern Europe, Survey Finds*, WALL ST. J., Nov. 9, 1999, at A21. The story reports on a survey done by the World Bank and European Bank for Reconstruction and Development. It found that companies pay bribes that amount to as little as 2% of annual revenue in Croatia to 8% in Georgia. The "bribery tax" fell especially hard on small companies. *Id.*; Wonacott, supra note 4; Peter Eigen, *The Transparency International Bribe Payers Survey*, at www.transparency.de/documents/cpi.bps.html; David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C2 Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593, 596 (2000) (noting that in the former Soviet Union, 60% of the companies paid bribes compared to 15% of businesses in industrial countries).

[6] *See, e.g.*, Lucinda A. Low & Katherine Cameron Atkinson, *Led by the U.S., the World Wages War on Corruption*, NAT'L L.J.,Mar. 3, 1997, at B9; John Plender, *Weeding out corruption*, FIN. TIMES, .Apr. 25, 2000, at 16; Hess & Dunfee, *supra* note 5, at 597-98 (noting that secrecy is a defining characteristic of corruption) and at 606. The Organization for Economic Cooperation and Development, consisting of 34 Western nations, called for transparency and financial disclosure to help combat bribery in its Inter-American Convention Against Corruption. *Inter-American Convention Against Corruption*, Organization of American States, Third Plenary Session (Mar. 29, 1996), http://www.oas.org/juridico/english/Treaties/b-58.html.

[7] *See* Fort & Schipani, *supra* note 3, at 5-9. They cite the Transparency International *Corruption Perception Index*, which ranks countries by perceived level of corruption, and the Heidelberg Index of Violence which ranks conflicts by level of intensity. Comparison of these indices indicates that the countries with the least amount of corruption were involved in the least number of violent conflicts; the most corrupt in the most violent conflicts. *Id. See also id.* at 26.

decisions made for personal gain rather than the general good should allow more resources to be allocated to those at the bottom of the economic scale.

Professors Fort and Schipani have persuasively argued that corporations can have the greatest impact on peace through mitigating internal (v. international) conflicts and the way in which corporations are governed makes a significant difference in the ethical values leading to mitigation of these conflicts.[8] Whistleblowing as a governance tool becomes even more important in this context because it encourages responsive, and thereby responsible governance practices. It gives individuals a say in their organization, and contributes to a feeling of procedural justice. Giving individuals a regularized way to speak and be heard also helps reinforce democratic ideas. This check on power is crucial for an effective democratic institution.[9] Globalization often leads to a feeling of disempowerment and creates conditions which allow a few to benefit at the expense of many.[10] Whistleblowing leads to accountability, and accountability helps defuse the resentment[11] and opportunities for corruption.

When whistleblowing is used to enforce just treatment norms, inter-ethnic, inter-gender, and inter-religious interaction and notions of equal treatment can be fostered. This is already true in the United States in terms of sexual harassment.[12] Such interaction[13] and enforced equality helps to defuse conflict.[14]

The growing dominance of multinational corporations allows them, in some respects, to act as independent states outside of the effective control of particular countries.[15] Thus, it is appropriate to consider the goals and restraints these multinationals impose on themselves, as well as those that are externally imposed.[16] In the United States, and to a lesser extent in other common law countries,[17] companies are being compelled and/or encouraged to establish codes of conduct and whistleblowing procedures to enforce them. This paper discusses whether these

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[8] Fort & Schipani, *supra* note 3, at 4. *See also* Fort, *supra* note 2, at 309.
[9] Fort & Schipani, *supra* note 3, at 61.
[10] *Id.* at 33-34.
[11] The ability of an individual to wreak havoc increases with the growing reliance on technology and electronic communication. *See, e.g.*, Don Clark, *Security Experts Are on Alert Over Wireless Hacking Technique*, WALL ST. J., Oct. 15, 2001, at B7.
[12] *See infra* part B. 2.
[13] Fort & Schipani, *supra* note 3, at 63 (interaction creates personal relationships, which helps break through stereotypes)..
[14] "Violence occurs in many forms in addition to wars between nation states. Conflicts and grievances obviously arise when one person or group feels that they have not been justly treated." Fort, *supra* note 2, at 309.
[15] Clyde D. Stoltenberg, *Globalization, "Asian Values," and Economic Reform*, 33 CORNELL INT'L L.J. 711, 712, 715 (2000); Jost Delbruck, *Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization*, SWISS R. INT'L & EUR. L. (forthcoming 2001).
[16] Alan Pike, *An unrelenting pressure*, in RESPONSIBLE BUSINESS, A FIN. TIMES GUIDE, Dec. 2000, at 4. As noted by Kofi Anan, U.N Secretary General, this is a voluntary declaration of principles, not a legally binding compact. Carola Hoyos, *principles of globalisation*, in RESPONSIBLE BUSINESS, 6; Fort, su*pra* note 3, at 303.

Contractarianism and communitarianism share the premise that corporations will be primarily self-governing. Elletta Sangrey Callahan, Terry Morehead Dworkin, Timothy L. Fort, & Cindy A. Schipani, *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 39 AM. BUS. L.J. 11 (forthcoming 2002).
[17] Many European MNCs also have ethics officers and codes. This is in line with attempts to develop procedures for corporate disclosure on social issues, auditing procedures, and the Global Reporting Initiative. Hess & Dunfee, *supra* note 5, at 624-25.

practices and goals can be harnessed to help deliver on the promise of peace through commerce.[18]

The first section of the paper examines the rationale for whistleblowing, it's growth in the United States, and the adoption or rejection of whistleblowing in other countries. The second section examines the cultural dimensions of whistleblowing and whether it is practical for multinational organizations to adopt it as a governance tool. It is suggested that adoption is feasible if appropriate reporting procedures and ethical norms are adopted, and allowance is made for some cultural adaptation. Finally, the advantages of open reporting and communication procedures to the corporation and the peace effort is discussed.

II. The Growth of Whistleblowing

A. Why Whistleblowing?

The most commonly accepted modern definition of whistleblowing is "the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action."[19] As indicated by this definition, it is seen today as an employee action. This has not always been the case. For example, the council of the city-state of Venice instituted it to help fight corruption and to give citizens a more meaningful voice in their government.[20] The U.S. Congress, building on an idea adopted from much earlier English legislation, passed a whistleblowing law as a way to supplement governmental resources in fighting fraud during the Civil War.[21] The recent emphasis on whistleblowing, however, began with Ralph Nader's 1971 call for its implementation as a means to stem organizational wrongdoing.[22] There are many reasons why it is an idea whose time has come again.

Work organizations, both governmental and civil, are growing in size and complexity, and individuals are often little more than "cogs" in the organization in which they work.[23] Individual jobs have also grown in complexity, and as a result they have become more specialized and expertise-based.[24] This, in turn, makes the detection of wrongful conduct more difficult due to lack of knowledge or access to information.[25] At the same time, the information and technology revolutions have increased the opportunities for significant fraud and other harmful and illegal

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[18] Nichols, *supran* note 1, at 263.

[19] MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 15 (1992); Terrance D.Miethe & Joyce Rothschild, *Whistleblowing and the Control of Organizational Misconduct,* 64 SOCIOLOGICAL INQUIRY 322, 323 (1994).

[20] SUSIE BOULTON & CHRISTOPHER CATLING, VENICE & THE VENETO 88-89 (2001). In the Sala della Bussola in the Doge's Palace, for example, there is a "bocca de leone" or lion's mouth. The lion's mouth has a slit through which citizens could slip secret denunciations. Catching tax evaders was one goal; another was state security.

[21] Act of Mar. 2, 1863, ch. 67, § 6, 12 Stat. 696 (now called the False Claims Act, 31 U.S.C. §§ 3729-3733 (1988) (The objective of the act was to punish government contractors who were, among other things, selling sawdust for gunpowder.); Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 303 n. 112.

[22] Ralph Nader, *A Code for Professional Integrity*, N.Y. TIMES, Jan. 15, 1971, at 43.

[23] Miethe & Rothschild, *supra* note 19, at 328; Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds,* 33 VAND. J. TRANSNAT'L L. 829, 837 (2000).

[24] Miethe & Rothschild, *supra* note 19. They have also become more professionalized.

[25] *Id.*

activities.[26] Whistleblowing is seen as one way to obtain, or regain societal control over the large organizations that increasingly dominate society.[27]

The premise behind recent governmental promotion of whistleblowing is that people of conscience work within these large, complex organizations, and would normally take action against wrongdoing except for fear of losing their jobs or other forms of retaliation.[28] Thus, if adequately protected from retaliation, they will come forward with evidence of wrongdoing before it would be detected externally, if discovered at all. Harms from the wrongdoing could be reduced, wrongful behavior stopped, and the expense of public oversight and investigation would be reduced if such reporting occurs.[29] Also, if whistleblowing proved a relatively common occurrence, wrongdoing would decrease because potential wrongdoers would be aware that their activities were not as secret as they might otherwise be.

B. The United States Experience

While initially discussed in the early 1970s, it took significant disasters such as the explosion of the Challenger[30] and food poisoning,[31] and publicity about extensive contractor fraud[32] for whistleblowing to become a common tool of control. All three branches of government, at both the federal and state levels, have now adopted measures designed to encourage whistleblowing.[33] While all measures contain protection for the reporter from retaliation, they vary considerably as to other issues[34] such as to whom the whistle should be blown,[35] whether motive should be considered,[36] whether the whistleblower may benefit from reporting,[37] what standard of evidence

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[26] *See id*; Fort & Schipani, *supra* note 3, at 14-15.

