EXPERIMENTING WITH CORRUPTION—AN ANALYSIS OF THE OECD ANTI-BRIBERY CONVENTION THROUGH THE LENS OF EXPERIMENTALISM

HANNAH HARRIS*

ABSTRACT

The impact of the OECD Anti-Bribery Convention ("the Convention") has been substantial, but foreign bribery and corrupt conduct remain significant global challenges. This Article introduces the theoretical framework of experimental governance and argues that experimentalism is well suited to addressing the challenges currently facing transnational anti-corruption efforts. The Article is the first to analyze the Convention through the lens of experimental governance, illustrating that the Convention, its peer review mechanism, and subsequent recommendations, each have experimentalist qualities. However, current efforts are constrained. The Article presents opportunities to further integrate experimentalist governance into the OECD approach and thus enhance the impact and effectiveness of anti-bribery efforts.

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* Dr. Hannah Harris is a lecturer at Macquarie Law School, Sydney. She has a BA (Hon) from University of Canterbury, New Zealand and a PhD from the University of New South Wales, Sydney. She researches the field of transnational law and corporate regulation and teaches corporate law and corporate governance. Special thanks go to Anne Yang (UNSW) for her assistance with earlier drafts of this Article.

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I. INTRODUCTION

The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions entered into force on 15 February 1999 (the "Convention" or the "OECD Anti-Bribery Convention").[1] But more than twenty years later, there may not be much to celebrate: recent attempts to quantify the success of the Convention focus on enforcement and suggest that only four of the thirty-four member states actively enforce the Convention. Almost half of the member countries have failed to prosecute a single case of foreign bribery between 1999 and today.[2] Enforcement challenges, combined with the continuation of corrupt conduct globally, suggest a need to re-evaluate the transnational anti-corruption framework, and the role of the OECD Anti-Bribery Convention within this framework.

Efforts to combat corruption face three key challenges: (1) complexity and measurement; (2) regulatory pluralism; and (3) resource and capacity limitations. Bribery, and corruption more generally, are complex and socially embedded activities that are subject to diverse interpretations. They are clandestine and often avoid detection, making these behaviors resistant to measurement and evaluation. The complexity of corrupt activity and the challenges posed by its clandestine nature have driven the evolution of an increasingly complex regulatory environment. Multiple international, regional, and domestic laws exist and target different aspects of corrupt activity. Different jurisdictions take different approaches to specific crimes, including the crime of foreign bribery targeted by the OECD Anti-Bribery Convention.

1. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 [hereinafter OECD].

2. FRITZ HEIMANN, ÁDÁM FÖLDES & SOPHIA COLES, TRANSPARENCY INT'L, EXPORTING CORRUPTION – PROGRESS REPORT 2015: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATTING FOREIGN BRIBERY 6 (2015).

Furthermore, a range of non-legal mechanisms have been developed by non-state actors to deal with the cost of corruption on the one hand, and the cost of compliance with anti-corruption efforts on the other. Both regulators and regulated entities require increasing amounts of money and expertise to operate in this complex environment. Resource and capacity limitations are often cited as a key obstacle for effective implementation and enforcement of anti-corruption law.[3]

The challenges above suggest a need to rethink the legal approach to combating corruption. This Article analyzes the OECD Anti-Bribery Convention through the lens of experimentalist governance and demonstrates that enhancing experimentalist features of the Convention and its application could benefit enforcement efforts and increase compliance. The experimentalist approach to governance focuses on setting a broad objective for governance and allowing regulated actors to experiment with the best methods to achieve this goal. Experimentalism sees compliance as a process of dynamic and continual engagement with regulatory goals and aims to foster engagement by diverse stakeholders. The ideal model of experimentalist governance involves the following five features: (1) stakeholder engagement characterized by an openness to participation and non-hierarchical decision making; (2) open-ended goals focused on a broadly agreed common problem; (3) contextualization of solutions based on implementation and elaboration by lower-level actors with local knowledge; (4) transparency and feedback through continual reporting and monitoring; and (5) revision through peer review to enable regular reconsideration and evolution of established rules and practices.[4] Additional dimensions of experimentalist governance include a pre-existing environment of regulatory complexity and the use of "penalty defaults" to motivate action.[5] Both concepts are elaborated in the next section.

Before discussing experimentalist governance in greater detail, it is useful to situate this approach within a broader sphere of flexible governance approaches. There are many variants of regulatory theory that attempt to go beyond the traditional command and control logic. Sharon Gilad suggests three categories of regulation: traditional rule based and prescriptive approaches, outcome-oriented approaches, and

3. Marie Chêne, *U4 Expert Answer: The Impact of Law Enforcement Interventions on Corruption*, TRANSPARENCY INT'L, Sept. 17, 2009.

4. Gráinne de Búrca, Robert O. Keohane & Charles Sable, *New Modes of Pluralist Global Governance*, 45 N.Y.U. J. INT'L. L. & POL. 723 (2013).

5. Charles F. Sabel & Jonathan Zeitlin, *Experimentalist Governance*, *in* THE OXFORD HANDBOOK OF GOVERNANCE 169, 169–184 (David Levi-Faur ed., 2012).

process-oriented approaches.[6] Gilad then explores the category of process-oriented regulation in greater detail, situating "New Governance" and experimentalist approaches within this category, along with management-based regulation, meta-regulation, and enforced self-regulation.[7] The author concludes that within the category of process-oriented regulation, meta-regulation has the greatest potential, with its emphasis on systemic and recursive learning. The elements of meta-regulation in Gilad's work, closely mirror those of experimentalism. In fact, while Gilad makes a distinction between meta-regulation and other forms of process-oriented regulation, Christie Ford situates experimentalism within the meta-regulation category, noting: "the most significant distinction is between meta-regulation and everything else."[8]

Another well-known category of flexible regulation is "responsive regulation," first developed by Ian Ayres and John Braithwaite.[9] Kenneth Abbott and Duncan Snidal note the important contribution that responsive regulation has made to regulatory theory through emphasizing the need to balance state-based regulation with self-regulation and expand the regulatory landscape to include public interest groups.[10] Including third parties (beyond the regulator and the regulated) is also an important feature of experimentalism, which highlights the need for broad participation. Abbott and Snidal further expand responsive regulation to the transnational sphere, focusing on the potential for collaboration and orchestration, while noting that responsive regulation itself is envisioned as an attitude, rather than a formula for direct application.[11] Ford also discusses responsive regulation, in the post-financial crisis context. The author is concerned that flexible regulation in general, and responsive regulation in particular, is "far more porous to external influence than prescriptive regulation would be."[12] However, Ford goes on to say that "the response to the frailties of flexible, dialogue based systems of power . . . is not to terminate dialogue but rather to engage more strongly and insistently with

6. Sharon Gilad, *It Runs in the Family: Meta-Regulation and Its Siblings*, 4 REG. & GOVERNANCE 485, 487 (2010).

7. *Id.*

8. Christie Ford, *Macro- and Micro-Level Effects on Responsive Financial Regulation*, 44 U. BRIT. COLUM. L. REV. 589, 597 (2011).

9. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION (1992).

