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## From Well-Side Meetings to Pelican Strategy: A Context-Based Approach to Combat Corruption

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# FROM WELL-SIDE MEETINGS TO PELICAN STRATEGY: A CONTEXT-BASED APPROACH TO COMBAT CORRUPTION

Lili Yan\*

## ABSTRACT

This article takes up the question of what strategy is to be used among different communities to eradicate corruption across borders. The debate between two legal scholars, Steven Salbu and Philip Nichols, over the viability of extraterritorial application of anti-bribery laws remains thought-provoking when we look at the effectiveness of the OECD Anti-bribery Convention or FCPA in curbing corruption. Empirical research shows that firms from countries with extraterritorial legal restrictions do not necessarily refrain themselves from paying bribes in foreign transactions. This article ties the Salbu-Nichols' debate, ISCT, mediating institutions theory, and Pelican Gambits strategy together to structure a context based anti-corruption framework. It builds on ISCT's authenticity and legitimacy principles to give context of the norms in order to apply various strategies to combat corruption. This article is by no means to promote elimination of laws or regulations of corruption or acquiescence of illegitimacy of corruption in international business. Instead, the framework emphasizes the importance of the interactive dynamics between a firm and its community when designing anti-corruption strategy in a global environment.

### KEYWORDS

corruption, ISCT, mediating institutions

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## I. INTRODUCTION

The root of the twenty-year old debate between two legal scholars, Steven Salbu and Philip Nichols, lies in the question of

whether there is an absolute universal standard to apply to combat corruption in different communities.<sup>1</sup> Nichols believes that extraterritorial and multilateral prohibition of bribery is a logical approach to combat corruption globally since corruption is universally condemned.<sup>2</sup> Salbu enlists defensible case scenarios where corruption is not morally condemned and warns of the risk of cultural imperialism when activities within a community must be evaluated by outsiders who may not fully appreciate the cultural context of the activities.<sup>3</sup> The Integrative Social Contracts Theory ("ISCT") gives the moral argument against corruption that bribery violates the hypernorm of necessary social efficiency by undermining the fundamental right to political participation and harming rational allocation of resources.<sup>4</sup> Fort and Noone extrapolate such argument beyond efficiency by focusing on a self-regulating mechanism – the mediating institutions, where a community needs to be small enough for the community's interest to relate to individual business' interest and vice versa.<sup>5</sup>

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<sup>1</sup> Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable Policy Goal Under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery*, 20 MICH. J. INT'L L. 451, 471 (1999) [hereinafter *Extraterritorial Restrictions*] (highlighting Nichols' assertion that Salbu's argument is "unsupportable").

<sup>2</sup> See Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 258 (1999) [hereinafter *Transnational Bribery*]; see also Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L. J. 627 (2000) [hereinafter *Myth of Anti-Bribery Laws*].

<sup>3</sup> 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) [hereinafter *Global Market*]; see also Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223 (1999) [hereinafter *Premature Evocation*]; see also Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 422 (1999) [hereinafter *Threat to Global Harmony*]; see also Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L. J. 657 (2000) [hereinafter *Delicate Balance*]; see also Steven R. Salbu, *Transnational Bribery: The Big Questions*, 21 NW. J. INT'L L. & BUS. 435 (2001) [hereinafter *Big Questions*].

<sup>4</sup> See Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252, 268 (Apr. 1994) [hereinafter *Integrative Social Contracts Theory*]; THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* 228 (Harv. Bus. Sch. Press 1999) [hereinafter *Ties That Bind*].

<sup>5</sup> Timothy L. Fort & James J. Noone, *Banded Contracts, Mediating Institutions, and Corporate Governance: A Naturalist Analysis of Contractual Theories of the Firm*, 62 L. & CONTEMP. PROBS. 163, 205 (1999) [hereinafter *Banded Contracts*] (describing

This article ties the Salbu-Nichols debate, ISCT, mediating institutions theory, and Pelican Gambits strategies together to structure a context-based anti-corruption framework. It builds on ISCT's principles of authenticity and legitimacy to give context in order to apply various strategies to combat corruption. This article is by no means arguing to promote the elimination of laws or regulations of corruption or acquiescence of illegitimacy of corruption in international business. On the contrary, supported by results from empirical research, this article's framework emphasizes the importance of the interactive dynamics between a firm and its community when designing global anti-corruption strategy.

## II. THE FOREIGN CORRUPT PRACTICES ACT ("FCPA"), THE DEBATE AND NORMATIVE JUSTIFICATION FOR CORRUPTION AS A LEGITIMATE SOCIAL INSTITUTION.

The Foreign Corrupt Practices Act, first enacted in 1977 and then amended in 1988 and 1998, prohibits any bribes made *corruptly* by United States ("U.S.") issuers, U.S. nationals or residents, or any persons acting on their behalf, inside or outside the United States, to foreign officials for the purpose of influencing or inducing any official act or decisions.<sup>6</sup> The purpose of securing any improper advantage, or obtaining, retaining or directing business is required for a bribe to fall under this act.<sup>7</sup> The intent that is required for liability under FCPA is *knowingly* used of any means *corruptly* in furtherance of any offer, payment, promise to pay, any money or anything of value, with the *knowledge* that such money or thing of value will be offered to influence or induce a foreign official to do anything in violation of their lawful duty, to secure any improper advantage, or to assist obtaining or retaining business.<sup>8</sup>

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good examples of a mediating institution; a gathering around a well talking about village affairs in the ancient time or an office conversation stricken next to the coffee machine).

<sup>6</sup> The Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (1998).

<sup>7</sup> *Id.* §§ 78dd-1, 2.

<sup>8</sup> *Id.* § 78dd-1(f)(2)(A); see also *Foreign Corrupt Practices Act: An Overview*, DEPT. JUST., <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> (Feb. 3, 2017).

Through its 1998 Amendment with the Congress' ratification of the Organisation for Economic Co-operation and Development ("OECD") Anti-Bribery Convention, the FCPA's jurisdiction extends beyond the territory of the U.S. to "allow greater enforcement efforts by U.S. prosecutors."<sup>9</sup> - The FCPA applies not only to U.S. nationals, residents, and companies within U.S. borders, but also anyone acting on behalf of U.S. issuers or companies, even if they are outside the U.S. or are foreign nationals.<sup>10</sup> By expanding the scope of persons covered by the FCPA, the U.S. is allowed to battle against corruption in foreign business practices.<sup>11</sup> The ethical question is whether it is appropriate for the U.S. to legislate and regulate foreign business practices that involve foreign norms and cultures.

The great debate between Steven Salbu and Philip Nichols centers on two ethical issues: whether corruption can be culturally justified and, if so, whether extraterritorial legal restriction of bribery imposes moral intrusion upon members of a society that holds different values from that of the U.S. and western cultures.<sup>12</sup> The later issue suggests the danger of cultural imperialism.<sup>13</sup>

### 1. Definition of Corruption/Bribery

Before addressing the "desirability and viability of extraterritorial prohibition of transnational bribery as an international policy goal," it is important to define corruption.<sup>14</sup> Corruption has been studied by scholars from a variety of disciplines.<sup>15</sup> Economic studies focus on the effect of corruption

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<sup>9</sup> Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L. J. 89, 93, 100 (2010); D. Michael Crites, *The Foreign Corrupt Practices Act at Thirty-Five: A Practitioner's Guide*, 73 OHIO ST. L. J. 5, 1049, 1052-53 (2012).

<sup>10</sup> The Foreign Corrupt Practices Act § 78ff(c).

<sup>11</sup> Bixby, *supra* note 9, at 100.

<sup>12</sup> *Big Questions*, *supra* note 3, at 438-39; *Myth of Anti-Bribery Laws*, *supra* note 2, at 651-53.

<sup>13</sup> *Premature Evocation*, *supra* note 3, at 252-53; *Threat to Global Harmony*, *supra* note 3, at 447-48; *Extraterritorial Restrictions*, *supra* note 1, at 471-72; *Transnational Bribery*, *supra* note 2, at 295-96.