[27] U.S. efforts to obtain or regain societal control over business organizations date back to the Industrial Revolution. *See* George C.S. Benson, *Codes of Ethics and Whistleblowing, in* WHISTLEBLOWING – SUBVERSION OR CORPORATE CITIZENSHIP? 53 (Gerald Vinten, ed., 1994).

[28] Janet P. Near, Terry Morehead Dworkin, & Marcia P. Miceli, *Explaining the Whistleblowing Process: Suggestions from Power Theory and Justice Theory*, 4 ORG. SCI. 393 (1993).

[29] Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J.266, 305 (1991).

[30] *See, e.g., NASA to Probe Transfer of Engineers At Thiokol After Damaging Testimony*, WALL ST. J., May 14, 1986, at 4.

[31] The first state to pass a whistleblowing statute, Michigan, did so after a poisonous fire retardant was mistakenly shipped to feed grain cooperatives instead of the intended nutritional supplement. Farmers lost millions of dollars, and residents suffered serious health effects, some of which could have been avoided if employees had come forward. They testified they did not because they had been warned they would lose their jobs if they did so. Terry Morehead Dworkin & Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 AM. BUS. L.J. 241, 243 (1987).

[32] Callahan & Dworkin, *supra* note 21, at 303.

[33] Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*,38 AM. BUS. L.J. 99, 99-100 (2000).

[34] Other issues not addressed in the text include sanctions by some states against the individuals who retaliate against the whistleblowers, whether the report of wrongdoing must be in writing, and what the appropriate statute of limitations should be. *See* Terry Morehead Dworkin, *Legal Approaches to Whistle-blowing*, 232, Table 6-2, *chapter in* MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE (1992).

[35] Dworkin & Callahan, *supra* note 29, at 267.

[36] Callahan & Dworkin, *supra* note 21, at 318-25.

[37] *Id.* There is more uniformity at the federal level, where legislators show less concern about motive and the identity of the report recipient, and are more willing to allow significant financial rewards for useful information. *Id.* at 278-83.

of wrongdoing should be required,[38] and what remedy should be provided to a whistleblower who suffers retaliation.[39]

As public policy supporting whistleblowing has matured, there has been a shift toward encouraging internal whistleblowing and away from the almost exclusive legislative emphasis on reporting outside the organization. This represents a change in emphasis away from a primary focus on punishment by governmental bodies toward earlier and more complete cessation of wrongdoing.[40] It also saves public funds. There are many other advantages to internal reporting. It accords with the actions of most whistleblowers,[41] is less harmful to the organization and the employee,[42] and is considered more ethical.[43] A variety of laws and decisions both directly and indirectly have caused employers to establish internal whistleblowing procedures in order to reap the benefits to organizations and the government that these reports can deliver.[44]

The most important direct cause of organizational establishment of internal whistleblowing procedures[45] is the Corporate Sentencing Guidelines.[46] The Guidelines, which determine penalties for corporations convicted of federal crimes,[47] take a "carrot and stick" approach toward curbing organizational wrongdoing. Convicted organizations that have made little or no effort to prevent or reduce wrongdoing suffer increased monetary penalties[48] and sanctions, including probation,[49] and mandated negative publicity.[50] Reduced fines and avoidance of sanctions are provided for organizations that, in good faith, have attempted to stop and detect misconduct.[51] A written code of ethics, a meaningful reporting system,[52] and

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[38] *See* Dworkin, *supra* note 34.
[39] Dworkin, *id.*; Dworkin & Near, *supra* note 31, at 260-64.
[40] Dworkin & Callahan, *supra* note 21, at 306.
[41] Miceli & Near, *supra* note 34.
[42] Near, Dworkin & Miceli, *supra* note 28, at 399. Studies of whistleblowers indicate that the best predictor of retaliation is external whistleblowing.
[43] For example, Sissela Bok, in her book, SECRETS (1989), cites internal whistleblowing as more ethical if it is feasible because sounding the loudest alarm first by reporting outside the organization is an act of disloyalty to colleagues and employees. If the problem can be solved internally, the destructive side-effects of external reporting can be avoided. *Id.* at 221.
[44] *See* Dworkin & Callahan, *supra* note 29, at 305-08, for a more through discussion of the benefits.
[45] *See* Janet P. Near & Terry Morehead Dworkin, *Responses to Legislative Changes: Corporate Whistleblowing Policies*, 17 J. BUS. ETHICS 1551, 1560 (1998); *Labor Letter*, WALL ST. J., Sept. 24, 1991, at A1.
[46] U.S. Sentencing Commission, *Sentencing Guidelines for Organizational Defendants*, 56 Fed. Reg. 22,786-97 (1991).
[47] The Sentencing Reform Act, passed in 1984, established the Sentencing Commission. The Commission, under a mandate to reduce disparities and judicial discretion in sentences, promulgated the Guidelines. After establishing guidelines for individual felons, the Commission established the Corporate Sentencing Guidelines. *See id.* at 22,787; Near & Dworkin, *supra* note 45, at 1551.
[48] Penalties assessed in a given case depend on a "culpability score " which increases the multiplier for factors such as involvement of high-level corporate officers in the crime, or previous convictions for the same crime. Sentencing Guidelines, note 46.
[49] *Id.* at 22,791. A convicted organization with fifty or more employees that does not have an effective compliance program is to be put on probation and ordered to put such a program in place.
[50] *Id.*; Andrew Cowan, Note, *Scarlet Letters for Corporations? Punishment by Publicity under the New Sentencing Guidelines*, 65 CAL. L. REV. 2387 (1992). Other penalties include fines that are sufficiently large to divest the organization of its net assets. Sentencing Guidelines, *supra* note 46, at 22,789.
[51] Sentencing Guidelines, *supra* note 46, at 22, 789-91; *Corporate Compliance Programs Can Play Role in Organizational Sentencing*, 62 Antitrust & Trade Reg. Rep. (BNA) 195, 196 (Feb. 13, 1992).
[52] The Guidelines specifically mention hotlines as an acceptable internal reporting mechanism. Additionally, to qualify for the reduced penalties, the organization is supposed to report the wrongdoing discovered through the

protection of whistleblowers from reprisals are key characteristics of an acceptable deterrence and detection program leading to the reduced fines and sanctions.

The Supreme Court has also prompted organizations to establish codes and internal reporting procedures through its harassing environment sexual harassment decisions.[53] However, most organizations establish them for the limited purpose of controlling harassment and not for the reporting of other kinds of wrongdoing.[54] In the harassment decisions the Court recognized a defense to harassing environment sexual harassment suits for firms that make reasonable efforts to prevent and correct harassment.[55] An effective complaint procedure is a central element of such a program.[56] This defense is also applicable in cases claiming harassment on such bases as religion, race, national origin, and disability.[57]

Revisions to the False Claims Act (FCA)[58] (the law mentioned above that was passed during the Civil War) has also spurred the establishment of intra-firm reporting frameworks.[59] While the act itself encourages external reporting through the filing of a lawsuit in the government's name, the extraordinarily large whistleblowers' awards, fines and recoveries paid to the federal government, and dramatic increase in FCA whistleblowing, have led many organizations, especially those in the defense and healthcare industries to, self-police.[60] Under the FCA, whistleblowers who successfully prosecute FCA claims against individuals or organizations which have fraudulently claimed federal funds receive up to thirty percent of recovered monies.[61] Because of the amount of fraud, treble damages, and fines as high as $10,000 per false claim, the average recovery for a successful FCA whistleblower is over one million dollars,[62] and the government has recovered over three billion since the law was revised

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internal reporting procedure to the government or cooperate with the government. Sentencing Guidelines, *supra* note 46, at 22,793.

[53] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[54] Earlier decisions and political events such as the Clarence Thomas Supreme Court confirmation hearings also resulted in many large businesses establishing harassment reporting procedures.

[55] The defense requires the employer to prove that it exercised reasonable care to prevent and correct sexually harassing behavior and that the employee unreasonably failed to take advantage of employer-provided corrective measures. See Burlington Industries, Inc., at 744 (1998); Faragher at 775.

[56] In several states, the requirement that employers provide education on sexual harassment, including information regarding internal reporting procedures, is imposed by statute. *See, e.g.*, MASS. GEN. LAWS ch. 151B, § 3A (2000); R.I. GEN. LAWS§ 28-51-2 (2001).

[57] *See* Debbie M Kaminer, *When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights*, 4 N.Y.U.J. LEGIS. & PUB. POL'Y 81 (2000-2001); Terry Morehead Dworkin & Ellen R. Pierce, *Is Religious Harassment "More Equal?"*, 26 SETON HALL L. REV. 44, 76 (1995); *Harassment Rulings Reinforce Need for Policies and Procedures* (BNA) 76 (June 21, 2001)(discussing disability harassment).

[58] 31 U.S.C. §§ 3729-33 (1988).

[59] *See* Charles Pereyra-Suarez & Carole A. Klove, *Ring Around the White Collar: Defending Fraud and Abuse*, 18 WHITTIER L. REV.31, 36-7 (1996).