10. Kenneth Abbott & Duncan Snidal, *Taking Responsive Regulation Transnational: Strategies for International Organisation*, 7 REG. & GOVERNANCE 95, 96 (2013).

11. *Id.* at 100.

12. Ford, *supra* note 8, at 600.

it."[13] Ford concludes that responsive regulation appears to be evolving, to emphasize the need for "institutional learning and memory," thus representing a welcome shift towards a meta-regulatory approach that may limit the macro and micro-level risks of capture, cooptation, and information asymmetry.[14]

Experimentalism is one of many non-traditional and flexible governance approaches, emerging out of a rich history of theory that challenges the limitations of command and control models. A strength of experimentalism is hybridity. It encompasses the features of other flexible approaches that are most salient to the complex transnational context. Experimentalism provides a broad, macro-level framework for governance, yet is simultaneously specific about the features of an ideal model. These specific features are all designed to enable experimentation with diverse approaches to solving a common problem and reaching a common regulatory goal. Providing a specific list of ideal elements allows experimentalism to be applied as a lens to analyze current governance efforts, while simultaneously forming a road map for governance efforts to articulate towards more effective governance. Furthermore, the recursive learning dimensions of experimentalism—explored further below—have been emphasized as a necessary addition to enhance other flexible, process driven regulatory theories and reduce their practical limitations.[15] It is because of these qualities, that experimentalism has the potential to overcome the complex regulatory challenges facing anti-bribery and anti-corruption efforts in a modern transnational context.

At first glance, the application of experimentalism to anti-bribery efforts may seem counter-intuitive, considering the clandestine nature of corrupt activity and the traditional focus on criminalization. However, it is precisely because of these unique qualities that an experimentalist approach should be explored. Experimentalism provides opportunities to reshape the regulatory environment and supporting positive outcomes for reducing corruption. This Article argues that significant benefits will stem from efforts to bridge the divide between the criminalization and criminal law enforcement focus of the OECD Anti-Bribery Convention and an experimentalist approach to governance. This argument is enhanced by existing experimental features within the OECD Anti-Bribery Convention framework and literature illustrating the benefits of new governance approaches in the context of other anti-bribery

13. Ford, *supra* note 8, at 623–24.

14. Ford, *supra* note 8, at 625.

15. Ford, *supra* note 8, at 625.

instruments such as the United States (U.S.) Foreign Corrupt Practices Act of 1977 (FCPA) and the Financial Action Task Force (FATF) system. Experimentation with the transnational anti-corruption regime will likely be partial, gradual, and constrained by outer boundaries of punitive action, but the benefits to enhancing experimentalist features of the Convention are significant. Benefits include a reduced burden on regulators and enforcement actors, enhanced buy-in by regulated entities, increased stakeholder engagement, and, perhaps most fundamentally, knowledge generation that may result in innovative solutions to this age-old challenge.

II. The Hallmarks Of Experimentalism

A. *Five Key Features*

Experimentalist governance has its foundations in the democratic theory of John Dewey[16] and has more recently been applied to the analysis of various regulatory efforts, focusing on attempts to maximize the productive interaction between the regulator and the regulated.[17] The experimentalist approach is distinct from the traditional principal–agent approach commonly applied to regulatory efforts in both domestic and transnational contexts. Traditional governance has focused on establishing proscriptive rules and enforcing compliance with these rules through various mechanisms that rely on a largely adversarial relationship between the regulator and the regulated, to the exclusion of all other stakeholders. Experimentalism sees compliance as a process of dynamic and continual engagement with regulatory goals by all stakeholders. Engagement with broad framework goals is the experiment, and compliance with these goals is iterative, deliberative, and can even reform the framework. In this context, punishment is not the outcome of failure. Punishment is used sparingly as a mechanism to encourage further experimentation and continued engagement. From the perspective of experimentalism, failure is essential to the iterative and recursive process of compliance and to the re-imagining of framework goals in light of experience and evaluation of outcomes.

A key tenet of experimentalism, drawn from Dewey's work, is the need for regulation—indeed for society and its institutions—to be responsive to uncertainty and the knowledge generated through

16. *See generally* John Dewey, The Public and Its Problems (1927).

17. Charles F. Sabel & William H. Simon, *Democratic Experimentalism*, *in* Searching for Contemporary Legal Thought 477–98 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

experience.[18] An ideal model of experimentalist governance has been put forward by Charles Sabel and Johnathan Zeitlin,[19] in discussion with other scholars including Grainne de Burca et al. who use a variety of examples from the United States, the EU and, to a more limited degree, international frameworks regulating environment and labor.[20] Abbott and Snidal have constructed a similar model to experimentalist governance, under the term "New Governance."[21]

Two of the most important elements of experimentalism, particularly in the context of transnational anti-corruption efforts, are the use of "penalty defaults" and the catalyzing effect of an environment characterized by complexity and uncertainty. A penalty default refers to a penalty that acts to motivate innovative compliance, rather than simply acting to deter harmful conduct. Penalty defaults can act as a compliance tool to drive the implementation of an experimental approach, where incentives to engage are otherwise limited or entirely absent.[22] The threat of "draconian trade sanctions" is a useful example of a penalty default in practice.[23] In their 2013 article, Grainne de Burca et al. illustrate how sanctions were used effectively to motivate negotiation of the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), as well as implementation of the program for protection of dolphins in tropical tuna fisheries through the 1992 La Jolla Agreement and subsequent binding Agreement on International Dolphin Conservation Program.[24] Furthermore, experimental frameworks for governance often arise and flourish in situations where the regulatory environment is complex, and actors cannot be certain of outcomes for non-compliance. In this context, the possibility of basic cost-benefit approaches to compliance or deviance is limited, motivating engagement and experimentation.[25] The possibility of penalty defaults and the importance of strategic uncertainty suggest the appropriateness of experimentalism in the context of transnational anti-corruption efforts.

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18. Charles F. Sabel, *Dewey, Democracy, and Democratic Experimentalism*, 9(2) CONTEMPORARY PRAGMATISM 35, 44 (2012).

19. Sabel & Zeitlin, *supra* note 5, at 169.

20. de Búrca, et. al., *supra* note 4.

21. Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 501 (2009).

22. de Búrca, et. al., *supra* note 4, at 176.

23. *Id.* at 445.

24. *Id.*

25. Sabel, *supra* note 18, at 44.

In addition to complexity and penalty defaults, Grainne de Burca et al. set out five features essential to the ideal model of experimentalist governance, while Christine Overdevest and Jonathan Zeitlin suggest four key features.[26] Abbott and Snidal take a slightly different approach, arguing that the essential distinction between "New" and "Old" governance is the differing role of the state.[27] In New Governance, the regulatory regime should be orchestrated by the state, but should be decentralized, with an emphasis on soft law and dispersed expertise. Abbott and Snidal's emphasis on decentralization and orchestration is important in a transnational context where dilution of centralized power occurs almost by default. States must tread carefully, to avoid impinging on the sovereignty of other nations, and international organizations must act subtly to avoid losing voluntary influence over states. Enhancing the role of states and international bodies in orchestrating actions that align with the OECD Anti-Bribery Convention is a subject explored further in subsequent sections of this Article.