<sup>14</sup> *Extraterritorial Restrictions*, *supra* note 1, at 453.

<sup>15</sup> See Sun Lianju & Peng Luyan, *Game Theory Analysis of the Bribery Behavior*, 2 INT'L J. BUS. & SOC. SCI. 104, 104 (May 2011) (stating, "we investigated the mechanism of the bribery behavior based on the non-cooperative static game

on competition and resource allocation.<sup>16</sup> Management and finance literature look at corruption from a principal-agent model, with a focus on the relationship between the principal (such as the government) and the agent (such as an official), examining the way of motivating the agent to be honest, ranging from efficiency wages to enhancing corporate governance values.<sup>17</sup> Strategy and international business scholars look at corruption from the perspective of institutional theory and resource-based views.<sup>18</sup> Ethicists propose normative moral arguments or “metaphors” against bribery, such as the deontological, consequentialist, teleological, non-teleological, pluralistic, and relativism approaches.<sup>19</sup>

Table 1 provides a list of definitions of corruption in the literature. The fact that there is not a universal definition of bribery across different disciplines or even within one discipline suggests the nature of corruption is contextualized.<sup>20</sup> As Wolf and Schmidt-Pfister (2010) put, evaluating international anti-corruption regimes requires scholars to understand how corruption is manifested and interpreted in different cultural contexts, because corruption may be “a culturally determined, thus more or less justified practice in one country or another.”<sup>21</sup>

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theory.”); see also Timothy Frye & Andrei Shleifer, *The Invisible Hand and the Grabbing Hand*, 87 AM. ECO. REV. PAPERS & PROC. 354, 354-55 (1997) (discussing the effect of corruption on private business based on the degree of government involvement in the economy).

<sup>16</sup> Lianju & Luyan, *supra* note 15, at 104; Frye & Shleifer, *supra* note 15, at 354-55.

<sup>17</sup> See Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q. J. ECONOMICS 599, 599-600 (Aug. 1993); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 305-06 (Oct. 1976); Daniel J. McCarthy & Sheila M. Puffer, *Interpreting the Ethicality of Corporate Governance Decisions in Russia: Utilizing Integrative Social Contracts Theory to Evaluate the Relevance of Agency Theory Norms*, 33 ACAD. MGMT. REV. 11, 11-12 (Jan. 2008).

<sup>18</sup> Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT’L BUS. STUD. 807, 808 (Nov. 2006).

<sup>19</sup> Thomas W. Dunfee et al., *Social Contracts and Marketing Ethics*, 63 J. MARKETING 14, 15 (Jul. 1999); *Integrative Social Contracts Theory*, *supra* note 4, at 253.

<sup>20</sup> See *Premature Evocation*, *supra* note 3, at 241 (discussing how gifts in one culture may be considered as bribery in another, demonstrating the difficulty in producing a global definition for corruption).

<sup>21</sup> Sebastian Wolf & Diana Schmidt-Pfister, *Between Corruption, Integration, and Culture: the Politics of International Anti-Corruption*, in INTERNATIONAL ANTI-

The ubiquitous nature of corruption requires this article to set boundaries of the concept of corruption before it can examine potential strategies to combat it.

II.1. TABLE 1. A COMPREHENSIVE LIST OF DEFINITIONS OF CORRUPTION AND BRIBERY

Corruption/Bribery	Definition	Focus
Corruption	Behavior which deviates from the formal duties of a public role because of private- regarding (personal, close family, private clique pecuniary or status gains); or violates rules against the exercise of certain types of private –regarding influence. <sup>22</sup>	Public and Private Sectors
Corruption	The abuse of public office for private gain. <sup>23</sup>	Public Sectors
Corruption	An illegal payment to a public agent to obtain a benefit. <sup>24</sup>	Public Sectors
Corruption	The sale by government officials of government property for personal gain. <sup>25</sup>	Public Sectors

CORRUPTION REGIMES IN EUROPE: BETWEEN CORRUPTION, INTEGRATION, AND CULTURE 13, 13 (Sebastian Wolf & Diana Schmidt-Pfister eds., 2010).

<sup>22</sup> J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (Jun. 1967).

<sup>23</sup> *Helping Countries Combat Corruption: The Role of the World Bank*, WRLD. BANK GRP., <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm> (last visited Nov. 20, 2022).

<sup>24</sup> Susan Rose-Ackerman, *When is Corruption Harmful?*, in POLITICAL CORRUPTION: CONCEPTS AND CONTEXTS 353, 353 (Arnold J. Heidenheimer & Michael Johnston eds., 2009).

<sup>25</sup> Shleifer & Vishny, *supra* note 17, at 599.



Corruption	The abuse of entrusted power for private gain. <sup>26</sup>	Public and Private Sectors
Corruption	The use or abuse of public office for private gain. <sup>27</sup>	Public Sectors
Bribery	Offering, promising, giving, accepting, or solicitation of an advantage as an inducement for an action which is illegal, unethical, or a breach of trust. Inducement can take the form of gifts, loans, fees, rewards, or other advantages (taxes, services, donations, etc.). <sup>28</sup>	Public and Private Sectors
Bribery	Transaction in which an official misuses his/her office "as a result of considerations of personal gain, which need not be monetary." <sup>29</sup>	Public Sectors
Bribery	Bribery occurs when one person (the briber) provides an inducement to another person (the bribee) that is intended to be in exchange for the bribee doing, or not doing, something that would favor the briber and be contrary to the bribee's positional duty. <sup>30</sup>	Including Private Sector Commercial Transactions

<sup>26</sup> *The Anti-Corruption Plain Language Guide*, TRANSPARENCY INT'L 1, 14 (July 2009), [https://issuu.com/transparencyinternational/docs/ti\\_plain\\_language\\_guide?e=2496456/2028282](https://issuu.com/transparencyinternational/docs/ti_plain_language_guide?e=2496456/2028282).

<sup>27</sup> Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. UNIV. INT'L L. REV. 1307, 1308 (2004).

<sup>28</sup> *The Anti-Corruption Plain Language Guide*, *supra* note 26, at 5.

<sup>29</sup> *Transnational Bribery*, *supra* note 2, at 258.

<sup>30</sup> Thomas W. Dunfee et al., *Social Contracts and Marketing Ethics*, 63 J. MARKETING. 14, 22 (July 1999).

Bribery	To corruptly offer, promise or give... anything of value... directly or indirectly, to any non-US government official or official of an international organization... to influence official acts, obtain or retain business, or secure any other improper advantage. <sup>31</sup>	Public Sectors
Coarse Bribery	The promise or payment of a benefit that includes a public official to breach a duty pertaining to a significant community interest. <sup>32</sup>	Public Sectors

For the purpose of this research in a multinational context, this article focuses on the abuse of position of foreign public officials and adopt the World Bank's definition with the addition of "intent" required by the FCPA in defining corruption as a willful abuse of foreign entrusted power for private gain.<sup>33</sup> This article uses the World Bank's working definition because it is "concise and broad enough to include most forms" and "places the public sector at the center of the phenomenon."<sup>34</sup> Adding in the mental status requirement by FCPA is to recognize the importance of motives in assessing corrupt behaviors.<sup>35</sup>

### 1. Normative Justification of Corruption as a Social Institution

Can it be ethical to pay a bribe? Salbu raises the "big questions" whether local and international laws should recognize culturally justified bribes and thereby exempt "good-faith

<sup>31</sup> The Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, 78dd-2.

<sup>32</sup> David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach: The C<sup>2</sup> Principles (Combating Corruption)*, 33 CORNELL INT'L L. J. 593, 595 (2000) [hereinafter *The C<sup>2</sup> Principles*].

<sup>33</sup> *Global Market*, *supra* note 3, at 245 (describing how bribery can occur with respect to both a public and private official. The focus of this article is on public bribery, so is the proposed definition).

<sup>34</sup> *Anticorruption Fact Sheet*, THE WORLD BANK (Feb. 19, 2020), <https://www.worldbank.org/en/news/factsheet/2020/02/19/anticorruption-fact-sheet>.