[60] *See* Callahan & Dworkin, *supra* note 33, at 101.

[61] 31 U.S.C. § 3730 (3)(d) (1988). If the government joins the suit, the whistleblower gets up to 25% of the recovery. The government has joined in about 15% of the suits. *See* Callahan & Dworkin, *supra* note 33, at 101 n.9.

[62] *See Qui Tam Statistics*, 12 FCA & QUI TAM Q. REV. 41 (1998).

in 1986 to 1999.[63] FCA suits increased from an average of six per year pre-revision of the Act, to approximately two per day in 1999.[64]

The widespread judicial adoption of a tort-based theory of wrongful firing in violation of public policy provides a similar indirect incentive for companies to provide internal reporting channels.[65] In many states, courts have specifically recognized this theory in whistleblowing cases.[66] Because employers who use their power to subvert public policy are usually perceived as especially wrongful, recoveries in these cases commonly include punitive damages and are quite large.[67]

This discussion of incentives is not exclusive.[68] Decisions such as *In re Caremark International, Inc.*,[69] suggesting that the failure to have a code of ethics may be tantamount to a violation of management's fiduciary duty to shareholders, and pressure from NGOs[70] have also spurred organizations to examine their ethical stances and system.[71] Whatever the spur, it is clear that most large U.S.-based organizations, including MNCs, now have some form of reporting procedure.

C. Whistleblowing in Other Countries

While whistleblowing as a control mechanism is most pervasive in the United States, it has been adopted or is being considered in many other countries. This development is most pronounced in countries with a common law tradition. Promotion of whistleblowing in these countries reflects the U.S. experience.[72] Initially, there is great reluctance to embrace whistleblowing. A precipitating scandal or series of incidents which receive widespread publicity and which involve insider knowledge of the problem is usually the motivating factor causing a country to move from denial to consideration or passage of legislation. It is assumed

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[63] *See FCA News*, 18 FCA & QUI TAM Q. REV 18 (2000). Representative Howard Berman, a main sponsor of the 1986 FCA amendments, stated another $3 billion more was expected to be recovered from pending litigation. Peter Aranson, *The Whistleblowing Juggernaut*, NAT'L L.J., Aug. 9, 1999, at A1, A12.

[64] *See* Aranson, *supra* note 63 (quoting prosecutor Joyce Branda). There are many other statutes that give rewards for whistleblowing, but none give the whistleblower as significant or sure an award. Callahan & Dworkin, *supra* note 21, at 278-283; Barton H. Thompson, Jr., *Symposium: Innovations in Environmental Policy: The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 226 (discussing awards for information leading to convictions for environmental crimes).

[65] See Dworkin &Callahan, *supra* note 21, at 285-95.

[66] *See, e.g.*, Wagner v. City of Globe, 722 P.2d 250, 257 (Ariz. 1986)(en banc); Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 385 (1988). For a complete list, see Callahan & Dworkin, *supra* note 33 Appendix.

[67] *See, e.g.*, Paraclesus Health Care Corp. v. Willard, 15 Indiv. Empl. Rts. Cas. (BNA) 1172 (Nov. 4, 1999); *Verdicts & Settlements*, NAT'L L.J., June 26, 2000, at A16.

[68] *See, e.g.*,Civil Service Reform Act, 5 U.S.C. § 2302 (1989), as amended by the Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 (1989); FREDERICK ELLISTON, JOHN KEENAN, PAULA LOCKHART & JANE VAN SCHAICK, WHISTLEBLOWING 16-19 (1985) (regarding reporting procedures established by the Nuclear Regulatory Commission) ; Jamie R. Welton, *In the Wake of the Columbia/HCA Investigations: Plotting a Course for Medicare Compliance*, 7 ELDER L.J.217, 247 (1999) (discussing the risks of Medicare noncompliance).

[69] 698 A.2d 959 (Del. Ch. 1996).

[70] NGOs, or non-governmental organizations, are comprised of international charities, aid agencies, and other pressure groups, and are growing in number and influence. Alan Pike, *confronting the critics*, in RESPONSIBLE BUSINESS, A FIN. TIMES GUIDE, Dec. 2000, at 17.

[71] *See* John Plender, *Unpopular Capitalidsm*, FIN. TIMES, Sept. 11, 2000, at 16 (citing the Seattle riots, Greenpeace, and the presidential campaigns of Gore and Nader, among other factors); David Gresing, *Shades of Seattle Riot as Clinton Addresses Elite Economic Forum*, CHI. TRIB., Jan. 30, 2000, at C13 (citing Davos protests).

[72] *See supra* notes 30-32 and accompanying text.

that knowledgeable insiders could have prevented the problem had their information reached the proper ears. It is also assumed or stated that had the insiders been protected from retaliation, the information would have been appropriately conveyed.

In the United Kingdom, for example, legislation was spurred by well-publicized, often tragic events such as the "Lyme Regis canoe case" in which four children drowned because of inadequate safety equipment and training at a recreational facility.[73] After several years of consideration, the Public Interest Disclosure Act was enacted by Parliament in 1998.[74] The law shows a strong preference for internal whistleblowing.[75] Whistleblowing legislation introduced in New Zealand[76] followed by four months a well-publicized incident there.[77] Australia's statutes followed well-publicized retaliation against whistleblowers.[78]

As in the U.S. legislation, all these laws protect the whistleblower from retaliation, but they vary in most other respects including the kind of information about which protected disclosures can be made, the quality of evidence of wrongdoing, the motive for the whistleblowing, whether the whistleblower can benefit from the disclosure, and the report recipient.[79] While the details vary, it is clear that the idea of whistleblowing as an organizational control mechanism is spreading through common law countries.[80] Legislative spurs for organizations to establish internal reporting mechanism are not as yet as powerful as in the United States. As in the U.S.,

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[73] *See, e.g.*, Gary Slapper, *Will these deaths be avenged?*, THE TIMES, Mar. 5, 1996, at 37. This case was one of four featured on a program aired in January 1996, on BBC Channel 4, highlighting the retaliation against whistleblowers in Britain. In the Lyme Regis case, an employee had written a letter to her employer about safety problems and was dismissed. She made her letter public after the deaths.

In another case that garnered much attention, 18,000 elderly investors lost their savings and taxpayers incurred a 150 million pound expense after the collapse of an investment firm. Again, there was a noted failure of whistleblowing. The official inquiry into the crash of the firm, Barlow-Clowes, noted that some of the employees must have known that they were engaging in something improper. However, the inspectors also noted that, "the position of the `whistle-blower' is frequently extremely uncomfortable. The most likely result of such `whistle-blowing' would be an immediate—if wrongful—termination of employment." Don Touhig, *How to protect whistle-blowers*, THE SUNDAY TIMES, Feb. 25, 1996, at News Review 4.

[74] Public Interest Disclosure Act, 1998, ch. 23 (Eng.). The Act amended the Employment Rights Act of 1996.

[75] Whistleblowers are protected under the Act if they make a "qualifying disclosure." *Id.* at 43B. A qualifying disclosure is made "if the worker makes the disclosure in good faith—(a) to his employer" (*id.* at 43C (1)(a), or someone designated by the employer. *Id.* at 43 (C)(2). The worker is allowed to go outside the employer to report if it is reasonably necessary. *Id.* at 43G.(2).

[76] The Protected Disclosure Act 2000 was enacted in January 2001. *See* http://www.ombudsmen.govt.nz/protecte.htm.

[77] Catherine Weber, *Whistleblowing and the Whistleblowers Protection Bill 1994*, 7 AUKLAND U. L. REV. 933 (1995).

[78] Whistleblower Protection Act 1993 No. 21, S. AUSTL. ACTS & ORD. (1993); Protected Disclosures Act 1994 No. 92, N.S.W. INC. ACTS (1994); Robert Baxt, *The public interest or improper use of information—the dilemma for the insider environmental whistleblower*, AUSTL. BUS. L. REV., Aug. 1996, at 319, 322 ns. 2,3; Richard Evans, *When honesty doesn't pay*, L. INST. J., June 1994, at 459. A commission was appointed in 1993 to examine the form that federal legislation should take, and whistleblowing legislation had been debated even earlier. David Lewis, *Employment Protection for Whistleblowers: On What Principles Should Australian Legislation Be Based*, 9 AUSTL. J. LAB. L. 135, 135-36 (1996). The Whistleblower Protection Act can be found at http://www.legislation.qld.gov.au/Legislation.htm. *See also* Public Service Act 1999, § 16 (Austl.).

[79] *See*, Terry Morehead Dworkin, *Models of Whistleblowing in the International Environment 4-12* (unpublished manuscript on file with author).