This Article utilizes the model of experimentalist governance presented by de Burca et al., within which the four features of Overdevest and Zeitlin can be situated. This model is comprehensive in its inclusion of all key features discussed across the literature, providing a valuable reference point for assessing the Convention. The key features of this model of experimentalism are:

(1) Stakeholder engagement: openness to participation of relevant stakeholders in a non-hierarchical process of decision making;
(2) Open-ended goals: articulation of a broadly-agreed common problem and setting of open-ended goals;
(3) Contextualization: implementation and elaboration by lower-level actors with local or contextualized knowledge;
(4) Transparency and feedback: continuous feedback, reporting, and monitoring; and
(5) Revision: established practices, involving peer review, for regular reconsideration and revision of rules and practices.[28]

Each of these features is expanded upon in Section III, which explores the value of experimentalism in the context of current

26. Christine Overdevest & Jonathan Zeitlin, *Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector*, 8 REG. AND GOVERNANCE 22 (2014).

27. Abbott & Snidal, *supra* note 21, at 520-21.

28. de Búrca, et. al., *supra* note 4, at 739.

challenges facing transnational anti-corruption efforts. Before undertaking this analysis, it is useful to address the primary critique of experimentalism and provide a response. Awareness of the limits of any theory is vital to pre-empt challenges in application and ensure that these are accounted for when applying theory in practice.

B. *Responding to Critique*

Most critiques of experimentalism relate to the challenge of securing accountability in a non-hierarchal framework. Arguably, accountability is a general challenge in any governance framework.[29] A lack of accountability in an experimentalist governance framework could result in manipulation or capture by powerful actors, or stagnation and ineffectiveness where will to comply is absent and framework goals are broad. This challenge will be exacerbated in situations where metrics for evaluation are not readily available or the framework goal is difficult to quantify.

To counter these risks, accountability in the context of experimentalism is facilitated through two key elements introduced above: stakeholder engagement (element one), and transparency (element four). Accountability is secured through diverse stakeholder engagement; combined with radical transparency of the processes, practices and rationales for a specific approach taken by a regulated actor. If these features are secured, accountability is ingrained in the regulatory process. However, if these features are limited or fail in practice, accountability will become a serious concern. Abbott and Snidal acknowledge criticisms of transnational new governance, which is informed by experimentalist features. They respond by asserting that this governance model is not a panacea, but "provides both the most viable way to strengthen the international regulatory system and valuable new opportunities for states and IGOs [intergovernmental organizations] to address urgent regulatory problems."[30]

Any regulatory regime, domestic or transnational, can be placed on a spectrum of compliance with the five experimentalist features set out above. Much of the existing literature evaluates various regulatory regimes based on their conformity to the experimentalist model. This evaluative process is useful, both in solidifying the ideal model of experimentalism and in addressing limitations and concerns with the

29. Cameron Holley, *Facilitating Monitoring, Subverting Self-Interest and Limiting Discretion: Learning from "New" Forms of Accountability in Practice*, 35 COLUM. J. ENVTL. L. 127, 143 (2010).

30. Abbott & Snidal, *supra* note 21, at 578.

approach. This Article engages in such analysis, attempting for the first time to apply the experimentalist model to the OECD Anti-Bribery Convention. However, it is important that the "grading system" approach to experimentalism is not the end in itself. Experimentalism is most powerful when viewed as a call to action, emphasizing possibilities for shifting the regulatory focus from compliance to experimentation. Why might such a call to action be necessary? The next section explores why experimentalism may be appropriate in the context of transnational efforts to combat corruption.

III. Experimentalism In The Anti-Corruption Context

This section illustrates the potential for experimentalism in the transnational anti-corruption context. This context is characterized by definitional complexity and regulatory pluralism, measurement and detection challenges, and substantial enforcement burden. Experimentalist governance is well suited to environments of complexity, where uncertainty of regulatory outcomes prevails.[31] Cameron Holley notes a range of other relevant advantages that non-traditional governance approaches may have over more traditional methods. These advantages include: reducing reliance on centralized agencies for resources and expertise, enhanced collaboration to generate novel solutions to complex problems, and avoidance of "ossification" that can occur in traditional governance frameworks.[32] To demonstrate the potential of experimentalism for anti-corruption efforts, this section also presents examples of emergent experimentalist features in existing anti-corruption efforts, including those utilized under the FCPA and FATF. These examples strengthen the argument for engaging with experimentalism in the anti-corruption context and provide some possibilities for how this experimentation may look.

A. *Addressing Complexity and the Challenge of Measurement*

The term "corruption" is highly contested: "the only thing most scholars seem to be able to agree upon is the complexity and variability of the term."[33] In practice, David Hess and Thomas Dunfee emphasize the paradox of corruption—a behavior they describe as "widely

31. Grainne de Búrca, *New Governance and Experimentalism: An Introduction*, Wis. L. Rev. 227, 232-33 (2010).

32. Holley, *supra* note 29, at 133.

33. Hannah Harris, The Global Anti-Corruption Regime: The Case of Papua New Guinea 8 (2019).

condemned yet widely practiced."[34] The current logic of criminalization is almost universal. However, different situations and contexts result in different incentives and justifications for corruption. Robert Klitgaard notes that "the boundaries of corruption are hard to define and depend on local laws and customs."[35] Arguments have been made in favor of "facilitation payments," on the basis that corruption is the only way to get around unnecessary bureaucratic red tape. It has also been argued that corruption can sometimes secure beneficial outcomes or prevent harm.[36] Hess and Dunfee emphasize that both justifications are flawed,[37] but the diversity of perspectives illustrates complex motivations for corrupt activity.

A wide range of factors can motivate corrupt activity including greed, lack of opportunity, insufficient pay, cultural norms, power imbalances, and even fear of violence. Considering these distinct and divergent motivations, the deterrent power of criminalization may have limited effectiveness. Methods for prevention must be dynamic and adaptable, in the context of differing rationales for behavior and differing impacts and side-effects that may result from both preventive and deterrent efforts. This complexity, combined with its clandestine nature, make measurement incredibly difficult. Measurement challenges mean that evaluating the success or failure of interventions becomes extremely difficult and most measurement attempts focus on perceptions and survey data. These measures are problematic, as emphasized by Michael Johnston, who notes the numerous methodological limits of perceptions indexes.[38]

The challenge of measurement and desire for objective data may explain the OECD Anti-Bribery Convention's focus on enforcement as a measure of success. This enforcement focus also aligns with its specific goal of achieving "functional equivalence" in the criminalization of foreign bribery.[39] However, enforcement is limited as an indicator of a success, both in terms of a specific behavior such as foreign bribery, and corrupt activity generally. Enforcement methods can vary significantly, and the quality of enforcement efforts is extremely difficult to

34. David Hess & Thomas Dunfee, *Fighting Corruption: A Principled Approach; The C² Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593, 594 (2000).

35. Robert Klitgaard, CONTROLLING CORRUPTION xi (Univ. Cal. Press, 1988).

36. Hess & Dunfee, *supra* note 34, at 611–13

37. *Id.* at 615.

38. Michael Johnston, *Assessing Vulnerabilities to Corruption: Indicators and Benchmarks of Government Performance*, 12 PUB. INTEGRITY 125, 126 (2010).