<sup>35</sup> *Premature Evocation*, *supra* note 3, at 240-51.

behaviors that can be morally justified.”<sup>36</sup> According to Salbu, a good-faith exemption would not undermine the spirit of anti-bribery laws, which target only bad-faith behaviors.<sup>37</sup> What underlies Salbu’s argument is that current extraterritorial anti-corruption laws have not been effective in using circumstantial evidence and local context to acknowledge and assess the difference between coarse corruption and legitimate social practice where bribes are paid.<sup>38</sup> Specifically, Salbu suggests ethical justifications from deontological, consequentialist, and social contract viewpoints.<sup>39</sup>

A deontological approach looks at whether one’s moral duty has been violated by paying bribes, under all three of Immanuel Kant’s categorical imperatives.<sup>40</sup> If paying bribes cannot become a universalized business practice without causing a self-defeating economic system by everyone acting on that, then it is immoral to pay bribes.<sup>41</sup> Salbu, however, by providing a hypothetical dilemma, suggests that under certain circumstances, paying a bribe could serve a higher moral duty that justifies the bribes.<sup>42</sup> The hypothetical dilemma suggests bribes can be made by good-faith businesses to entrenched authorities in a politically motivated famine in order to donate food to the people in the regime and provide necessities to meet their basic needs.<sup>43</sup> What was hypothetical from a scholastic perspective turned out to be true in reality: four years after Salbu’s article, the United Nations (UN) published an independent investigation report on the illicit bribe payments made in connection with humanitarian contracts in the United Nations Oil-For-Food Program (“OFFP”) by firms

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<sup>36</sup> *Id.* at 240-41; *Big Questions*, *supra* note 3, at 437 (detailing how Salbu raised four big questions in this article).

<sup>37</sup> *Big Questions*, *supra* note 3, at 449.

<sup>38</sup> *Id.* at 458 (providing an explanation of the C<sup>2</sup> Principles, which would require firms to create procedures to combat bribes and publicly disclose their efforts to do so).

<sup>39</sup> *Id.* at 439.

<sup>40</sup> *Id.* at 440.

<sup>41</sup> Norman E. Bowie, *A Kantian Approach to Business Ethics*, in *A COMPANION TO BUSINESS ETHICS* 3, 6 (Robert E. Frederick ed., 1999)

<sup>42</sup> *Big Questions*, *supra* note 3, at 439.

<sup>43</sup> *See id.*; *see also* Thomas W. Dunfee & David Hess, *Getting from Salbu to the “Tipping Point”: The Role of Corporate Action within a Portfolio of Anti-Corruption Strategies*, 21 *NW. J. INT’L L. & BUS.* 471, 487 (2001) [hereinafter *Tipping Point*].

from all over the world to the Saddam Hussein regime in Iraq.<sup>44</sup> The report, entitled "Report on Program Manipulation" and was published by the Independent Inquiry Committee into The United Nations Oil-for-Food Program.<sup>45</sup> The report disclosed that 3,614 companies sold \$34.5 billion of humanitarian goods to Iraq, among which were humanitarian kickbacks totaling more than \$1.5 billion by 2,253 companies.<sup>46</sup> Although the intention of these kickbacks were hard to assess, the fact that many firms that paid bribes were from the least corrupt countries in the world suggests that Salbu's hypothetical dilemma could be realistic in the business world as long as authoritarian governments still exist.<sup>47</sup> If an American company had a bona-fide intention to fulfill their moral duty to provide necessities to the trapped Iraqi people, then under the deontological ethical decision-making model, their compliance to the Iraqi government's bribery request is justified.<sup>48</sup>

A similar justification under the deontological approach that Salbu suggests is when one has no control in a corrupt system where bribery has been institutionalized.<sup>49</sup> A bribery payment is made more to comply with one's duty to follow the rule in a crooked system for survival than to manipulate or abuse a legitimate process for one's own interest at the sacrifice of others.<sup>50</sup>

In applying the utilitarian analysis to bribes, Salbu suggests that if a single instance of bribery could pass the balancing test to "maximize net social utility," it may be ethically justified.<sup>51</sup> Although he admits that it is difficult to do an actual net effect analysis out of a hypothetical situation, if we see "a plausible scenario under which the benefits of making a particular payment

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<sup>44</sup> See Independent Inquiry Comm. into The United Nations Oil-for-Food Program, Rep. on Manipulation of the Oil-for-Food Programme by the Iraqi Regime (Oct. 27, 2005) [hereinafter Oil-for-Food Program].

<sup>45</sup> *Id.* at i.

<sup>46</sup> *Id.* at 1, 4.

<sup>47</sup> See generally *id.* at 4-5 (providing background information for the conclusion drawn); see generally *Big Questions*, *supra* note 3, at 439 (reiterating Salbu's hypothetical dilemma and conclusion).

<sup>48</sup> See *Big Questions*, *supra* note 3, at 439-40 (explaining in detail the deontological approach).

<sup>49</sup> See *id.* at 444-45 (using the classical case of a U.S. manager facing the dilemma of either hiring a *commercialista* to pay tax kickbacks in Italy or causing big financial loss to his company and losing his job).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 442.

outweigh the costs," the bribe-payment can be justified.<sup>52</sup> In the case of kickback payment in the OFFP, if the lives of the Iraqi civilians saved by a firm paying kickbacks to the Iraqi government in order to import their humanitarian goods yield greater net social utility than not paying bribes, then such bribes are justified under a utilitarian point of view.<sup>53</sup>

From an empirical perspective, although the empirical result of this article suggests that firms from more corrupt countries with the bribery experience in the OFFP are found to be more likely to invest in relatively corrupt countries ten years later, which may demonstrate negative ripple effects in a real business case, there is no significant relationship between a one-time bribery payment and firms' long-term performance or foreign investment location strategies among firms from clean, or less corrupt, countries.<sup>54</sup>

Salbu's third moral justification is through the social contract approach, under which culturally different expectations may justify bribe-payment.<sup>55</sup> Although the FCPA provides one exception and two affirmative defenses to bribery payments, such an exception and defenses are mostly deficient to provide clear guidance when managers face ethical dilemmas.<sup>56</sup> The most discussed example of this kind of dilemma is a gift.<sup>57</sup> A gift can be given as an expression of gratitude, loyalty, or for trust-building, or to send a message of caretaking in some cultural contexts.<sup>58</sup> A banquet of over \$500 U.S. dollars per person with government officials is a common business practice in Japan when a new business introduces itself to the market, though it would likely be

<sup>52</sup> *Id.* at 443.

<sup>53</sup> *See id.* at 439 (describing the utilitarian point of view).

<sup>54</sup> Lili Yan & Robert J. Weiner, *Do Birds of a Feather Flock Together? Firm-level Evidence on Corruption and FDI*, 2017 ACAD. MGMT. PROC. 1 (Nov. 30, 2017).

<sup>55</sup> *Big Questions*, *supra* note 3, at 446.

<sup>56</sup> *See generally*, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, U.S. DEPT. JUST. CRIM. DIV. & SEC ENFORCEMENT DIV. (2nd ed. 2020), <https://www.justice.gov/criminal-fraud/file/1292051/download> (describing the following concepts in the FCPA: the "routine governmental action" exception to FCPA, 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b); 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c). Under the affirmative defense of FCPA, if a payment is legal under the written law and regulations in the country where the bribes are paid, or is considered "reasonable and bona fide expenditures," the payment maker is not liable for the bribe paid).

<sup>57</sup> *Big Questions*, *supra* note 3, at 456-57.