[80] Ireland and Canada have also considered whistleblowing legislation. *See* Jane Baker Jones, *Whistleblowing: No longer out of tune*, AUSTL. ACCT., Aug. 1996, at 56; A & L Goodbody, Irish Law Newsletter, *Pension Trustee – As "Whistleblower" and Other Developments*, BUS. MONITOR, Feb. 1, 1996.

though, the idea of promoting internal whistleblowing is also being established through rules regarding sexual harassment.[81]

There has been greater reluctance to adopt whistleblowing in other countries for reasons that are discussed below. While EC countries other than England have not embraced whistleblowing, they were made aware of it and the need for protection of whistleblowers through the case of Stanley Adams. Adams, a senior executive at the Swiss company Hoffman-La Roche, reported the company's anti-competitive conduct to the EEC Commission for Competition.[82] Switzerland signed the Free Trade Agreement with the EC in 1972, and Adams assumed his disclosure would be protected under this agreement.[83] Adams asked the Commission to keep his identity confidential, and the Commission did not begin investigations until after Adams resigned and moved to Italy.[84] During the investigation, Adam's identity was inadvertently revealed to his former employer, which had him arrested when he returned to Switzerland[85] and he was held incommunicado for three months. Adams' Italian business ventures failed, his wife committed suicide, and he was found guilty of economic espionage.[86] He was later imprisoned in Italy after the failure of his businesses there. Hoffman-La Roche was found guilty of anti-competitive activities.[87] This case received wide publicity, and the European Parliament adopted a resolution instructing its Legal Affairs Committee to consider the implications of the case.[88] However, no protective legislation resulted.[89]

Whistleblowing in the EC has also been considered in response to the amount of fraud that has been discovered.[90] Initially discussed in the early 1990s, it arose again several years later when Paul van Buitenen blew the whistle on the Commission's failure to deal with fraud.[91] Although his coming forward eventually led to the mass resignation of the Commission and

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[81] *See, e.g.,* Sex Discrimination Act of 1994, 20 FCR 217 (Austl.). Additionally, companies operating in the United States are likely to have reporting procedures in those operations even though they may not have them in their operations outside the U.S.

[82] Neville March Hunnings, *The Stanley Adams Affair or The Bitter Bit*, 24 COMMON MKT. REV. 65 (1987).

[83] *Id.* at 70-71.

[84] YVONNE CRIPPS, THE LEGAL IMPLICATIONS OF DISCLOSURE IN THE PUBLIC INTEREST 12 (2d ed. 1994).

[85] Hoffman-La Roche instituted proceedings in Switzerland for the theft of its documents when it learned that the EC had received information contained in the company's documents. Adams was arrested on charges of economic espionage in violation of § 273 of the Swiss Penal Code. *Id.*

[86] Hunnings, *supra* note 82, at 73.

[87] The company was found guilty of violating Article 86 of the Treaty of Rome because it abused its dominant position in the vitamin market. Cripps, *supra* note 84, at 13. The company was fined the equivalent of 180,000 pounds. This was reduced by one-third on appeal. *Id.*

[88] *Id.* at 14.

[89] As a result of the report to the European Parliament, the Parliament requested that the Commission of the EC make a payment to Adams to compensate him for the psychological and physical consequences of his whistleblowing. He was paid 25,000 pounds, which was less than his expenses. He appealed his claim for damages to the European Court of Justice, and was partially successful. The court found in his favor, but allowed only half the damages claimed because they found Adams to be partially responsible for his damages because he did not inform the Commission that it was possible to infer his identity from the documents that were handed over to Hoffman-La Roche, he did not ask to be kept informed about the progress of the investigation, and he returned to Switzerland without investigating the progress of the investigation. The Parliament also asked the Commission to give the Legal Affairs Committee an assurance that in the future people who revealed information of activities that were contrary to the EEC-Switzerland trade agreement would not be prosecuted in the Swiss Courts. *Id.*

[90] Michael Dybes, *EU told to protect `fraud busters'*, THE TIMES, June 2, 1995, at Overseas News. The amount of detected fraud in 1994 exceeded 816 million pounds, and this was estimated to be only the "tip of the iceberg."

[91] Neil Buckley, *Kinnock ushers in cultural revolution*, FIN. TIMES, Jan. 20,2000, at 3.

several changes in controls within the bureaucracy, no measures were adopted to protect whistleblowers who, like van Buitenen, suffer retaliation.[92]

III. Can Whistleblowing be Globally Applied?

The question posed at the beginning of this paper was whether the increasing adoption by MNCs of codes of ethics and whistleblowing procedures could be harnessed to help deliver on the promise of peace through commerce. The impact of these mechanism will be greatly limited if they can only be applied when companies operate in common law countries. As the *Adams* and *van Buitenen* cases discussed above illustrate, there is still great reluctance to embrace whistleblowing procedures. This, then, raises the questions of whether it is practical or ethical for MNCs to try to enforce such procedures regardless of where they operate. I argue that it is despite the varying cultural norms involved.

A. The Cultural Dimension

The reluctance to consider or encourage whistleblowing has a definite cultural component and varies by country. As discussed above, modern (nonpolitical)[93] whistleblowing has been a Western phenomenon. The countries that have adopted it have common law-based legal systems in a society that prizes individualism. While "snitching" in general is not condoned, the idea of law enforcement through citizen enforcement has long roots in England and the United States, and whistleblowing has been advocated as a way to control large organizations for over 30 years.[94] However, in some Western countries such as France, Greece, and Luxembourg, whistleblowing is seen as little different from informing the government about dissident views of neighbors or colleagues, which was frowned on at least in part because this was considered an attribute of totalitarian or Communist states.[95] In Germany whistleblowing was thought unnecessary because of moral superiority.[96]

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[92] *Avenue of the Americas: Lucky Guy*, FIN. TIMES, Jan. 20, 2000, at 11. While van Buitenen has not retained his position, he has received several awards for his whistleblowing, including being named "European of the Year" by READER'S DIGEST. He received $10,000 in prize money, and intended to put it into a fund to help other whistleblowers around Europe. *Id.*

[93] Ethicist Sisela Bok distinguishes legitimate whistleblowing from government-endorsed reporting for ideological or religious persecution purposes. I adopt this distinction here. *See* Bok, *supra* note 43, at 213.

[94] *But see* Peter Drucker, analogizing whistleblowing to "informer systems set up by monarchs or dictators, cited in George C. Benson, *Codes of ethics and whistleblowing*, 7 MANAGERIAL AUDITING J. 37, 39 (1992). Benson supports internal whistleblowing.

[95] Michael Dynes, *EU told to protect `fraud busters'*, THE TIMES, June 2, 1995, at Overseas News.

[96] Peter Norman, *Comment & Analysis: A hidden hand of corruption*, FINANCIAL TIMES, June 5, 1996, at 27. Norman discusses a cultural denial of corruption and financial malpractice in Germany despite clear evidence to the contrary including fraud surveys conducted by KPMG in 18 countries, and statements from officials. Wolfgang Schaupensteiner, Frankfurt's top anticorruption prosecutor, called the corruption in the building industry in terms of bribes paid to government officials for public works contracts as being on a "Sicilian scale." *Id.* The Deputy Director of the Christian Democratic Union in the Bundestag stated, "[A] few years ago [corruption] was almost a foreign word in Germany." He also stated that, "[s]een internationally, I am convinced that we still have relatively healthy structures." *Id.*

When the author discussed the idea of whistleblowing with lawyers and law professors in Germany in 1996, no one had heard of the idea, and their reaction was that it was a peculiar idea, at best; the more common reaction was that it was bizarre, destructive and unnecessary.

The idea of reporting the wrongdoing of one's group is alien to many other cultures in which group membership rather than individualism is the norm. In Japan, for example, the tradition of consensus, company mentality, and lifetime employment, makes whistleblowing almost unheard of and highly risky.[97] One employee who defied this tradition, an ex-Honda engineer who allegedly quit in a dispute over safety issues, is now a plaintiff's expert witness in the United States in suits against Honda[98]. His testimony provides an income that he could no longer earn in Japan because of his dissent.[99]

One explanation for these differences can be drawn from several studies that show basic differences in value systems between national cultures.[100] The differences can be described in several ways, but one which incorporates dimensions relevant to whistleblowing is that proposed by Hofstede.[101] He identified five dimensions on which cultures vary: power distance, individualism, uncertainty avoidance, masculinity, and Confucian dynamism.[102] These dimensions will influence ethical decision-making and, in turn, affect support for whistleblowing. Of these five, the first two and the last are most relevant to examining whistleblowing among cultures. Cultures with a high power distance more willingly accept that power in organizations is unequally distributed among individuals and are more willing to accept inequality, autocratic leadership and centralization of authority.[103] Cultures high in individualism have a loosely-knit social framework in which people believe they are responsible for themselves and their immediate family instead of believing they are members of an in-group which will look out for them.[104] A society which scores high in Confucian dynamism is a dynamic, future-oriented society, while a society low in this dimension tends to be tradition-bound and static.[105]

These classifications are, of course, only tools of analysis, and countries may vary in where they are on a continuum in each dimension.[106] Nonetheless, they may help explain why the

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[97] Benjamin Weiser, *An Ex-Employee As Hostile Witness: Honda Faces Unusual Critic*, INT'L HERALD TRIB., Mar. 6, 1996. Whistleblowing is "very much out of character and rare" in Japan. *Id.* quoting Professor Daniel Foote of the University of Washington School of Law. Professor Setsuo Miyzawa of Kobe University is quoted as saying, "A whistleblower would become `a marked man.'" *Id.*

"[T]he likely reaction of a Japanese worker who stumbles on alleged wrongdoing would be to protect his company's image and reputation, to save face at any cost." Valerie Reitman & Michael Schuman, *Men's Club,* WALL ST. J., Sept. 26, 1996, at R17.

[98] *Id.*

[99] "In America, `the squeaky wheel gets the grease.'" In Japan, "the nail that stands out gets pounded down." Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation,* 98 PSYCHOL. REV. 224, 224 (1991). These sayings exemplify the differences in acceptance of dissent in the U.S. and Japan.