39. OECD, *supra* note 1, art 1.

measure.[40] Even the OECD has recognized the limitations of enforcement data, due to inability of some states to provide information on active investigations.[41] Furthermore, a range of contextual factors may contribute to high or low levels of enforcement, independent of levels of corrupt activity. One example is political will and resource allocation;[42] another is variation in regulatory approach and methodology.

Ease of detection is also an important factor, complicated by the clandestine nature of bribery and corruption. In the context of the FCPA, "many convictions relied on actions that the corporation could have easily disguised to avoid detections, suggesting more careful firms are able to make similar payments without significant fear of prosecution."[43] Reverse causality is also a consideration, as "the level/intensity of anti-corruption efforts and enforcement might be driven by the level of corruption."[44] Less enforcement may be due to less corruption, rather than despite it. Using enforcement as a measure of success, without recourse to other factors, risks misallocation or over-allocation of resources to enforcement agencies and goals. Allocation of resources to enforcement may not be necessary or productive and diverts resources from alternative areas of intervention.

Embracing an experimentalist approach to governance, drawing on broad stakeholder engagement and local contextualization, may produce innovative responses to unique variants of corrupt conduct. Such contextualization has potential to generate new approaches to measurement and evaluation, based on specific understandings of the causes and effects of corruption in each context. It is also particularly important as membership of the OECD Anti-Bribery Convention continues to expand beyond OECD member countries.[45]

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40. Joseph Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 345 (2013).

41. OECD WORKING GROUP ON BRIBERY, 2016 Data on Enforcement of the Anti-Bribery Convention (2017).

42. Chêne, *supra* note 3, at 5.

43. David Hess & Christie Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L L.J. 307, 314 (2008).

44. Rajeev Goel & Michael Nelson, *Measures of Corruption and Determinants of US Corruption*, 12 ECON. OF GOVERNANCE 155, 159 (2011).

45. The OECD Convention is open to non-OECD member countries to ratify. So far, eight states are party to the Convention, but not members of the OECD. These states are: Argentina, Brazil Bulgaria, Colombia, Costa Rica, Peru, Russia and South Africa. The OECD member states are arguably economically and socially heterogeneous, therefore, unique challenges may emerge when states outside of this group attempt to implement and enforce the provisions of the Convention. Such challenges include the reality that the Convention was negotiated and drafted based on the interests, values and concerns of OECD member states.

B. *Utilizing Pluralism*

The number of legal and non-legal mechanisms targeting corruption have increased substantially since the enactment of the US FCPA in 1977. The current transnational anti-corruption framework can be usefully understood as a regime "complex": a multifaceted framework of rules and mechanisms that has evolved in response to complexity and continuing challenges posed by corrupt activity in a globalized world. Several authors have discussed the concept of regime complexes in some detail, notably Robert Keohane and David Victor[46] and Overdevest and Zeitlin.[47] Keohane and Victor note a continuum with fully integrated and hierarchical international regulatory regimes at one extreme and highly fragmented and incoherent institutions at the other, with regime complexes in the middle. Overdevest and Zeitlin construct a regime complex for the forest sector by linking "regulatory schemes operating in the same policy domain, supported by varying combinations of public and private actors."[48] Both articles emphasize the dynamic potential of such regime complexes, while also discussing the limitations and restrictions compared with more traditional hierarchical approaches to governance. It is beyond the scope of this Article to fully map the anti-corruption complex and the multitude of diverse binding and non-binding mechanisms that it comprises. Instead, the focus is limited to foreign bribery, that activity prohibited by the OECD Anti-Bribery Convention. However, through exploration of the Convention, the plurality of international laws and transnational actors involved in anti-corruption efforts becomes apparent, creating both challenges and opportunities.

C. *Domestic Laws and Institutions*

Efforts to combat foreign bribery were not initiated at the international level, but were triggered by domestic events and catalyzed by domestic legal change. From this domestic starting point, the framework transcended national borders, evolving through interaction with the values and interests of diverse state and non-state actors. For the purpose of brevity, this section documents the earliest and latest examples of domestic law that form part of this now transnational framework. This analysis illustrates the starting point for the framework, its

46. *See generally* Robert Keohane & David Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7 (2011).

47. *See generally* Overdevest & Zeitlin, *supra* note 26.

48. Overdevest & Zeitlin, *supra* note 26, at 22.

continuing influence, and its plurality, through unique domestic legal rules with diverse application and interpretation.

The earliest piece of legislation to target bribery of foreign public officials was the FCPA. Enactment of this law catalyzed legal developments at the international level.[49] The FCPA was triggered by domestic scandals in the US, including "American revulsion over the Watergate scandal."[50] The law prohibits the act of bribing a foreign official for the purposes of obtaining or retaining business. It also puts in place accounting measures "meant to assist with anti-bribery compliance efforts."[51] These accounting measures are a particularly useful aspect of the Act, substantially assisting detection efforts.[52] The FCPA put US companies at a comparative disadvantage internationally, as companies domiciled in other jurisdictions did not have comparative legislation.[53] This competitive disadvantage was the catalyst for international action, with corporate interests from the US joining moral entrepreneurs to agitate for consistent criminalization of foreign bribery across jurisdictions.[54] At first, these efforts were unsuccessful. However, over time, the "stickiness" of moral arguments meant that those in favor of the status quo in the United Kingdom (UK) and Europe were untenable.[55] The result was negotiation of the OECD Anti-Bribery Convention.

Utilization of the FCPA has been dynamic and non-linear. In the first twenty-five years, there were only a handful of actions filed annually.[56] However, "the rate of enforcement increased slightly between 2002 and 2006 before nearly tripling between 2007 and 2011."[57] In 2017, a total of thirty-five enforcement actions were filed by the U.S. Department of Justice (DOJ) and the Securities Exchange Commission (SEC)[58] and 11.9 million dollars were paid by companies to resolve FCPA cases.[59] The

49. Kenneth Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight against Corruption*, 31 J. OF LEGAL STUD. 141, 161 (2002).

50. *Id.*

51. Yockey, *supra* note 40, at 330.

52. Eric Engle, *I Get by with a Little Help from My Friends? Understanding the U.K. Anti-Bribery Statutes, by Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 INT'L LAW. 1173, 1176 (2010).

53. *Id.*

54. HARRIS, *supra* note 33, at 18.

55. Abbott & Snidal, *supra* note 10.

56. Yockey, *supra* note 40, at 330.

57. *Id.*

58. Stanford Law Sch., *Foreign Corrupt Practices Act Clearing House*, http://fcpa.stanford.edu/ (advanced search for enforcement proceedings from 2017) (last visited Mar. 1, 2020).