<sup>58</sup> *Premature Evocation*, *supra* note 3, at 235-40.

a bribery case in the U.S.<sup>59</sup> The thousands-year old Confucius culture of paternalism has a great influence on such business practice in China because local authorities are regarded as the parents of business within its political jurisdiction; it is seen as the source of authorities that demands deference.<sup>60</sup> A meal is not given necessarily to abuse the government official's power, but for the business to show respect to the authorities.<sup>61</sup>

Philip Nichols, on the other hand, rejects the claim that extraterritorial anti-bribery laws constitute cultural intrusion and posits that extraterritorial anti-bribery laws are viable "multinational and unilateral efforts to combat corruption."<sup>62</sup> Nichols' two main reasons are, first, that bribery is universally condemned, and second, that there is nothing wrong for a home country to criminalize transnational bribery by its own citizens.<sup>63</sup> In addition, Nichols sees the FCPA as "Bright Line Rules," and describes the effect of the law as "[having] significantly shaped the behavior of U.S. companies."<sup>64</sup> Per Nichols, whether a business practice would be considered bribery in the host country depends on the local law.<sup>65</sup> For that reason, dining at a luxury restaurant with Chinese government officials would not be bribery if it is legal according to the Chinese law. Such a conclusion in defining the viability of extraterritorial regulation needs further examination as this interpretation is not adequate for two reasons. First, the FCPA criminalizes any actions that "corruptly offer, promise or give . . . anything of value . . . directly or indirectly, to any non-US government official or official of an international organization . . . to influence official acts, obtain or retain business, or secure any other improper advantage . . ."<sup>66</sup> Admittedly, the FCPA gives an affirmative defense that allows for what is legal in the law of the host country.<sup>67</sup> This defense, however, is almost practically impossible for business managers to prove, because most laws stipulate what is prohibited rather

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<sup>59</sup> *Id.* at 239-40.

<sup>60</sup> *See generally id.* at 250 (describing the practices of gift giving in China).

<sup>61</sup> *Id.* at 239-40.

<sup>62</sup> *Myth of Anti-Bribery Laws*, *supra* note 2, at 655.

<sup>63</sup> *Id.* at 629, 648-49.

<sup>64</sup> *Id.* at 641-42.

<sup>65</sup> *Extraterritorial Restrictions*, *supra* note 1, at 472.

<sup>66</sup> The Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1-3, 78ff.

<sup>67</sup> *Id.* at § 78m(c).

than what is legal.<sup>68</sup> This is as futile as trying to prove the null hypothesis in statistical science. Second, the FCPA applies not only to U.S. nationals, but any U.S. issuing companies and anyone working as an agent to the U.S. companies.<sup>69</sup> Because a business cannot effectively use the affirmative defense for the reasons above, this leaves the U.S. court to be in the position to assess whether a foreign national, outside the territory of the U.S., has corruptly paid bribes based on the U.S. courts' understanding of a foreign national's local law or culture.<sup>70</sup> This is what makes the viability of an extraterritorial law questionable.

Both Salbu and Nichols agree that bribery is universally disapproved.<sup>71</sup> Both of them agree that bribery should be prohibited,<sup>72</sup> but they do not agree on the viability of extraterritorial application of anti-bribery laws in culturally differentiated contexts.<sup>73</sup> Salbu's concern of cultural sensitivity in different communities and Nichols' confidence of the viability of application of the U.S. law illustrate the *norm-taking* problem in fighting against corruption that Donaldson and Dunfee try to resolve through their Integrated Social Contract Theory ("ISCT").<sup>74</sup>

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<sup>68</sup> Dieter Juedes, *Taming the FCPA Overreach Through an Adequate Procedures Defense*, 4 WM. & MARY BUS. L. REV. 37, 47-48 (2013) (stating, "because no country has written laws that expressly permit bribery, this defense is an illusory safe harbor").

<sup>69</sup> The Foreign Corrupt Practices Act, § 78m(h)(1).

<sup>70</sup> See *Myth of Anti-Bribery Laws*, *supra* note 2, at 654 (discussing the issue of cultural sensitivity invoked by the application of anti-bribery laws).

<sup>71</sup> *Id.* at 629; *Big Questions*, *supra* note 12, at 438.

<sup>72</sup> *Big Questions*, *supra* note 3, at 438; *Myth of Anti-Bribery Laws*, *supra* note 2, at 633.

<sup>73</sup> See *Big Questions*, *supra* note 3, at 446; see also *Threat to Global Harmony*, *supra* note 3, at 433-37 (emphasizing that Salbu warns of the risk of cultural imperialism due to evaluation by outsiders); but see *Myth of Anti-Bribery Laws*, *supra* note 2, at 645-53 (opposing Salbu's perspective, Nichols believes that extraterritorial and multilateral prohibition of bribery is a logical approach, and legally and ethically "unremarkable.")

<sup>74</sup> *Big Questions*, *supra* note 3, at 446; *Myth of Anti-Bribery Laws*, *supra* note 2, at 645; Gastón de los Reyes et al., *Beyond the "Win-Win": Creating Shared Value Requires Ethical Frameworks*, 59 CAL. MGMT. REV. 142, 143, 145 (Mar. 2017) [hereinafter *Shared Value*] (introducing the term "norm-taking" as a framework that helps a manager identify legitimate non-legal norms to follow, and "norm-making" as a framework of firms taking the initiative in making norms when there is a regulatory void to fill).

### III. A CONTEXT-BASED STRATEGY TO COMBAT CORRUPTION IN A GLOBAL CONTEXT

To utilize data from the Oil for Food Program aforementioned as a natural experiment to examine the effectiveness of multinational organizations' efforts to combat corruption, this author performed a statistical test to determine any association between a country's commitment to and ratification of the Convention and incidents of their firms' foreign bribery.<sup>75</sup> The empirical test result in Table 2a (Appendix 1) supports a significant association.<sup>76</sup> The frequency of bribe payment in the UN Oil-for-Food Program drops from 67% for firms from non-OECD countries to 45% for firms from OECD countries.<sup>77</sup> However, 45% of the firms from OECD countries still paid foreign bribes when asked for illicit kickbacks, irrespective of the deterrence and commitment given by their home countries' efforts.<sup>78</sup> Table 2b (Appendix 2) shows that almost half of the firms, 48.49%, from countries with relatively less domestic corruption still paid foreign bribes in the OFFP.<sup>79</sup> Hess and Dunfee called this kind of perplexing inconsistency between country- and firm-behavior *the paradox of corruption*: "corruption is widely condemned yet widely practiced."<sup>80</sup> With this empirical evidence of the "paradox," this article now explores two alternative mechanisms in the scholarship to extraterritorial regulations in combating corruption.<sup>81</sup>

#### 1. Model 1: Mediating Institutions

Mediating institutions are a mechanism introduced by Timothy Fort and James Noone in which to overcome corruption is to connect one's self-interest with the welfare of the community

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<sup>75</sup> See Oil-for-Food Program, *supra* note 44, at 15.

<sup>76</sup> See *infra* Appendix 1: Table 2a.

<sup>77</sup> See *infra* Appendix 1: Table 2a.

<sup>78</sup> See *infra* Appendix 1: Table 2a.

<sup>79</sup> See *infra* Appendix 2: Table 2b.

<sup>80</sup> *The C<sup>2</sup> Principles*, *supra* note 32, at 594-96.

<sup>81</sup> *Id.* at 615.



to which she belongs.<sup>82</sup> It is through self-regulating structures that relate to basic, communal human nature.<sup>83</sup> They borrow from sociological and anthropological studies and introduce the concept of “mediating institutions.”<sup>84</sup> Mediating institutions refer to small organizations that “stand between the individual and the large superstructures of contemporary society.”<sup>85</sup> These organizations are small enough that they provide the means of an ongoing mediating process of dialogue and adjustment between individuals and the common.<sup>86</sup> It is through these dialogues and adjustments that “individuals’ moral behavior inculcates and relates to the good of a community whose members are harmed by corruption.”<sup>87</sup> The interaction between individuals and the common in such small organizations “gains its meaning, significance, and enrichment through this process of *participatory* accommodation or adjustment.”<sup>88</sup> An example would be a social gathering next to a well in an ancient Jewish community – wells played an important role for the local community to meet and to exchange dialogues that pertain to the wellbeing of the communities.