[100] *See, e.g.,* GERT HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK RELATED VALUES (1980); F. TROMPENAAR, RIDING THE WAVES OF CULTURE: UNDERSTANDING DIVERSITY IN GLOBAL BUSINESS (1994); Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implicatins for Cognition, Emotion, and Motivation,* 98 PSYCHOL. REV. 224, 224 (1991); D. Vogel, *Business Ethics: New Perspectives on Old Problems,* 33 CAL. MGMT. REV. 101 (1991).

[101] GERT HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK RELATED VALUES (abridged ed.) (1984).

[102] *Id.*

[103] *Id.* at 65-109.

[104] *Id.* at 148-175.

[105] For a description of the influences of Confucian theory on a corporation *see* Stoltenberg, *supra* note 15, at 719. "`[T]he practice of civility and mutual respect' encouraged by Confucian teaching was commonly regarded as a `humane' and superior alternative to the enforcement of laws on `unwilling or recalcitrant subjects.'" *Id.* at 721.

[106] There are also individual variations within a culture. *See* Markus & Kitayama, *supra* note 99, at 226.

United States, Australia, and England are some of the first countries with whistleblower legislation, and other countries are more reluctant to accept the idea. Japan is a low-scoring country on individualism, relatively low-scoring on dynamism, and high-scoring on power distance.[107] People living in a low individualistic, high power distance country are less likely to challenge authority and those in authority are less likely to tolerate challenges. Additionally, loyalty to the group will be stronger in this climate, thus making reporting on someone within the group less likely.[108] Finally, going against societal norms to blow the whistle is less likely in a low-dynamic society. The United States, Australia and England, by contrast, are countries which score at the high end on the individualism and dynamism dimensions, and low on power distance.[109] Thus, people in these societies are more likely to challenge authority and doing so is more likely to be socially acceptable. Even if it is frowned on, people are more likely to do so if they, as an individual, feel it is the right thing to do.

This analysis does not imply that whistleblowing procedures cannot be successfully implemented in countries like Japan.[110] It does indicate that it will be more difficult, and MNCs will have to carefully consider and structure what they ask their employees to do if internal reporting is to be used as an ethical control mechanism. It may be easier now than it would have been even a decade ago for two reasons. First, the societies studied are dynamic.[111] Japan, for example, is slowly moving away from life-time employment as its economy worsens, and independent thinking and challenges to authority are becoming more common.[112] Second, whistleblowing is increasingly being discussed and considered on an international scale so it is not as radical an idea as it once may have appeared. Korea, a country that lies along the same

[107] *See also id* discussing non-Western views, especially Japanese, of the self as part of an encompassing social relationship in which, "one's behavior is determined, contingent on, and, to a large extent organized by what the actor perceives to be the thoughts, feelings, and actions of *others* in the relationship." *Id.* at 227. This contrasts with a Western view of the self, "whose behavior is organized and made meaningful primarily by reference to one's own internal repertoire of thoughts, feelings, and action . . . ." *Id.* at 226.

[108] This is because the society will be more collectivist in nature. *See* Joseph Sanders, V. Lee Hamilton, & Toshiyuki Yuasa, *The Institutionalization of Sanctions for Wrongdoing inside Organizations: Public Judgments in Japan, Russia, and the United States*, 32 L. & SOC'Y REV. 871 (1998) for a discussion, in part, of collectivist views and the view of sanctions in Moscow, Tokyo, and Washington. One finding was that the Japanese were more likely to think that individuals should apologize and resign rather than have sanctions imposed against the organization.

[109] Hofstede, *supra* note 100, at 269.

[110] The non-Western attributes also apply to countries like China, with its Confucian emphasis on interrelatedness and kindness (*See* Markus & Kitayama, *supra* note 99, at 228), and Latin American, African, and certain southern European cultures. *Id.* at 225.

[111] *See* Stoltenberg, *supra* note 15, at 9 (regarding China); Phillip M. Nichols, *The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code*, 18 U. PA. J. INT'L ECON. L. 1235, 1275-79 (1997), for a discussion of how western laws can change society due to the dynamic relationship between culture and law.

[112] *See, e.g., Japanese business ethics: Blow whistles while you work*, ECONOMIST, Apr. 28, 2001, at 68; Peter Landers, *The Mighty Pen*, WALL ST. J., Oct. 1, 2001, at R5; Yumiko Ono, *Ask the Iconoclast: To Understand Itself, Japan Calls a Novelist*, WALL ST. J., Aug. 23, 2001, at A1; Peter Landers, *Teed Up*, WALL ST. J., June 13, 2000, at A1 (describing a court and publicity battle by a top executive of Mitsukoshi Ltd., Japan's most prestigious department-store chain, to obtain information about the company spending $550 million to buy land for a golf course in the 1980s that it never built; the deal was kept secret from him and others, and he was ordered to resign when he tried to find out about it); Gillian Tett, *Japan's ethical clampdown puts golf out of bounds*, FIN. TIMES, May 19, 2000, at 20 (describing new rules for bureaucrats instituted to help combat corruption).

dimensions as Japan on Hofstede's scale, is considering whistleblowing legislation as part of its anti-corruption efforts.[113]

B. How to Overcome These Differences

In order for companies to successfully implement global ethical codes and internal reporting procedures, especially in countries that have yet to embrace whistleblowing, three things are essential: Reporting procedures must be clear, easy to access, and strongly supported by top management; Ethical norms should concern relatively few issues which can garner wide acceptance or understanding; Allowance must be made for some cultural adaptation

1. Reporting Procedures

A large number of studies have been conducted on whistleblowers, particularly on what distinguished observers of wrongdoing who blow the whistle from those who don't.[114] The most important predictor is whether there is a clear reporting procedure that is seen as being effective.[115] Fear of retaliation and protection from retaliation do not seem to play as significant a role.[116] Additionally, to help overcome the reluctance of employees to report wrongdoing, especially where it is counter-cultural, the organization must convince the employees that adherence to its principles and procedures is for the common good of the organization.

In terms of micro-level theories of deviance, whistleblowing needs to be seen as normative behavior rather than deviant behavior. In situations where great emphasis is placed on organizational conformity and loyalty to one's coworkers and the organization, the organization must convince employees that whistleblowing is normative and desired.[117] Social learning theory can also help explain how whistleblowing can be seen as normal rather than deviant. Learning takes place through interaction with significant others. If organizational leaders, coworkers, or society view whistleblowing as appropriate, then whistleblowing will be seen as normal and should increase.[118] Even if viewed as deviant within a group, support from important external constituents can give a person sufficient rationalization to engage in whistleblowing.[119] The reporting requirements below, if implemented and seriously followed, will help achieve this "normative" behavior.

To haven an effective compliance program an organization should:

Establish a written compliance program. This should be clearly written, easily understood, relatively brief, and lack legal verbiage. To the extent feasible, employees from all

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[113] HEUNGSIK PARK, THE LOGIC OF WHISTLEBLOWING (1999). Professor Park has been the Associate Director of the Whistleblower Protection Center (The Chamyeoyeondai) since 1994.

[114] Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 163 n. 73 (citing studies); Near, Dworkin & Miceli, supra note 28, at 398-99; Miceli & Near, *supra* note 19, at 148-152 (and studies cited therein).

[115] Near, Dworkin & Miceli, supra note 19, at 398-99; Callahan & Dworkin, *supra* note 114, at 178; Miceli & Near, *supra* note 19, at 127-28.

[116] Dworkin & Near, *supra* note 27, at 261.

[117] Miethe & Rothschild, *supra* note 19, at 325.

[118] *Id.* at 326.

[119] James W. Michaels & Terrence D. Miethe, *Applying Theories of Deviance to Academic Cheating*, 70 SOC. SCI. Q,, 870 (1989); Markus & Kitayama, *supra* note 99 at 230, n.3..

sectors of the organization should participate in the formation of the requirements. This has two benefits: greater investment in the program from the employees and a greater probability of the code responding to real issues.[120]

Train employees regarding compliance. The training should be done in a way that engages the employees and causes them to think about what is required.[121] The policy should stress that employees can be held personally liable for failure to comply,[122] and the organization may be legally liable for his or her failure.[123] Stress that nonretaliation is an integral part of the policy and procedure.

Establish a simple reporting procedure. An individual or office should be designated as the report recipient. Establishing a special person for this purpose sends the message that the organization takes the issues seriously and is open to dissent.[124] Having someone like an ombudsperson, who is independent of management and reports to the board of directors, reinforces this message.[125] It also increases the likelihood of reporting and reduces the fear of retaliation.[126]

Investigate and respond quickly. To the extent possible, the privacy of the parties involved should be maintained during the investigation. The response should include a report back to the whistleblower so s/he knows the company has listened and taken action.

Maintain Strong Auditing. Someone high in the organization or on the board (depending on how the reporting procedure is established) should ensure that the system is working as planned and that responses to reports are appropriate.[127] If patterns of unwanted behavior emerge, this person should also ensure these are addressed through further training or other action.

Republish and report. An annual report should be issued to all employees summarizing activities.[128] The report should come from the head of the organization. This shows that the leadership believes the program is important,[129] reinforces the message that

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[120] Callahan, Fort, Dworkin, & Schipani, *supra* note 16.