59. Richard L Cassin, *FCPA Enforcement Index 2017*, FCPA BLOG (Jan. 2, 2018), http://www.fcpablog.com/blog/2018/1/2/2017-fcpa-enforcement-index.html.

approach taken to enforce the FCPA has also changed in recent years, with an increase in Deferred Prosecution Agreements (DPAs) and cross jurisdictional cooperation.[60] Critics have argued that the FCPA is being "over-enforced," creating an environment of uncertainty that negatively impacts business.[61] However, from an experimentalist perspective, uncertainty can be a valuable tool to motivate innovation and collaboration.[62]

The UK Foreign Bribery Act, which came into force in July 2011, represents a more recent attempt to combat foreign bribery through domestic legislation. This Act does not make express allowance for "facilitation payments" the way the FCPA does.[63] It also addresses extraterritorial jurisdiction in a unique way. Under the UK Act, British nationals, foreign residents, UK companies, and overseas organizations are all subject to the Act.[64] The extent of strict liability for corporations under the Act includes an "adequate procedures" defense, creating "an implied command to companies to form soft law in this field."[65] Commercial bribery (sometimes referred to as business to business bribery) is also a crime under the Act. Its inclusion has been controversial, as it goes beyond the international standard set by international instruments like the OECD Anti-Bribery Convention.[66]

Enactment of the UK Act motivated action in other jurisdictions. Australia has introduced the Crimes Legislation Amendment (Corporate Crime) Bill 2017 at the Commonwealth level, which mirrors the UK Act. It includes the strict liability component, "associated person" language, and "adequate measures" defense. Almost 20 years after the OECD Convention entered into force, and following four phases of OECD peer review, domestic law continues to evolve to address criminalization of foreign bribery in unique ways. Myriad factors, beyond the two examples introduced above, continue to impact domestic approaches to foreign bribery. Additional factors that increase variability, complexity, and uncertainty include variation in the treatment of corporate actors—particularly between common law and civil law jurisdictions, differing practices around extraterritorial jurisdiction, and the approach of courts to interpreting statute across common law jurisdictions.[67]

60. Yockey, *supra* note 40, at 335.

61. *Id.*

62. Hess & Ford, *supra* note 43.

63. Engle, *supra* note 52, at 1182.

64. Adefolake Adeyey, *Foreign Bribery Gaps and Sealants: International Standards and Domestic Implementation*, 15 BUS. L. INT'L 169, 179-80 (2014).

65. Engle, *supra* note 52, at 1185.

66. *Id.* at 1186.

67. *Id.* at 1182; Adeyey, *supra* note 64.

D. *International Laws, Institutions, and Actors*

Nine international treaties exist that specifically target corrupt activity.[68] Of these nine treaties, eight require criminalization, but only the OECD Anti-Bribery Convention is exclusively focused on bribery of foreign public officials. The extent of international criminalization of corrupt activity illustrates the trend towards universal condemnation, at least in principle. The trend in practice still depends substantially upon the action of individual states, but the multitude of supporting international agreements provides an opportunity for orchestration, where coordinating actors can draw on normative arguments to support anti-bribery efforts.

Multilateral Development Banks (MDBs) are important actors in the anti-bribery sphere, adding to the pluralist regulatory environment that governs corrupt activity. These actors do not directly enforce anti-bribery law. However, they do shape corporate action at the international level and contribute to the plurality of relevant norms and rules. The most obvious example is the World Bank sanctions system, which enables the World Bank to debar companies found to have acted corruptly in relation to a World Bank contract.[69] Sanctions can also be applied for failure to comply with material terms in the Voluntary Disclosure Program terms and conditions. Other MDBs have equivalent sanction systems, based on their membership of the International Financial Institutions Anti-Corruption Taskforce and signatures of a Joint Statement in September 2006:

> [T]he institutions will continue to work together to assist their member countries in strengthening governance and combating corruption, in cooperation with civil society, the pirate sector, and other stakeholders and institutions such as the press and judiciary with the goal to enhance transparency and accountability.[70]

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68. Indira Carr, *Corruption, Legal Solutions and Limits of Law*, 3 INT'L J.L. IN CONTEXT, 227, 230-31(2007).

69. WORLD BANK, *Combating Corruption* (Oct. 24, 2018), http://www.worldbank.org/en/topic/governance/brief/anti-corruption.

70. Joint Statement by the Heads of the African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, European Investment Bank Group, Inter-American Development Bank Group, International Monetary Fund, and World Bank Group (Sept. 17, 2006), http://www.eib.org/attachments/general/uniform_framework_en.pdf

This is an illustration of the plurality of relevant actors involved in anti-corruption efforts, and the need for all stakeholders to be represented in anti-corruption efforts. Specific MDBs have also agreed to mutual enforcement between institutions, by way of the 2010 World Bank Group Agreement for Mutual Enforcement of Debarment Decisions.[71]

The environment of regulatory pluralism set out above could be seen to challenge or constrain effective anti-corruption efforts. However, from the perspective of experimentalism, this plurality of regulatory mechanisms could be a strength, rather than a weakness. Keohane and Victor emphasize that regime complexes result from failures of traditional approaches to globalized challenges, often leading to experimental compliance efforts.[72] Because of the uncertainty that regime complexes produce, actors are encouraged to experiment and collaborate to find novel solutions.[73] Collaboration can often result in unexpected outcomes that, if evaluated in a transparent and inclusive manner to ensure accountability, may provide alternative methods for reducing behaviors otherwise resistant to traditional regulatory methods.

E. *Reducing Regulatory and Enforcement Burden*

One of the most substantial challenges presented by corrupt activity is its clandestine nature: "secrecy is a defining characteristic of corruption."[74] Enforcement efforts require extensive investment, skill, and expertise. Deviant actors are motivated to innovate and develop methods for subverting law and the transnational dimension of corruption further increases regulatory and enforcement burden. This is particularly relevant for the crime of foreign bribery, where the behavior is almost guaranteed to occur across jurisdictional boundaries. Regulatory pluralism further complicates enforcement efforts and compliance cost, increasing the need for cooperation across jurisdictions and requiring increased understanding of emerging laws and practices. In this context, an experimentalist approach is valuable, if the pluralism and

71. Agreement for Mutual Enforcement of Debarment Decisions, (Apr. 9, 2010), www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Agreement_for_Mutual_Enforcement_of_Debarment_Decisions-1.pdf.

72. Keohane & Victor, *supra* note 46.

73. Overdevest & Zeitlin, *supra* note 26, at 23; Charles Sabel, Gary Herrigel & Peer Kristensen, *Regulation under Uncertainty: The Coevolution of Industry and Regulation*, 3 REG. & GOVERNANCE 371 (2017).

74. Hess & Dunfee, *supra* note 34, at 597–98.

uncertainty that creates increased regulatory and enforcement burden can also be harnessed to motivate innovation and increased compliance by regulated actors.

The OECD Anti-Bribery Convention, its peer review process, and the Working Group on Bribery (WGB) are well positioned to orchestrate action in this complex and pluralist environment, facilitating knowledge exchange between regulators and supporting formal legal mechanisms for cooperation. A non-hierarchical and experimental approach to governance has potential to utilize pluralism, rather than falling victim to complexity and regulatory challenges it presents. Examples of the benefits of experimentalism in the context of anti-corruption efforts are further explored in the following section.