The mediating institution model emphasizes that the size of such organizations needs to be small enough that individuals can feel the consequence of their behaviors to the interest of the community: otherwise, individuals will be disconnected from the consequence.<sup>89</sup> According to Fort and Noone, connecting one’s self-interest to the welfare of the community is the key to preventing bribery.<sup>90</sup> When one’s notion of individual autonomy

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<sup>82</sup> 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. 524, 515-46 (2000) [hereinafter *Gifts, Bribes, and Exchange*].

<sup>83</sup> *Id.* at 524.

<sup>84</sup> *See id.* at 524-25; *see also Banded Contracts*, *supra* note 5, at 214.

<sup>85</sup> *Banded Contracts*, *supra* note 5, at 193.

<sup>86</sup> *Id.* at 186 (citing Rogene A. Buchholz & Sandra R. Rosenthal, *Toward a New Understanding of Moral Pluralism*, 6 BUS. ETHICS Q. 263, 268 (1996)).

<sup>87</sup> Thomas Donaldson & Paul J.H. Schoemaker, *Self-Inflicted Industry Wounds: Early Warning Signals and Pelican Gambits*, 55 CAL. MGMT. REV. 24, 25 (Jan. 1, 2013).

<sup>88</sup> *Banded Contracts*, *supra* note 5, at 186 (citing Rogene A. Buchholz & Sandra R. Rosenthal, *Toward a New Understanding of Moral Pluralism*, 6 BUS. ETHICS Q. 263, 263 (1996)).

<sup>89</sup> *Gifts, Bribes, and Exchange*, *supra* note 82, at 524.

<sup>90</sup> *See id.* (discussing the naturalist approach that human beings develop moral sense through communities).

takes priority over her notion of communal interest, the chance of bribery increases.<sup>91</sup> Small-size mediating institutions can accomplish the goal of connecting one's self interest to the welfare of the community for two reasons.<sup>92</sup>

First, people formulate their moral views by observing what other people in the same community are doing.<sup>93</sup> What others are doing may have "some moral force in business context."<sup>94</sup> The group mind shapes a sense of interconnected moral identity with each other and develops a sense of individual responsibility.<sup>95</sup> Being in a community may require significant personal sacrifice to adapt to their communal identity.<sup>96</sup> People do not formulate their moral views based on an application of normative philosophy, but instead, by observing what others in their community do.<sup>97</sup>

This is one way how one connects his or her own interest to that of the community. Second, morality can be communal in small organizations because they provide "an internal feedback mechanism to regulate behavior."<sup>98</sup> Individuals in small communities are responsible to solve their problems within the communities.<sup>99</sup> This requires "a level of participation by individuals within the community."<sup>100</sup> Because the interest is communal and direct, an individual can also exert powerful influence on the community in small groups.<sup>101</sup> Large-size communities would have difficulties replicating this internal feedback mechanism: it conceals the consequences of an

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<sup>91</sup> *Id.* at 523.

<sup>92</sup> *See id.* at 520, 524 (stating that internal feedback mechanisms and following observances of how people formulate their moral views, can be methods through which connections can be established).

<sup>93</sup> *Id.* at 520.

<sup>94</sup> Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L. J. 215, 220 (2001).

<sup>95</sup> *See Banded Contracts*, *supra* note 5, at 177, 193-94 (explaining the development of "group mind").

<sup>96</sup> *Id.* at 177.

<sup>97</sup> *Gifts, Bribes, and Exchange*, *supra* note 82, at 520 (citing Bronislaw Malinowski, *Argonauts of the Western Pacific: An Account of Native Enterprise and Adventure in the Archipelagoes of Melanesian New Guinea*, 110 NATURE 326 (Oct. 7, 1922)).

<sup>98</sup> *Id.* at 524.

<sup>99</sup> *Id.* at 523-24.

<sup>100</sup> *Id.* at 542.

<sup>101</sup> *Id.*

individual's actions, hosts "scalar stress," and "can leave an individual disconnected from the consequences of his actions."<sup>102</sup>

Applying this model in the context of corruption, a community dialogue about bribery would enable robust dialogue among small-size communities to hear the voice of those affected by the multinational and local rules that prohibit bribery.<sup>103</sup> As the aforementioned discussion of moral justifications to bribery suggest, extraterritorial laws and regulations, without interactive dialogue and adjustment to those justifications, will only cause scalar stress and concealing of the consequences of individual actions.<sup>104</sup>

This is also where Fort and Noone differ from Donaldson and Dunfee.<sup>105</sup> According to Fort and Noone, people need to group themselves into communities small enough to prioritize the communal nature over self-autonomy to effectively eradicate corruption.<sup>106</sup>

According to Donaldson and Dunfee, necessary social efficiency is what makes norms legitimate.<sup>107</sup> Size or communal interaction is not as important.<sup>108</sup> As discussed in the earlier section, by focusing only on necessary social efficiency and ignoring the discussion why norms of smaller groups with stronger bonding should not be valued, ISCT is vulnerable in addressing why small-community norms for relationship building should fail to contribute to hypernorms under the purview of bribery other than social efficiency argument.<sup>109</sup>

The mediating institution model suggests a cooperative model found in the basic human nature of communal interaction.<sup>110</sup> Fort and Noone, however, have not addressed how to practically fit the mediating institution model in a global context.<sup>111</sup> To be specific, how and when should small-sized communities' dialogues and adjustments fit into the large

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<sup>102</sup> *Id.* at 524, 542.

<sup>103</sup> *Gifts, Bribery and Exchange*, *supra* note 82, at 520.

<sup>104</sup> *Id.* at 542.

<sup>105</sup> *Id.* at 524.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Gifts, Bribery and Exchange*, *supra* note 82, at 523-24.

<sup>110</sup> *Id.* at 524.

<sup>111</sup> *Banded Contracts*, *supra* note 5, at 203.

international community to maintain both universal principles of justice and diversity among small communities in combating corruption? In the context of illegitimate corruption norms that are so formidably interdependent, can small organizations alone best manage systemic risks of bribery?

## 2. *Model 2: Pelican Gambits*

Like Fort and Noone, Tom Donaldson and Paul Schoemaker suggest a model of cooperative strategy originally found in nature - Pelican Gambits.<sup>112</sup> Pelicans and many other species of animals engage in "reciprocal altruism," a type of behavior that "sacrifice[s] in the short run, only to succeed in the long run both collectively and as individuals."<sup>113</sup> Donaldson and Schoemaker define Pelican Gambits as "strategic moves towards cooperation in highly competitive economic environments for the purpose of limiting risks to one's firm, the industry, and society."<sup>114</sup> Unlike traditional passive industry self-regulation, "a Pelican Gambit is a proactive strategy within an individual firm about systemic risk, opening the door to cooperative risk avoidance strategies at the industry level."<sup>115</sup> This strategy is recommended to avoid risk that can cause catastrophic damage to the firm, industry, and society.<sup>116</sup>

Warning signs of systemic risks across industries often include in the dominant paradigm weak regulations, practice of norms that would violate public trust, and lack of transparency or open discussion.<sup>117</sup> These risks cannot be managed by a single firm alone. In fact, illegitimate norms in an industry can be so prevalent that firms benchmark themselves by imitating one another.<sup>118</sup> In such a regime, legislators or regulators are not reliable in bringing effective change due to their lack of knowledge or information of the underlying systemic risks or

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<sup>112</sup> Donaldson & Schoemaker, *supra* note 87, at 29.

<sup>113</sup> *Id.* at 30.

<sup>114</sup> *Id.* at 24.

<sup>115</sup> *Id.* at 29.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 33-34.