[121] This can be done in a variety of ways including workshops, live presentations and videos. *See, e.g.*, LUIS R. GOMEZ-MEIJIA ET AL., MANAGING HUMAN RESOURCES 268-74 (2001). Whistleblowing is more likely to occur in Asian societies when there is a clear definition of what is wrongful. Markus & Kitayama, *supra* note 99, at 231-2.

[122] Janet P. Near & Terry Morehead Dworkin, *Responses to Legislative Changes: Corporate Whistleblowing Policies*, 17 J. BUS. ETHICS 1551, 1558 (1998).

[123] There is evidence that Asians are less likely to do a cost-benefit analysis and more likely to report for the good of the group. Markus & Kitayama, *supra* note 99, at 228.

[124] *See* Callahan & Dworkin, *supra* note 114, at 165-66.

[125] This is especially important when managers are involved in the wrongdoing. *Id.* at 165.

[126] Callahan, Dworkin, Fort & Schipani, *supra* note 16, at 24.

[127] Hofstede notes the importance of feedback channels in effectively managing multicultural organizations. Hofstede, *supra* note 100, at 274-5.

[128] *See* Hess & Dunfee, *supra* note 6, at 623-25, regarding the importance of companies reporting progress in fighting bribery. They state that this lends credibility, and cite with favor the Global Reporting Initiative. *Id.* at n. 181. The reporting must be done consistent with individual privacy concerns.

[129] The impression that top-level managers are exempt from the rules is the most likely factor to undermine acceptance and observance of the rules. *See* Gary R. Weaver & Linda Klebe Trevino, *Compliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior*, 315, 323, 330; Robert C. Ford & Woodrow D. Richardson, *Ethical Decision Making: A Review of the Empirical Literature*, 13 J. BUS. ETHICS 205, 212 (1994). Alternatively, strong support from the top is likely to encourage reporting in Asian societies. The Chinese, for example emphasize being loyal and pious to their superiors and obey them, "whether they are parents, employers, or government officials." Markus & Kitayama, *supra* note 99, at 233; Hofstede, *supra* note 100, at 259.

dissent is allowed, and that employees are listened to. It is also an opportunity to republish the policies and bring them to everyone's attention.

Many MNCs will already have most of these policies in place because they meet the requirements of the Corporate Sentencing Guidelines as well as other legal spurs.[130] One of the main differences between these suggestions and what many U.S. companies have established in response to the Guidelines is the establishment of an ombudsperson rather than a hotline. The former is preferred because it makes investigation and follow-up reporting more feasible, and the personal contact is important in fostering reports and compliance.[131]

2. Appropriate Ethical Norms and Cultural Adaptability

It is obvious that people will not become whistleblowers if they do not consider the observed activity wrongful no matter how good the reporting procedures may be. What is considered wrongful is affected by culture.[132] Thus, the more globally a MNC's code is to be applied, the more difficult it will be to have buy-in from all employees. To foster participation, the code should concern relatively few issues that can garner wide acceptance or understanding. Also, in order to make it the most effective, allowance must be made for some cultural adaptation. While this is not easy, it can be done.

Probably the easiest norm for employees to understand is compliance with the law. Other norms on which a company could probably get broad agreement are fair treatment of employees, protection of the environment, and rules against bribery. However, within these broad categories, there is much room for interpretation. The following discussion, which focuses on harassment, serves as an example. Harassment was chosen because it is almost universally banned or frowned upon in its most egregious forms, legal rules regarding it have led many MNCs to adopt codes and reporting procedures, it has distinctive cultural interpretations, it involves ethical duties, and there is evidence of a positive correlation between gender equality and nonviolence.[133]

The recognition of sexual harassment as a legal and moral issue is relatively recent. Even after the adoption of Title VII in 1964, which laid the legal basis for equal treatment of the genders in the U.S. workplace, harassment was not initially recognized as falling within this law. It is only in the last two decades that protection from harassment has become a widespread legal right in the U.S.[134] Today, two forms of sexual harassment are recognized by the courts: quid pro quo harassment and harassing environment sexual harassment. A quid pro quo cause of action arises when a supervisor offers or threatens to withhold a job or job benefit in exchange

[130] *See* supra ns. 40-71and accompanying text. These suggestions are also consistent with the C2 Principles recommended by Professors Hess and Dunfee in combating bribery. Hess & Dunfee, *supra* note 6, at 29-30.
[131] Many hotlines allow anonymous reporting. While anonymity reduces the chances of retaliation, it also undermines the credibility and effectiveness of the report. *See* Callahan & Dworkin, *supra* note 114, at 168-9; Miceli & Near, *supra* note 19, at 61, 74-75; U.S. GENERAL ACCOUNTING OFFICE, 9-YEAR GAO FRAUD HOTLINE SUMMARY (1988).
[132] *See, e.g.*, Markus & Kitayama, *supra* note 99; Hofstede, *supra* note 100, at 13-38.
[133] *See* Fort & Schipani, *supra* note 3, at n. 272.
[134] The Supreme Court first recognized sexual harassment in 1986. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

for sexual favors.[135] Hostile environment cases arise when unwelcome sexual conduct from any employee unreasonably interferes with an individual's job performance, or creates an intimidating, hostile or offensive work environment.[136] The latter is the kind, discussed above, for which the Supreme Court recognized a defense if employers make reasonable efforts to prevent and correct it, including effective policies and complaint procedures.[137]

Other countries and trade organizations have followed the United States and recognized these forms of sexual harassment and often adopt the same language.[138] However, cultural and legal differences have resulted in the concept having different meanings or results. The European Commission, for example, prepared a Code of Practice that enunciated official recommendations on workplace sexual harassment.[139] The Commission used the language adopted in the United States in defining both kinds of sexual harassment , but the Code contained no sanctions and was non-binding on member states.[140] This left the member states to deal with harassment in their own way.[141] France chose to distance itself from the U.S. approach, dealing only with quid pro quo harassment, but making it a crime.[142] Prosecution, though, was generally limited to situations where the harassment was essentially equivalent to sexual violence.[143] In Germany, some of the states adopted laws, but they varied among themselves[144].

Other countries demonstrate wide divergence in attitudes toward and attention directed to sexual harassment. In the Czech Republic, for example, many viewed with disapproval what they saw as the extremes of American justice and the media attention paid to the issue.[145] Additionally, many women did not view the issue as one of individual rights or one that required laws protecting them,[146] and many women viewed verbal remarks favorably.[147] No laws addressed the issue, and Czech companies lacked policies pertaining to it.[148] Japan also had no laws specifically pertaining to harassment, and harassment was dismissed as trivial by both

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[135] The employer is strictly liable for such actions. *Id.*

[136] *Id.*

[137] *See supra* notes 53-57 and accompanying text.

[138] M. Starr, *Who's the Boss? The Globalization of U.S. Employment Law*, 15 BUS. Law. 635 (1996); B.H. Earle & G.A. Madek, *An International Perspective on Sexual Harassment*, 12 L. & INEQUALITY 43 (1993).

[139] In 1990, the Council of Ministers passes a resolution entitled, The Protection of the Dignity of Men and Women at Work." The resolution defined sexual harassment in the same terms as that used in the U.S., and urged the European Commission to prepare a Code of Practice. The Commission found that sexual harassment was a serious problem for many working women after reviewing research, and prepared the Code of Practice. M. Rubenstein, *The Dignity of Women at Work: A Report on the Problem of Sexual Harassment in the Member States of the European Communities* (Oct. 1987 ISBN 92-825-8764-9); M. Rubenstein & I.M. de Vries, *How to Combat Sexual Harassment at Work*, COMM'N OF THE EUR. COMMUNITIES (1993).

[140] A. Bernstein, *Law, Culture, and Harassment*, 142 PA. L. REV. 1227 (1994). Bernstein posited that the lack of sanctions resulted from the fact that sexual harassment was not widely viewed as a legal wrong in the EU countries.

[141] In response to a proposal from the European Commission (OJ C 337 E, 28.11.2000, p. 196), the Council issued a decision on December 20, 2000, which established a program for a Community framework strategy on gender equality. 2001 OJ (L17/22) 19.1. It does not specifically mention sexual harassment.

[142] Abigail C. Saguy, *Employment Discrimination or Sexual Violence? Defining Sexual Harassment in American and French Law*, 34 L. & SOC. REV.1091 (2000).

[143] *Id.*

[144] *See* Bernstein, *supra* note 140.

[145] *Why Feminism is Faring Poorly in the Czech Republic*, CTK NAT'L NEWS WIRE, Mar. 27, 1996.

[146] A. Friedrich, *Harassment Allegations Seen as Czech Anamoly*, PRAGUE POST, July 19, 1995.

[147] *Id.*; E. McClune, *Media Leads Dialogue About Whether Sexual Harassment Exists Here*, PRAGUE POST, Aug. 2, 1995.