F. *A New Experimental Direction—Examples from the FCPA and FATF*

The challenges of complexity, pluralism, and regulatory burden have coalesced to impact the way that existing anti-corruption mechanisms operate and illustrates the potential for experimentalism in this context. This section shows how experimentalism can be used in practice, exploring first the DPAs increasingly utilized by the DOJ for violations of the FCPA, and second an emerging experimentalist approach to compliance utilized by the FATF. The FATF is not directly concerned with foreign bribery. However, the relationship between foreign bribery and money laundering is significant and the FATF emphasizes this relationship.[75]

Enforcement of the FCPA has increased significantly since the early 2000s.[76] Joseph Yockey emphasizes that "the FCPA is now in the midst of an unprecedented surge in enforcement."[77] This surge in enforcement has been controversial and has triggered significant debate on reform, with some arguing that the Act is over-enforced, and others suggesting the nature of enforcement is insufficient to deter corrupt acts.[78] For the purposes of this Article, it is useful to illustrate how increased enforcement of the FCPA has embraced experimentalist and new-governance approaches, using negotiated settlements and DPAs that mandate changes to corporate compliance structures but "rely on the

75. *See* Financial Action Task Force, *Best Practices Paper: The Use of the FATF Recommendations to Combat Corruption* (2013), www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf.

76. Andrew Tyler, *Enforcing Enforcement: Is the OECD Anti-Bribery Convention's Peer Review Effective?* 43 GEO. WASH. INT'L L. REV. 137, 141 (2011).

77. Yockey, *supra* note 40, at 326.

78. *Id.* at 327.

regulated entity to develop implementation techniques."[79] This approach is often supplemented by third-party monitoring of corporate actions in response to these agreements. David Hess and Christie Ford emphasize this aspect as an essential element for success.[80]

The use of reform undertakings in SEC settlement agreements and DOJ DPAs has been argued to be "the best available mechanism for grappling with difficult problems of organizational culture."[81] This argument is based on the limitations of hard and soft regulation respectively, suggesting that reform undertakings are may provide a powerful middle ground, provided they meet certain criteria. Hess and Ford suggest the following criteria for success: transparency, flexibility, contextualization, participation, orchestration, and measurement.[82] These features align well with those of experimentalist governance, applying them to the regulation of corporates in the context of foreign bribery.

The benefits of reform undertakings and the specific experimentalist qualities that enhance their impact suggest two possibilities for the OECD Anti-Bribery Convention. First, the OECD Anti-Bribery Convention peer review framework should consider qualitative dimensions of enforcement, acknowledging different methods for enforcement across jurisdictions and evaluating their impact on the behavior of the relevant actors (e.g. corporations capable of bribing foreign officials). Second, the OECD may be able to utilize the experimentalist logic reform undertakings, to support enhanced implementation and enforcement by state parties. This could be operationalized by requesting or requiring third-party monitoring by NGOs or other external actors as part of follow-up and review process, in cases where a state party has consistently failed to implement or enforce the Convention in a meaningful way.

The FATF provides additional examples of how an experimentalist approach can be utilized in the context of transnational governance. The mandate of the FATF was originally to examine and develop measures to combat money laundering. The mandate has since been expanded to include terrorist financing, proliferation of weapons of mass destruction, and the general protection of the integrity of the international financial system.[83] Mark Nance provides an in-depth

79. Hess & Ford, *supra* note 43, at 310.

80. *Id.*

81. *Id.* at 312.

82. *Id.* at 336–39.

83. Financial Action Task Force, *History of the FATF*, http://www.fatf-gafi.org/about/historyofthefatf (last visited Apr. 10, 2020).

discussion of the experimentalist features of the FATF, highlighting three important aspects: (1) the evolution of the FATF form and function, in response to broad stakeholder engagement and experience of members; (2) the use of grey and black-listing as a penalty default to foster engagement, rather than as a punitive mechanism; and (3) the development and continued use of a peer review monitor mechanism to support implementation and enforcement of recommendations and gather information on best practices based on experiences of implementing members.[84]

The FATF has always engaged extensively with diverse stakeholders, including private sector actors[85] and non-profit organizations.[86] In addition to broad participation, the FATF utilizes a penalty default approach to non-compliance. Nance shows that coercive blacklisting has been less effective than the more recent two-list approach which is "more aligned with experimentalism."[87] The author compares the FATF approach to the concept of a penalty default under experimentalism. The two-list approach places states on a gray list first, based on whether they are "cooperative or un-cooperative, not whether they are compliance or non-compliant."[88] The state is removed from the list once they make credible plans to improve their anti-money laundering systems.[89]

The FATF has also adopted an experimentalist approach to monitoring and review.[90] Initially, no mechanism for monitoring was established under the FATF mandate. However, as the FATF evolved and expanded its focus, the need to monitor and evaluate progress became apparent. A simple self-evaluation questionnaire was developed first to establish whether states were considering implementation of the recommendations, this questionnaire evolved and formed part of a much more substantial mutual evaluation and peer review process. Even this process has evolved with the mandate and experiences of the FATF. The peer review was initially concerned with "whether states had the appropriate laws on the books."[91] However, over time, the focus has shifted from formal implementation to effectiveness. The current phase four evaluation process, which is ongoing, is entirely concerned

84. Mark Nance, *Re-thinking FATF: An Experimentalist Interpretation of the Financial Action Task Force*, 69 CRIME, L. & SOC. CHANGE 131, 146 (2018).

85. *Id.* at 146.

86. *Id.* at 137.

87. *Id.* at 140.

88. *Id.* at 142–43.

89. *Id.*

90. *Id.* at 143.

91. *Id.* at 144–45.

with effectiveness. This focus is designed not to rank or criticize, but to gather and disseminate information and enhance understanding of challenges, successes, and limitations in the application of FATF recommendations.[92] The peer review approach itself is well aligned with the logic of experimentalism, allowing for contextualization, non-hierarchical participation, and a focus on diagnosis rather than punitive action.

The FATF and the FCPA examples illustrate how experimentalist governance can be operationalized. Both examples suggest fertile ground for further expansion of such an approach in the context of the OECD Anti-Bribery Convention. The following sections map existing experimentalist features within the OECD Anti-Bribery Convention and suggest possibilities to further enhance the Convention and its impact on reducing corrupt activity.

IV. Experimentalist Features Of The OECD Anti-Bribery Convention

All five features of experimentalism are present in varying degree in the OECD Anti-Bribery Convention, the 2009 "Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions" (the Recommendation), and the peer review process. However, many of these features are limited by outer boundaries of the Convention's objectives and the OECD agenda. The OECD is concerned primarily with economic efficiency and opportunity, and the OECD Anti-Bribery Convention has a specific criminalization mandate. Rather than seeing these realities as a limitation on experimentalist potential, this Article argues that the Convention could be enhanced by encouraging a more experimentalist approach. Furthermore, situating the OECD Anti-Bribery Convention within the context of the broader transnational anti-corruption framework, suggests potential for engagement by other actors and institutions, furthering productive experimentation and positive outcomes for reducing corrupt activity.

A. *Background to the OECD Anti-Bribery Convention*

The OECD Anti-Bribery Convention seeks functional equivalence in the criminalization of bribery of foreign public officials.[93] It also requires liability of legal and natural persons, criminalization of money-laundering, and proportional and dissuasive sanctions for breaches of

92. *Id.* at 144.