<sup>118</sup> Donaldson & Schoemaker, *supra* note 87, at 27.

willingness to eradicate them.<sup>119</sup> Nor are insiders from within the firms or the industry, either because they lack the incentive or they have become numb to the reality of the existing problem.<sup>120</sup> Donaldson and Schoemaker propose firms in this type of situations should do what pelicans do in nature - undertake a temporary sacrifice through cooperation among industry members in order to better manage long-term systemic risk.<sup>121</sup>

Unlike Donaldson and Dunfee's ISCT framework to keep the status quo, both Pelican Gambits and mediating institutions are proactive strategies for cooperation in situations of uncertainty.<sup>122</sup> But Pelican Gambits differ from mediating institutions in that they call for leading firms to move forward with industry cooperation in order to change the illegitimate norms that breed systemic risks.<sup>123</sup> This is counterintuitive; firms in industries with interdependent norm practice would want to manage themselves in isolation or take advantage of the norm deficiency, but Pelican Gambits call for a coordinated action to change the current norms.<sup>124</sup>

The authors use the Canadian chemical industry as an example of Pelican Gambit.<sup>125</sup> Leaders of large companies of the Canadian chemical industry cooperated to address the safety and regulatory risks that have been prevalent in the industry.<sup>126</sup> They met face-to-face with CEOs from other firms, made long-term business case for a cooperative, industry-level approach, provided cooperating system assistance, periodically met in small groups for monitoring purposes, and assembled "a cross-sectional group of activists, academics, consumers, seniors, and youth . . ."<sup>127</sup>

Effective steps for firm leaders to take in implementing Pelican Gambits include assessing various systemic risks for any industry (whether risky practices are prevalent in the industry and whether industry leadership are strong), working cooperatively among business leaders to inform and assist the

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<sup>119</sup> *Id.* at 28.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 30.

<sup>122</sup> *Id.* at 29.

<sup>123</sup> *Id.* at 30-31.

<sup>124</sup> Donaldson & Schoemaker, *supra* note 87, at 30-31.

<sup>125</sup> *Id.* at 31.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

government to understand “industry-based initiatives” to lower systemic risk, gathering information across and within organizations to evaluate the systemic risk, and projecting future actions based on the information collected.<sup>128</sup>

Pelican Gambits complement mediating institutions in that they call for positive dialogue within industries, especially by leaders from large firms.<sup>129</sup> This is important in combating corruption, because some industries are more prone to bribery than others.<sup>130</sup> Positive dialogue within both small communities and larger industry players complement each other in allowing firms to actively adjust and transform the cultural norms of bribery and protect themselves from the systemic risk of corruption.<sup>131</sup> As was seen earlier from the debates between Salbu and Nichols, the problem of combating corruption is magnified in a multinational context when a universal legal standard is lacking or unenforceable by a single sovereign.<sup>132</sup> To effectively combat corruption, we need not only small-sized organizational dialogue, but also adjustment in countries and industries that are fraught with corruption.<sup>133</sup>

#### IV. A CONTEXT-BASED STRATEGY TO COMBAT CORRUPTION IN A GLOBAL CONTEXT

Donaldson and Dunfee’s ISCT provides a useful norm-justification mechanism but does not provide sufficient guidance for combating corruption.<sup>134</sup> The authors of the ICST acknowledge that “research based on detailed, context-rich scenarios... requiring subjects to respond to precisely delineated dilemmas is more consistent with the requirements of ISCT.”<sup>135</sup> An effective strategy to combat corruption calls for recognition of the context where dynamic interactions between individuals and community

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<sup>128</sup> *Id.* at 39.

<sup>129</sup> *See id.* at 37 (emphasizing positive intra-industry dialogue).

<sup>130</sup> OECD, FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS, 21 (2014).

<sup>131</sup> *Id.* at 3.

<sup>132</sup> *Premature Evocation*, *supra* note 3, at 230.

<sup>133</sup> *Id.*

<sup>134</sup> *Shared Value*, *supra* note 74, at 152; Philip M. Nichols, *Multiple Communities and Controlling Corruption*, 88 J. BUS. ETHICS 805, 811 (2009) [hereinafter *Controlling Corruption*].

<sup>135</sup> *Integrative Social Contracts Theory*, *supra* note 4, at 275.

norms are taking place, and for dialogues and adjustment through small and large communities to address the tension in that context.<sup>136</sup>

The cornerstones of norm justification in ISCT are authenticity and legitimacy.<sup>137</sup> Although the purpose of this section is not to justify norms, the concept of authenticity and legitimacy provides a good framework for describing different types of context of community norms.<sup>138</sup> Authenticity asks attitudinal and behavioral aspects of the putative norms: whether a norm is approved and deviance disapproved by a substantial majority of the members of the community, and whether a substantial majority of the communities actually act in compliance with the norm.<sup>139</sup> Legitimacy asks if the putative norms are compatible with hypernorms.<sup>140</sup>

Building on the framework of authentic norm provided in ISCT, this article constructs the context to combat corruption as a function of authenticity and legitimacy. The 2x2 matrix below examines four different types of contexts in formulating strategies to combat corruption. The columns of the matrix correspond to the legitimacy of a norm. The rows of the matrix correspond to the authenticity. The four types of combination of authenticity and legitimacy illustrate four contexts of the norms of corruption: legitimate and authentic norms, legitimate and inauthentic norms, illegitimate and authentic norms, and illegitimate and inauthentic norms. Each context calls for different, appropriate responses.

Authenticity	Legitimacy
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<sup>136</sup> *Id.* at 277.

<sup>137</sup> *Id.* at 272.

<sup>138</sup> *Id.* at 276.

<sup>139</sup> *Integrative Social Contracts Theory*, *supra* note 4, at 264, 274-75; *see also Ties That Bind*, *supra* note 4, at 209 (depicting a flowchart for enhanced understanding).

<sup>140</sup> *See Ties That Bind*, *supra* note 4, at 44 (explaining the relationship between legitimate norms and hypernorms with regards to putative concepts).

	<b>Legitimate</b> <sup>141</sup>	<b>Illegitimate</b> <sup>142</sup>  (Systemic Risk - Context Transformation)
<b>Authentic</b> <sup>143</sup> (Top-down Strategy)	A Law; Transnational organizations	C Pelican Gambits
<b>Inauthentic</b> <sup>144</sup> (Bottom-up Strategy)	B Mediating Institution	D Pelican Gambits Mediating Institution

i. Quadrant A

Community members in this context have a genuine attitude towards legitimate cause for paying bribes and they act on such cause.<sup>145</sup> They also expect other members in the same community to do the same.<sup>146</sup> The uncertainty that community members cannot monitor each other's behaviors in this context is low.<sup>147</sup> Community members are most open to collaboration in this context.<sup>148</sup> This is where Salbu's first example of legitimate bribe

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<sup>141</sup> Bribe paying is compatible with hypernorms in situations involving these groups.

<sup>142</sup> Bribe paying violates hypernorms in the context of this group.

<sup>143</sup> Communities have a genuine attitude toward compliance with the putative norm of paying bribes or toward the cause of bribery in these contexts.

<sup>144</sup> Communities lack a genuine attitude towards bribes or behave otherwise in these contexts.

<sup>145</sup> See generally *Big Questions*, *supra* note 3 (providing an example of a situation which would give rise to a legitimate cause for paying bribes).

<sup>146</sup> See generally *id.* at 443 (providing examples of the teleological approach, which would benefit greatly from collective support of an ends-oriented approach when it comes to potential acts of technical corruption).

<sup>147</sup> But see Dr. Bruce Bayley, *Noble Cause Corruption: Do the Ends Justify the Means?*, POLICE1 (Feb. 12, 2010), <https://www.police1.com/chiefs-sheriffs/articles/noble-cause-corruption-do-the-ends-justify-the-means-SCKX3VQGkXYSFhUb/> (indicating that the prospect of members being unable to monitor each other is a frequent criticism and cause for concern of the teleological approach being outlined here).