[148] *See* McClune, *supra* note 147.

companies and businessmen.[149] Nonetheless, a Japanese court in 1992 awarded damages to a Japanese woman who was verbally harassed by her employer.[150]

These are but a few examples of national differences on sexual harassment. Not only does this diversity present a challenge to implementing global policies for MNCs,[151] it also leads to dilemmas for many nationals working abroad.[152] One way to approach these questions is through the perspective provided by Professors Donaldson and Dunfee in their integrative social contracts theory that recognizes ethical obligations based on macrosocial and microsocial contracts.[153] Companies can build on this to develop ways to resolve ethical issues in a global context using a generic stakeholder theory that is not culturally bound.[154]

Dunfee argues that hypernorms can be used to border or limit the cultural relativism of micronorms. If nonharassment is a hypernorm, or if there are hypernorms limiting microsocial treatment of harassment, then universal rules about harassment could be ethically applied. A *hypernorm* is a principal "so fundamental to human existence that [it serves] as a guide in evaluating lower level moral norms."[155] Because of its importance, the hypernorm is likely to be reflected in global principles that are generally recognized in a variey of ways. Often hypernorms are cast in the language of rights. Are there hypernorms that support a person's right to work in an environment free of harassment?

An examination of numerous global and regional declarations and other documents, such as the 1948 Universal Declaration of Human Rights,[156] the UN Convention on the Elimination of All Forms of Discrimination Against Women, [157]OECD Guidelines for Multinational Enterprises,[158] the Council of Europe's 1996 Social Charter, [159]EC Directives and Codes of Practice, as well as the laws and philosophies of particular countries, suggest there are three hypernorms relevant to harassment: personal security,[160] respect for human dignity,[161] and

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[149] D. Niven, *The Case of the Hidden Harassment,* HARV. BUS. REV., Mar.-Apr., 1992, at 12.
[150] Fukuoka Chino Saibansho, Heisei, Gannen (wa) No. 1872, Songai Baisho Jiken (Judgment of Apr. 16, 1992).
[151] In addition to the challenges already mentioned, MNCs face an ethical dilemma: Do MNCs have a moral obligation to enforce higher standards no matter where they operate because of the physical and emotional costs of harassment and its reinforcement of unequal treatment. *See, e.g,* ,Terry Morehead Dworkin, Laura Ginger & Jane P. Mallor, *Theories of Recovery for Sexual Harassment: Going Beyond Title VII,* 25 SAN DIEGO L. REV. 125 (1988); B. Bursten, *Psychiatric Injury in Women's Workplaces,* 14 BULL. AM. ACAD. PSYCHIATRY L. 245 (1986); P. Crull, *Stress Effects of Sexual Harassment on the Job: Implications for Counseling,* 52 AM. J. ORTHOPSYCHIATRY,539 (1982).
[152] For example, if U.S. employees are part of a joint venture where they are working alongside employees of the host country, should they impose their values if they see something that would clearly be wrong at home? Can they demand they be treated in a manner similar to what they would expect if working in their home country? Alternatively, can they ignore the stricter home constraints if they are working in a country that lacks them?
[153] Thomas Donaldson & Thomas R. Dunfee, *Toward A Unified Conception of Business Ethics: Integrative Social Contracts Theory,* 19 ACAD. MGMT. REV. 252 (1994). *See also* THOMAS DONALDSON & THOMAS W. DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS Ethics 49-81 (1999).
[154] Thomas R. Dunfee, *Does Stakeholder Theory Make Sense In a Global Context?,* (paper presented at the Annual Meeting of the Int'l Ass'n of Bus. & Soc., Vienna, June 1995).
[155] Donaldson & Dunfee, *supra* note 153, at 265.
[156] U.N. GAOR, 3d Sess., 67th plen. mtg. At 1, U.N. Doc. A/811 (1948). This document was part of the International Bill of Human Rights, U.N. GAOR, 3d Sess., supp. No. 1, at 71, U.N. Doc. A/565 (1948).
[157] 19 I.L.M. 33 (1980).
[158] OECD Guidelines, 25 I.L.M. 494 (1986).
[159] 1996:Europ.T.S. No. 163.
[160] W.C. Frederick, *The Emperical Quest for Normative Meaning: Introduction and Overview,* 2 BUS. ETHICS Q. 91 (1992).
[161] Donaldson & Dunfee, *supra* note 153.

nondiscrimination.[162] At a minimum, these hypernorms support global rules against quid pro quo harassment. Having to trade sexual favors for the right to employment and its benefits threatens personal security, undermines human dignity, and is generally acknowledged to be discriminatory. It is not endorsed by any country.

Environmental sexual harassment is more problematic since it seldom involves personal security and there is no general consensus—even in the United States—as to what constitutes a harassing environment. Staring, verbal comments, jokes, etc. are not viewed as harassment by women in many countries. To the extent that such harassment erodes human dignity and is discriminatory, it violates two of the hypernorms. Thus, organizations can ban demeaning, discriminatory treatment. What constitutes such treatment, though, should be determined on a microsocial basis. Cultural imperialism needs to be avoided, too.[163]

Part of an effective complaint procedure discussed above is having a clearly-written compliance program along with training. This is where cultural differences can be taken into account.[164] Exploration of what constitutes harassing environment in a particular location should be addressed through seminars, focus groups, and other means. It is unrealistic to expect that the U.S. standard for harassing environment would be accepted elsewhere. However, respecting cultural differences does not mean respecting the lowest common denominator.[165] A minimum standard should be set, and the chance for appeal outside the local system should be allowed. This could be to the person doing the auditing, who would be responsible for ensuring local interpretation does not set the bar too low.

MNC implementation of global equal treatment standards reinforced by reporting procedures is not only feasible but it can also help reduce conflict. Some studies indicate there is a positive correlation between gender equality and nonviolence.[166] Creating an atmosphere where inter-group interactions are fostered under conditions of equal treatment helps defuse conflict.[167] It can help defuse resentment and limit disruptive behavior through contributing to a feeling of psychological security[168] and increasing physical security.[169]

A similar analysis could be conducted regarding bribery.[170] Professors Salbu and Nichols, in their recent articles debating the wisdom of attempting to control bribery through implementation of global laws, well illustrate the cultural variations in interpreting what constitutes bribery.[171] Professor Salbu, notes that without true global unity, respect must be paid to cultural diversity.[172]

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[162] THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS (1989).

[163] R.T. De George, *International Business Ethics*, 4 BUS. ETHICS Q. 1 (1994); Derek G. Barella, Note, *Checking the "Trigger-Happy" Congress: The Extraterritorial Extension of Federal Employment Laws Requires Prudence*, 69 IND. L.J. 889, 913 (1994). *Cf.* Mark Granovette, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985) (arguing that contractarianism and other business ethics arguments have a Western bias).

[164] Hofstede, *supra* note100, at 276.

[165] Nichols, supr*a* note 1, at 299. Donaldson and Dunfee suggest that a prioritization rule can help resolve norm conflicts, but that it must be tested against universal principles. Donaldson & Dunfee, *supra* note 153, at 185-86, 226-30.

[166] Fort & Schipani, *supra* note 3, at 64.

[167] *See supra* notes 13-14 and accompanying text.

[168] *See* Fort & Schipani, *supra* note 3, at 41.

[169] *See* Miceli & Near, *supra* note 19, at 11.

[170] Professor Dunfee has recently argued for the control of bribery through corporate action. Hess & Dunfee, *supra* note 5.

[171] Steven R. Salbu , *Extraterritorial Restriction of Bribery: A Premature Evocation of the Global Village*, 24 YALE J. INT'L L. 223, 226 (1999); Nichols, *supra* note 1.

[172] Salbu , supra note 171, at 226.

He states that the world today is culturally pluralistic and argues against a forced fit between externally imposed law and divergent cultures.[173] In furtherance of this argument, he illustrates the cultural variations in the views of gifts versus bribes. Professor Nichols focuses on the harms bribery causes including loss of respect for the law, inequitable distribution of wealth that further adds to social tension, undermining democracy, and possibly, coups[174] and loss of peace.[175] He believes it is possible to ban transnational bribery.

In light of the lack of uniformity is it feasible for an MNC to ban bribery? Yes. Every country in the world prohibits bribery of its officials.[176] This would be the starting point of the code[177] along with compliance with local laws. However, allowance for legitimate gift-giving can be made on a microsocial basis with appropriate discussion and training.[178]

As stated in the introduction, bribery can cause conflict. One important reason for this is that it undermines free trade and free trade helps foster peace.[179] Corporations that adopt bribery bans and enforce them through reporting procedures potentially contribute to peace by allowing better utilization of resources.[180] This, in turn, frees up more resources for those at the bottom of the economic rungs,[181] and will have an increased impact in the emerging economies that are most harmed by bribery.[182] Current writers on bribery all stress the need for transparency.[183] Rules reinforced by whistleblowing can deliver transparency.

IV. The Contributions of Open reporting and Communication to the Corporation and to Peace

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[173] *Id.* at 230-31.

[174] *See* Hess & Dunfee, *supra* note 5, at 596 ("Corruption limits a government's ability to perform vital functions and may even threaten its overall effectiveness.")

[175] Nichols, *supra* note 1, at 279. "The ability of law enforcers to dispense with the law and of bribe-givers to buy their way around the law renders the system meaningless. . . . Ultimately, bribery undermines the legitimacy of governments, especially democracies . . . Citizens may come to believe that government is simply for sale to the highest bidder." *Id* *See also* Timothy L. Fort & James J. Noone, *Gifts, Bribes & Exchange: Relationships in Non-Market Economies and Lessons for Pax E-Commercia*, 33 CORNELL INT'L L.J. 515, 518-24 (2000). Hess & Dunfee note that bribery can influence government spending by moving it out of vital functions to areas where the bribe-takers can earn more. Hess & Dunfee, *supra* note 5, at 597.