93. OECD, *supra* note 1, para. 2.

relevant law.[94] The Convention requires domestic implementation and enforcement efforts in member states, which can include non-OECD nations. All forty-four members of the OECD Anti-Bribery Convention have enacted implementing domestic legislation to comply with OECD requirements.[95] The Convention is supported by the Recommendation, adopted by the OECD "to enhance the ability of the state parties to prevent, detect and investigate allegations of foreign bribery."[96] The WGB is an OECD body that monitors implementation and enforcement of the Convention. The WGB is supported by the OECD Secretariat and has been the key actor in promoting a dynamic and recursive approach to implementation and enforcement and adapting new review phases, far beyond what was originally envisioned. Even so, the OECD Anti-Bribery Convention has been more successful at achieving implementation (in terms of legal change), than it has in securing enforcement of these laws.

The OECD Anti-Bribery Convention does not expressly seek to reduce corruption.[97] The Convention is concerned with criminalization of supply side bribery of foreign officials in international business transactions. Based on this objective, the OECD Anti-Bribery Convention does not provide for any benchmark of success beyond implementation and enforcement of the criminal law measures it promotes. However, context is important. The OECD Anti-Bribery Convention was negotiated early in the push towards transnational anti-corruption efforts. It was not negotiated in the same environment of complexity and regulatory pluralism that currently exists. In this complex regulatory environment, the Convention has become one tool of many that exist in the multifaceted transnational anti-corruption framework.

Reference to the United Nations Convention Against Corruption (UNCAC) in the Recommendation illustrates that the interaction between the OECD Anti-Bribery Convention and other anti-corruption efforts has been on the agenda for at least a decade.

More recently, the OECD has recognized its powerful coordinating role in a report that seeks to map out a strategic approach to combating

94. OECD, *supra* note 1, arts. 2, 7 & 3.

95. *See* OECD, *The Detection of Foreign Bribery* (2017).

96. OECD Working Group on Bribery, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (2009).

97. OECD, *supra* note 1, para. 2.

corruption and promoting integrity.[98] Understanding the OECD Anti-Bribery Convention as part of a broader transnational framework and recognizing the OECD interest in combating corruption more generally demonstrates the value of looking beyond enforcement.

The domestic impact of the OECD Anti-Bribery Convention provides further rationalization for broader contextualization. Through domestic implementation and enforcement, the OECD Anti-Bribery Convention has a direct impact on the broader environment in which corrupt actors operate. The way the Convention is implemented and enforced will impact incentives for corrupt activity beyond foreign bribery. For example, by disincentivizing corporates to bribe foreign officials, foreign officials and the operation of foreign governments will also be impacted. Finally, the criminalization approach chosen by the parties during negotiation of the OECD Anti-Bribery Convention emphasizes the "values-based rationale for combating corruption"[99] and an interest in harm reduction. This further strengthens the argument for looking beyond enforcement.

B. *Stakeholder Engagement*

One of the key features of an experimentalist regime is broad participation and stakeholder engagement. In the context of the OECD Anti-Bribery Convention, this feature is present but constrained. In the early stages of drafting the Convention, participation was limited to a few key states and the OECD Secretariat.[100] Negotiation and adoption were concluded between June and November 1997. The actual negotiation process was not open to non-state actors and was restricted to OECD member states, as is the standard process for the drafting of OECD Anti-Bribery Conventions. However, Mark Pieth notes the crucial yet informal role played by non-state actors leading up to and during negotiation. The WGB met regularly with these actors from 1995 onward, and Transparency International played a significant role in securing commitment by skeptical government and business leaders.[101]

Since adoption of the Convention, the primary entry points for participation are during on-site visits, as part of the peer review process,

98. OECD, *Strategic Approach to Combating Corruption and Promoting Integrity Report* (2018), https://www.oecd.org/corruption/OECD-Strategic-Approach-Combating-Corruption-Promoting-Integrity.pdf.

99. Tyler, *supra* note 76, at 143.

100. Mark Pieth, *Introduction*, *in* THE OECD CONVENTION ON BRIBERY: A COMMENTARY 3-42, 15 (Mark Pieth et al. eds., 2007).

101. *Id.* at 16.

and through engagement facilitated by the WGB. In 2008, the WGB conducted a public consultation that resulted in the updated 2009 Recommendation and development of the Good Practice Guidance on Internal Controls, Ethics and Compliance; details are provided in the annual report from that year.[102] Broad participation in peer review is more constrained. The "Phase 4 Monitoring Guide" (OECD 2016) (the Guide) requires that on-sight visits involve meeting with non-government actors.[103] However, "the decision on whom to meet with and where to meet rests, de facto, with the examined country."[104]

Broad participation and stakeholder engagement must be balanced by concerns of states over confidentiality and the need to ensure open and honest dialogue during the peer review process. However, the WGB continues to facilitate participation across private sector, civil society, and government, and uses insight from engagement with non-state actors to continue to develop its approach to combating bribery. Continuing to enhance and encourage collaboration between state and non-state actors should be a priority for advancing the OECD Anti-Bribery Convention and fostering an experimentalist approach to its implementation and enforcement. On this basis, the WGB should consider critically the nature and quality of participation during country visits. The WGB should also continue to orchestrate participation at the international level.

C. *Open-Ended Goals and Contextualization*

The goal of the OECD Anti-Bribery Convention is broad in the sense that it requires "functional equivalence," rather than specifying legal requirements that countries must conform to. In this sense, the goal of the Convention is open-ended. This openness is in large part due to the need for contextualization present in most international treaties. The OECD Anti-Bribery Convention is not self-executing and relies on state implementation and enforcement to realize its goals. Due to diverse legal, cultural, social, and political traditions in state parties, a certain degree of openness is necessary to allow for this contextualization. The question then arises, is this "openness" and "contextualization" sufficient to satisfy the ideals of experimentalism?

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102. OECD, 2008 *Annual Report* (2008), https://www.oecd.org/newsroom/40556222.pdf.

103. OECD, *Anti-Bribery Convention: Phase 4 Monitoring Guide* (2016), www.oecd.org/daf/anti-bribery/Phase-4-Guide-ENG.pdf.

104. Niccola Bonucci, *Article 12: Monitoring and Follow-Up*, *in* THE OECD CONVENTION ON BRIBERY: A COMMENTARY, 445, 462 (M. Pieth, A.L. Lucinda & P.J. Cullen eds., 2007).

Answering this question is a matter of perspective. The Convention does not require "uniformity or changes in fundamental principles of a party's legal system."[105] Specific examples of this flexibility can be found throughout the Commentaries on the OECD Anti-Bribery Convention (the Commentaries). For example, "a party may use various approaches to fulfill its obligations" under article 1.[106] For acts of complicity, incitement, aiding and abetting, or authorization of foreign bribery, the Commentaries emphasize that if the act "is not itself punishable under the Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official."[107] Finally, in relation to the responsibility of legal persons, "in the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility."[108] Contextualization and flexibility are also supported by the monitor and peer review process. The Guide emphasizes that the monitoring approach "must be tailor-based and customized to take into account the specific circumstances of the evaluated country."[109]

Despite this flexibility, the method of achieving the goal of functional equivalence is constrained by the outer boundary of criminalization. More recently, evaluation based on enforcement of implementing law appears to be a further limitation. The Convention structures criminalization as the preferred method, limiting the ability of states to receive credit for anti-bribery efforts outside of this framework. It should be noted, however, that enforcement is open to diverse interpretations and applications. The use of DPAs in enforcement of the FCPA has already been discussed as experimentalist, going beyond the traditional punitive methods of criminal law enforcement. The reporting framework for the phase four peer review appear to support these developments, suggesting the evolution of a more experimentalist approach to understanding and evaluating enforcement under the OECD Anti-Bribery Convention.