<sup>148</sup> But see *id.* (suggesting that an ends-oriented approach such as this will pose problems in regard to monitoring, direction, and unity since it is enforcing a "do whatever it takes" attitude, which might lead to a lack of cohesion in ideas due to selfishness).



in meeting humanitarian needs would take place.<sup>149</sup> In such a context, a top-down model of government laws and regulations with culturally justified exceptions to legitimate bribes would be sufficient.<sup>150</sup>

ii. Quadrant B

Community members in this context comply with the norms of paying bribes, without a genuine attitude or willingness to act on such norms.<sup>151</sup> This could happen when individuals hold an “attitude that recognizes an excuse or justification for certain forms of behavior in current circumstances” due to “social pressure or to a desire to conform to what they perceive to be the norms of the community.”<sup>152</sup> Salbu’s second justification of bribery for survival falls under this context.<sup>153</sup> Because of the divergence in individual attitudes and the legitimacy of the norm, uncertainty in monitoring other members’ behavior in terms of paying bribes are present.<sup>154</sup> This requires an anti-bribery strategy that effectively reconnects individual self-interest to community interest.<sup>155</sup> According to Fort and Noone, “it is critical to recapture the communal self and to provide structures that nourish it because otherwise any attempts to outlaw bribery through transnational organizations would be empty rules because they make no meaningful connection between people and the prohibition.”<sup>156</sup>

Top-down methods, such as firm bylaws or anti-bribery laws, may still apply to this context, but need to rely on small mediating institutions to reconnect individual self-interest to the meaning of such laws and regulations.<sup>157</sup> To be specific, a law-making process that intends to prohibit bribery with limited exceptions should include communication with individuals in local communities, hearing their reasons and concerns in legitimizing certain bribery actions, and incorporating feedback from them in the law-making

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<sup>149</sup> *Big Questions*, *supra* note 3, at 439.

<sup>150</sup> *Id.*

<sup>151</sup> *Gifts, Bribes, and Exchange*, *supra* note 82, at 530.

<sup>152</sup> *Id.*

<sup>153</sup> *Big Questions*, *supra* note 3 at 439.

<sup>154</sup> *Id.*

<sup>155</sup> *Gifts, Bribes, and Exchange*, *supra* note 82, at 530.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 542-43.

process. HR training, employee associations, or independent board committees within a company can give voice to or hear the voice of employees in terms of bribe paying, deliver personal meanings of reasons for and against gift-giving, understand other community's ethical perspectives, and confirm that illegitimate bribery are not tolerated while legitimate bribery is recognized. People respond to law compliance and good behaviors when they know they are not alone.<sup>158</sup>

iii. Quadrant C

This is a context where the norm of paying bribes is not compatible with the hypernorms, but the attitude and behavior of community members are authentic.<sup>159</sup> Professor Andrew Spicer suggests that this can happen in situations of systemic corruption where the institutional context shapes its community members' attitude and behavioral expectations.<sup>160</sup> Individuals in such a context may not even be aware of or understand the ethical issues around corruption.<sup>161</sup> When a norm is illegitimate and the public attitude and actual behavior are authentic, the strategy is to transform the context.<sup>162</sup> Spicer calls for restructuring institutional arrangements in such a situation.<sup>163</sup>

The uncertainty to monitor other community members' bribery behavior is extremely high in the case of systemic risk of corruption.<sup>164</sup> The Pelican Gambit strategy is needed for effective institutional norm transformation. Game theorists suggest that good coordination by other players can be reached through one's leading, by committing themselves to a particular choice.<sup>165</sup> When other players observe the leading choice, they will respond accordingly.<sup>166</sup> Firms have the opportunity to establish a reputation for cooperation, and encourage other players to do the

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<sup>158</sup> *Id.* at 520.

<sup>159</sup> Andrew Spicer, *The Normalization of Corrupt Business Practices: Implications for Integrative Social Contracts Theory (ISCT)*, 88 J. BUS. ETHICS 833, 835-37 (2009).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 834.

<sup>162</sup> *Id.* at 837-38.

<sup>163</sup> *Id.* at 838.

<sup>164</sup> *Id.* at 834.

<sup>165</sup> HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH* 545-46 (Jack Repcheck ed., 8th ed. 2010).

<sup>166</sup> *Id.* at 546.

same.<sup>167</sup> The defecting party will be punished for not cooperating in the next round of the game.<sup>168</sup>

It is necessary for the firms to envision themselves in the market for a long run to be willing to take such a step.<sup>169</sup> It is also necessary for those firms to be influential enough in the industry for other firms to observe and follow.<sup>170</sup> Small mediating institutions are not the most effective actors in systemic corruption due to their limited influence in a highly corrupt environment.<sup>171</sup> A top-down global anti-corruption program, such as extraterritorial regulations, is also less likely to be effective.<sup>172</sup> In communities with high corruption, the institutional power to enforce laws and regulations are usually weak.<sup>173</sup> The major resistant power lies in the powerful members within the community.<sup>174</sup> As Wolf and Schmidt-Pfister explain the potential situation OECD is facing when community members prioritize financial concerns over anti-corruption regulations,

[t]he legal implementation and practical enforcement of international anticorruption provisions at the national level can be significantly hampered by lacking political will or contradicting interests of national key actors. If more states...disobey international anti-corruption norms because of national economic considerations, the OECD's policy against overseas bribery – maybe the

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<sup>167</sup> *Id.* at 529.

<sup>168</sup> *Id.*

<sup>169</sup> Alice Calin, *How to Forge Long-Term Collaboration in Your Company*, HUBGETS (Jul. 25, 2018), <https://www.hubgets.com/blog/howto-forge-long-term-collaboration/> (emphasizing the importance of long-term collaboration as opposed to short-term collaboration).

<sup>170</sup> Heather A. Haveman, *Follow the Leader: Mimetic Isomorphism and Entry into New Markets*, 38 ADMIN. SCI. Q. 593, 598 (Dec. 1993).

<sup>171</sup> *Tipping Point*, *supra* note 43, at 474.

<sup>172</sup> See Steven R. Salbu, *Redeeming Extraterritorial Bribery and Corruption Laws*, 54 AM. BUS. L. J. 641, 672 (2017) (suggesting recommendations that extraterritorial anti-corruption initiatives should adopt to increase their effectiveness).

<sup>173</sup> DEP'T FOR INT'L DEV. & UKAID, WHY CORRUPTION MATTERS: UNDERSTANDING CAUSES, EFFECTS AND HOW TO ADDRESS THEM 18 (2015), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/406346/corruption-evidence-paper-why-corruption-matters.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/406346/corruption-evidence-paper-why-corruption-matters.pdf) [hereinafter CORRUPTION MATTERS].

<sup>174</sup> Živka Pržulj & Svetolik Kostadinović, *Cultural Roots of Corruption-The Case of Western Balkans*, 5 MEDITERRANEAN J. SOC. SCI. 528, 533 (Aug. 2014).

most successful international anti- corruption regime so far—is jeopardized.<sup>175</sup>

This context explains why leading firms from a highly corrupt industry should make Pelican Gambits. Leading firms can take actions, such as joining industry alliances, in committing themselves not to pay bribes or initiating transparency programs which allow other firms to monitor their accounting books or governance reports.<sup>176</sup> These actions send strong signals that they are willing to cooperate with others and take accountability for their actions.<sup>177</sup> In addition to giving clear signals, industry leading firms can individually or cooperatively punish firms that continue paying bribes by refusing to cooperate with such firms, as well as rewarding firms who refuse to pay bribes by giving favorable cooperation with them.<sup>178</sup>

#### iv. Quadrant D

This is a context where a norm of paying bribes is illegitimate, and community members' attitudes and behavior are inauthentic, indicating a high systemic risk of corruption.<sup>179</sup> As discussed in Quadrant C, even if the powerful members accept the laws themselves, legal implementation can be problematic in a context of systemic corruption.<sup>180</sup> A top-down global anti-corruption program, therefore, is not the most effective strategy in this context.

Strategies for this context should be a combination of mediating institutions and Pelican Gambits. Although the community members in this context do not agree with the corruption norm, it is challenging for anti-corruption campaigns to “convince the least powerful in a community to mobilize resistance under conditions of vulnerability and risk.”<sup>181</sup> This is because the least powerful “often suffer high costs if they act on

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<sup>175</sup> Wolf & Schmidt-Pfister, *supra* note 21, at 17.