[176] Nichols, *supra* note 1, at 258, 278. It is also condemned by the world's major faiths. Hess & Dunfee, *supra note 5*, at 594.

[177] Professors Donaldson and Dunfee establish a series of hypernorms against bribery including "necessary social efficiency" in their book. THOMAS DONALDSON & THOMAS W. DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS 117 (1999). Necessary social efficiency bears some resemblance to Professor Patricia Werhane's "basic rights."

[178] *See* Hess & Dunfee, supra note 5, at 605 (noting the International Chamber of Commerce's (ICC) recommendation that business adopt their own rules of conduct based on the ICC's bribery rules, but adapted to their particular situation).

[179] Timothy L. Fort & James J. Noone, *Gifts, Bribes and Exchange: Relationships in Non-Market Economies and Lessons for Pax E-Commercia*, 33 CORNELL INT'L L. J.515, 517 (2000).

[180] Nichols states that bribery could be globally banned by making it a crime when it is prohibited by the laws of the host country. *Id.* at 288.

[181] Fort & Noone, *supra* note 175, at 521; Donaldson & Dunfee, *supra* note 153, at 228.

[182] *See supra* notes 4-7 and accompanying text.

[183] Nichols, for example, states that effective policing will require transparent decision-making in host countries and voluntary codes of corporate conduct. *Id.* at 259. These are precisely the processes that whistleblowing promotes and works in conjunction with. Opaque regulatory procedures, when combined with weak enforcement, create conditions which help promote bribery. *Id at 273. See also* Hess & Dunfee, *supra* note 5, at 605; Fort & Noone, *supra* note 175.

The discussions of bribery and harassment contemplate consideration of local norms in order to be effective. The interaction between the rules and local norms is best explained through small-group training and discussions. Imposition of rules without an understanding of the rationale behind them is not very effective.[184] Local, small-group discussions allow explanations in culturally understandable terms.[185] While whistleblowing is usually an individual activity, sensitivity to the desired norms can be accomplished on a group basis. Understanding of the norms should lessen misunderstandings and unintentionally false alarms. Additionally, feeling that one can make an impact at the local level makes one more likely to adopt the community's norms.[186] To the extent that the rules have personal meaningfulness, they are more likely to be followed.[187] Professors Fort and Noone urge this approach in combating bribery.[188] Many Australian companies train about sexual harassment in small groups through having the male employees visualize the acts of harassment happening to their wives, daughters and mothers. Engagement fosters absorption and understanding, and engagement is easiest in smaller numbers where personal interaction is facilitated.

Internal whistleblowing procedures and codes of ethics will operate more effectively when organizations operate as mediating institutions.[189] Mediating institutions are "relatively small organizations where moral identity and behavior is formed."[190] Studies indicate that as the size of an organization increases, individual ethical decision-making behavior decreases.[191] Thus, for large multinationals, the need for training in relatively small groups at the local level is heightened. To the extent that corporate employees cooperate with each other, it may be because they have internalized trust learned within the organization.[192] Again, this is easier learned through face-to-face, personal interaction.

There are benefits to the organization that adopts the discussed policies and procedures. Global strategic alliances represent a type of competitive weapon. In order to take the best

[184] See OLIVER WENDELL HOLMES, JR., THE COMMON LAW 41 (1881) ("The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community . . . ."); Fort & Noone, *supra* note 175, at 528. The more culturally diverse the organization, the more difficult it is to achieve "major learning" or to change norms, values, and worldview. Arvind Parkhe, *Interfirm Diversity, Organizational Learning, and Longevity in Global Strategic Alliances,* 1991 J. INT'L BUS. STUD. 579, 591 (1991).

[185] Fort & Noone, supra note 175, at 536. The relative size the categories the labor force is broken down into, and work structuring and coordination varies by culture. Hofstede, supra note 100, at 265.

[186] Fort & Noone, supra note 175, at 544.

[187] *See* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. Pa. L. Rev. 1811, 1811 (2001).

[188] Fort & Noone, *supra note 175*, at 540-41.

[189] Callahan, Dworkin, Fort & Schipani, *supra* note 16 at 17; Hofstede, *supra* note 100, at 274 ("A shared company subculture between people of otherwise different national cultures considerably facilitates communication and motivation.")

[190] *See* TIMOTHY L. FORT, ETHICS AND GOVERNANCE: BUSINESS AS MEDIATING INSTITUTION (2001).

[191] Robert C. Ford & Woodrow D. Richardson, *Ethical Decision Making: A Review of the Empirical Literature*, 13 J. BUS. ETHICS 205, 217 (1994).

[192] Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law,* 1735 U. PA. L. J. 1735 (2001).

advantage of the alliance, multicultural perspectives must be listened to.[193] Additionally, firm-specific fairness norms promote efficiency.[194]
Organizations that foster internal reporting and open discussion are likely to find that external reporting will become virtually nonexistent.[195] Problems can be raised and resolved earlier if employees feel free to engage in discussion and dissent. Open communication within the organization has many other organizational benefits as well.[196]

V. Conclusion

Stakeholders have the ability to wreak "fatal havoc" in business and the world.[197] This is true of internal stakeholders-employees as well as external stakeholders, especially with the increased reliance on computers and information.[198] Failure to listen to employees and deal fairly with them can provide the conditions that foster disruption and possible havoc. We recently saw the ability of a few individuals to create debilitating and tragic havoc outside their organizations on September 11.

"Corruption and unethical practices in the workplace are . . . thought to result in declining confidence in major institutions and to contribute to the alienation and anomie experienced in modern society."[199] MNCs which foster reasonable codes and meaningful reporting procedures can help to defuse disruptive situations. Combining whistleblowing and reporter protection with a code significantly aids in several ways: it shows the company means what it says, it gives employees a way to make sure the organization is legal and ethical, it shows that open communication will be practiced, and people who speak up will be dealt with fairly.[200]

In addition, MNCs can help in the evolution of a normative global village.[201] They can create conditions that socialize and empower individuals,[202] and give them the tools to interact more successfully in their society.[203] To the extent that ideas such as fairness and responsibility for compliance are learned within the company and are then taken externally, organizations have the ability to have an impact far beyond their individual realm.[204] At the same time, exporting the

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[193] Parkhe, *supra* note 184, at 598. Parkhe notes that this may be particularly difficult for Japanese companies because of the historically closed nature of Japanese society.
[194] Robert Cooter & Melvin A. Eisenberg, *Fairness, Character, and Efficiency in Firms*, 149 U. Pa. L. Rev. 1717 (2001).
[195] Callahan, Dworkin, Fort & Schipani, *supra* note 16.
[196] For example, to the extent that fairness norms are internalized, efficiency is bolstered. Cooter & Eisenberg, *infra* note209, at 1717-18. Externally, companies that are seen as weak on transparency may be susceptible to public disapproval. Hess & Dunfee, *supra* note 5, at 607.
[197] Fort, *supra* note 1, at 309; Pike, *supra* note 16.
[198] Fort, *supra* note 1, at 309-10.
[199] Miethe & Rothschild, *supra* note 19.
[200] Fort, *supra* note 2, at 336. "[T]he very commitment to communicate is a validation of human respect and dignity." Fort cites Lon Fuller as one who argued for communication as the central natural law principle. *Id.* at 357.
[201] "Individual firm action is a vital component of the ultimate mix of policies and strategies that are likely to make a significant difference in the practice of corrupt payments." Hess & Dunfee, *supra* note 5, at 615.
[202] In addition, the emergence of an information-based society can lead to increased power for individuals vis-à-vis the government. Stoltenberg, *supra* note 15, at 712-13.
[203] Fort, *supra* note 2, at 331.
[204] *Id.* at 332. Mediating institutions can promote peace by "humanizing the relationships that exist within an organization."

idea of whistleblowing helps promote transparency and good government in the larger society.[205] Organizational norms matter most when law is the weakest.[206]

As countries shift in their commercial institutions from a "relational orientation" to a more Western "formal orientation" based on the rule of law,[207] whistleblowing could be a helpful procedure in that transition.[208] It is designed to allow individuals to enforce the rules despite the individual connections of those in power. In the words of Alan Watson, "In most places at most times borrowing is the most fruitful source of legal change."[209] Borrowing from MNCs which set the bar higher is also a fruitful source of change.

[205] Giving people a say in the organization's behavior reinforces democratic ideas. Fort & Schipani, *supra* note 3, at 20.
[206] John C. Coffee, Jr., *Do Norms Matter? A Cross-Country Evaluation*, 149 U. PA. L. REV. 2151, 2175 (2001).
[207] Nichols, *supra* note 1, at 281.
[208] Stoltenberg, *supra* note 15, at 725 ("the strong capitalist economy that has emerged recently in South Korea is contributing to the development of an ethical decision pattern similar to that of the Western countries . . . .", quoting John M. Etheredge & Carolyn B. Erdener, *Ethical Decision Patterns in Four Countries: Contrasting Theoretical Perspectives*, in INTERNATIIONAL BUSINESS ETHICS: CHALLENGES AND APPROACHES 61 (George Enderle ed. 1999); also at 728.
[209] Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 335 (1996).

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