<sup>176</sup> CORRUPTION MATTERS, *supra* note 173, at 61.

<sup>177</sup> *Id.* at 62.

<sup>178</sup> See *Gifts, Bribes, and Exchange*, *supra* note 82, at 530 (discussing how game theorists would see such behavior as a tit-for-tat strategy in repeated games).

<sup>179</sup> *Id.* at 530-31.

<sup>180</sup> *Id.* at 541.

<sup>181</sup> Spicer, *supra* note 159, at 836.

their moral values.”<sup>182</sup> For that reason and the rationales discussed in Quadrant C, an effective anti-corruption strategy in Quadrant D calls for industry or community leaders to act first.

Once the powerful community leaders take initial action, corporations and local societies are in a better position to fight against corruption through reconnecting community members’ interest to the community.<sup>183</sup> This is where mediating institutions play a big role in bringing about transformation from corrupt norms into ethical business practice.<sup>184</sup> Specific strategies can be employed through communicative interactions with individual community members.<sup>185</sup> One example is engaging in dialogues with business participants for their opinions of what should be included into an anti-corruption guideline.<sup>186</sup> This self-regulating structure provides a channel for employees’ voices to be heard, the harm that can be done to them be acknowledged, and the solution that works best for them be considered.<sup>187</sup> Fort and Noone describe such a strategy as “sequential hierarchy”:

[a] small group of individuals reach a consensus first, and then one of them attempts to reach a consensus with representatives of similarly sized groups. This allows cooperative action by large groups of individuals who do not grant differential status or power to any one member of their society. This sequential hierarchy requires a popular desire or perceived need for communal decision-making. Even in large corporations, relatively small communities could be created to provide the sense of moral identity necessary for business ethics.<sup>188</sup>

A sequential hierarchy provides a solution where small-size communities do not have to follow the norms of large communities but instead align their interest with that of the large

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<sup>182</sup> *Id.* at 835

<sup>183</sup> *Controlling Corruption*, *supra* note 134, at 810.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 811.

<sup>186</sup> *See generally Banded Contracts*, *supra* note 5, at 196 (detailing this as the sequential hierarchy strategy).

<sup>187</sup> *See id.*

<sup>188</sup> *Id.*

communities.<sup>189</sup> In such a context, small and large firms intervene in the dominant illegitimate corruption norm by both engaging with small mediating institutions and playing Pelican Gambits.<sup>190</sup> This proactive approach allows for transforming illegitimate norms from submissive compliance to proactive transformation, at individual, firm, and industry level.<sup>191</sup>

## V. CONCLUSION

More than two decades after the great debate between Salbu and Nichols, the question of ethical justification of using extraterritorial restrictions against corruption still lingers.<sup>192</sup> As Nichols correctly noted, the businessperson already knows not to pay and instead needs direction as to how not to pay and to trust that others will not pay.<sup>193</sup> Corruption cannot be eradicated by an international organization.<sup>194</sup> Nor can an imposed extraterritorial application of anti-corruption laws be the solution.<sup>195</sup> This article argues that such approaches fail to recognize the context-shaping role of the communities and the norm-transforming role of the firms. Instead, a context-based framework for interactive anti-bribery strategies is proposed. Individuals, firms, and industries should all be involved based on the context of authenticity and legitimacy of a bribery norm to complement a structured discussion of strategies to combat corruption globally.

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<sup>189</sup> *Id.*

<sup>190</sup> *See generally id.* (showing how this happens by detailing the intricacies of the sequential hierarchy, allowing for the conclusion to be drawn pertaining to mediating institutions and in the context of strategic moves towards cooperation for the purpose of limiting risk in many areas).

<sup>191</sup> *See generally id.* (demonstrating through the background information how this result can be deduced).

<sup>192</sup> *See* Eugene Kornilovich, *How Ethics and Compliance Fight Corruption*, STRATEGIC FIN. (Mar. 1, 2022), <https://sfmagazine.com/post-entry/march-2022-how-ethics-and-compliance-fight-corruption/> (showing that the debate over the efficacy of anti-corruption laws is still occurring).

<sup>193</sup> *Controlling Corruption*, *supra* note 134, at 811.

<sup>194</sup> *See id.* at 811-12 (detailing that the simple observation that corruption is wrong, as attributed to international organizations, has no effect).

<sup>195</sup> *See id.* at 810 (explaining how international law fails to address the requisite concerns for the situation at hand).

APPENDIX 1: TABLE 2A.

$\chi^2$  test of association between a firm's home country's implementation of the OECD Anti-Bribery Convention and its foreign bribery in the OFFP.

Home country with implementation of the OECD Anti-Bribery Convention	Bribery		Total
	No	Yes	
No	635	1281	1916
(row percent)	(33.14)	(66.86)	(100)
(column percent)	(40.84)	(62.67)	(53.24)
Yes	920	763	1683
(row percent)	(54.66)	(45.34)	(100)
(column percent)	(59.16)	(37.33)	(46.76)
Total	1555	2044	3599
(row percent)	(43.21)	(56.79)	(100)
(column percent)	(100)	(100)	(100)
Statistic	Value	Prob.	
Chi-square	169.1331	0.000	

**H<sub>0</sub>:** There is no association between home country's implementation of the OECD Anti- Bribery Convention and foreign bribery by its firms.

**H<sub>a</sub>:** There is an association between home country's implementation of the OECD Anti- Bribery Convention and foreign bribery by its firms.

\* The row level is the OFFP bribery distribution among firms at the same country level, and the column level is the bribery distribution among OECD and non-OECD countries.

Given the interest in the effectiveness of international organizations' anti-bribery solution, The author used a bivariate nonparametric  $\chi^2$  test to examine the association between countries whose national laws criminalize bribery of foreign public officials in international business transactions and their firms' bribery occurrences, and report the result in Table 2.

The Chi-square result shows that that the propensity to bribe drops from 66.86% for firms from non-OECD countries to 45.34%

for firm from OECD countries (p-value <0.000), suggesting a deterrence effect of the Convention. While statistically significant, there is still 45% of the firms from OECD countries paid foreign bribes. This illustrates the “paradox of corruption” that Hess and Dunfee (2001) described in assessing international efforts to combat corruption.

APPENDIX 2: TABLE 2B.

**$\chi^2$  test of association between a home country's domestic corruption norms and its firms' foreign bribery in the OFFP.**

Home country's domestic corruption norms	Bribery		Total
	No	Yes	
Clean	752	708	1460
(row percent)	(51.51)	(48.49)	(100)
(column percent)	(48.36)	(34.64)	(40.57)
Dirty	803	1336	2139
(row percent)	(37.54)	(62.46)	(100)
(column percent)	(51.64)	(65.36)	(59.43)
Total	1555	2044	3599
(row percent)	(43.21)	(56.79)	(1000)
(column percent)	(100)	(100)	(100)
Statistic	Value	Prob.	
Chi-square	68.9723	0.000	

**H0:** There is no association between a firm's home country's domestic corruption norms and its foreign bribery in the OFFP.

**Ha:** There is association between a firm's home country's domestic corruption norms and its foreign bribery in the OFFP.

\*The row level is the OFFP bribery distribution among firms at the same country level, and the column level is the bribery distribution among clean and dirty countries.



\*Clean = countries with a Corruption Perception Index (CPI) score higher than the median of all countries participating in the OFFP

Dirty = countries with a Corruption Perception Index (CPI) score equal to or smaller than the median of all countries participating in the OFFP

The author used a bivariate nonparametric  $\chi^2$  test to examine the association between home country corruption norms and their firms' bribery occurrences. The Chi-square result shows that the propensity to bribe drops from 65.36% for firms of dirty countries to 34.64% for firm of clean countries (p-value <0.000). This suggests a corruption norm effect on firm behavior. Still, almost half of the firms (48.49%) from clean countries paid foreign bribes in the OFF. This illustrates the "paradox of corruption" that Hess and Dunfee (2001) described in assessing international efforts to combat corruption.