Surveys for phase four peer review include questions directed towards information gathering, rather than critical evaluation. One question covers "the most common sources of information referred to your law enforcement authorities accusing natural and/or legal

105. OECD, *supra* note 1, para. 2.
106. OECD, *supra* note 1, para. 3.
107. OECD, *supra* note 1, para. 11.
108. OECD, *supra* note 1, para. 20.
109. OECD, *supra* note 103, at 9.

persons of involvement in foreign bribery" and whether any source of detection has increased or initiatives that have been undertaken to enhance cooperation and detection.[110] The survey still requires responses to questions about the number of successful prosecutions and number of discontinued proceedings, but the extent of the information sought goes beyond basic enforcement statistics to information about successful and unsuccessful methods and approaches that may be useful to other participants involved in the peer review process. This flexibility should be encouraged. It suggests that the OECD is open to an experimentalist approach, even within the confines of the criminal law framework. Information gathered will have the added benefit of increasing understanding of the factors that contribute to foreign bribery, providing metrics for measurement and monitoring of the target activity, and suggest alternative approaches best placed to reduce instances of foreign bribery in specific contexts.

D. *Transparency and Feedback*

The OECD Anti-Bribery Convention exhibits substantial experimentalist qualities of transparency and feedback. The multi-stage, continually evolving peer review process requires publication of final reports for each country reviewed, and now also requires a media release announcing publication. The WGB has also requested that state parties take steps to ensure all relevant stakeholders have access to this report.[111] The main limitation on transparency and feedback in the context of the OECD Anti-Bribery Convention relates to the confidentiality requirements in place to ensure "openness" in discussion between the WBG and state parties.[112]

The Recommendation emphasizes that the WGB should promote public reporting and provision of information, as well as consultation and cooperation with international organizations, financial institutions, non-governmental organizations, and representatives of the business community.[113] However, the Guide states that provision of public information "must be balanced against the need for confidentiality which facilitates frank evaluation of performance."[114] Thus, the need to ensure continued engagement between the WGB and the state parties to the Convention limit the extent of transparency. This is likely to

110. *Id.* at 40.
111. *Id.* at 20.
112. Bonucci, *supra* note 104, at 466.
113. OECD, *supra* note 1, XIV & XVII, at 26–27.
114. OECD, *supra* note 103, at 10.

remain a challenge for embracing a truly experimentalist approach. Existing commitment to increased transparency and feedback should be encouraged, both between states and the WGB, and between the OECD and other anti-corruption stakeholders. Furthermore, from the perspective of experimentalism, openness between the WGB and state parties under review should be viewed as a legitimate objective. Transparency and feedback between these two actors are essential to the accountability and recursive learning framework that the peer review mechanism is designed to facilitate.

E. *Revision*

Revision is yet another area where the OECD Anti-Bribery Convention appears to be embracing experimentalism, constrained by the objective of functional equivalence in criminalization of foreign bribery. The updated Recommendation, based on lessons learned through the implementation and review process, is one example. Additionally, the WGB has been "flexible in adopting new procedures where needed", including additional follow-up reviews in specific cases.[115] The Detection of Bribery Report (2017) discusses lessons learned in the first 20 years of the Convention.[116] It emphasizes the role of diverse stakeholders, the need for civil society engagement and the importance of whistle-blower protection. It seems that the process of contextualization and broad participation have influenced continued evolution of the OECD Anti-Bribery Convention, beyond what was originally envisioned. In this sense, the OECD Anti-Bribery Convention is a positive example of experimentalist governance at the transnational level.

The Recommendation itself is a product of revision, however, it also re-emphasizes the need for criminalization and urges states to implement domestic legislation in line with the Good Practice Guidance on Implementing Specific Article of the Convention.[117] This additional guidance appears to be a hardening of the framework goals of the Convention. However, closer inspection shows that the guidance remains sufficiently general to allow parties to contextualize applications to their own unique circumstances. As noted earlier, the Recommendation also supports a range of non-criminal measures, including public awareness-raising, whistle-blower protection, broad

115. Tyler, *supra* note 76, at 165.
116. OECD, *supra* note 95.
117. OECD, *supra* note 1, annex. 1.

participation, and acknowledgement of additional international mechanisms such as UNCAC. These additions represent positive revisions to the Convention's approach, in response to the complex and pluralist environment in which the Convention now operates.

The practical limitations of the OECD Anti-Bribery Convention should not dissuade efforts to enhance experimentalism, both within the Convention and through interaction between the Convention and other legal and institutional tools of the transnational anti-corruption framework.

V. Opportunities For Enhancing Experimentalism In The OECD Anti-Bribery Convention

By enhancing experimentalist features of the Convention where possible, its impact and effectiveness will be enhanced. As demonstrated above, the features of experimentalist governance are well-suited to the complexity, pluralism, and enforcement challenges facing anti-corruption efforts. Additional steps should also be contemplated to utilize the Convention as part of a broader transnational anti-corruption framework, acknowledging the need to look beyond criminalization and enforcement.

A. *OECD Actions*

A key area where the OECD framework could enhance its experimentalist potential is through improved metrics for foreign bribery and evaluation of the impact of the Convention. The WGB should consider incentivizing state parties to collect data, not only on enforcement efforts, but also on the impact of anti-corruption efforts on legal, political, social, and economic factors. The OECD Strategic Report (the Report) suggests that metrics and evaluation are high on the institution's agenda. The first pillar of the organization's ongoing work on anti-corruption and integrity involves strengthening "its evidence-based approach to combating corruption and promoting integrity."[118] The Report notes a need to move beyond legal analysis and deepen "qualitative and quantitative understanding of corruption, its causes and its impacts."[119]

The OECD Anti-Bribery Convention should also consider formalizing participation and institutionalizing broad stakeholder engagement in the peer review process, and the work of the WGB. Formal

118. OECD, *supra* note 98, at 17.

119. OECD, *supra* note 98, at 19.

requirements for consultation with civil society and private sector actors should be considered on a regular basis, so that the OECD approach does not stagnate, and can continue to adapt and respond to changes in perspective and practice. In the context of peer review, the WGB should consider strengthening the requirement for non-government engagement in on-sight visits, by establishing a process for follow-up review in cases where governments fail to provide access to all relevant stakeholders requested by the reviewing party.

Finally, the OECD Anti-Bribery Convention should utilize its position to orchestrate continued anti-corruption efforts. This could involve regular meetings and collaboration between the WGB and the bodies responsible for implementation and enforcement of other international legal mechanisms, such as UNCAC. The OECD Strategic Report again provides a positive illustration of the OECD's interest in taking on such a role. It notes the motivation to develop an overarching strategic approach driven by "repeated and international calls for the OECD . . . to develop a coherent and articulated strategic approach to combating corruption and promoting integrity."[120]

B. *Actions Beyond the OECD*

Efforts by the OECD, acting alone, will likely have positive outcomes for anti-corruption efforts generally. However, even more will be achieved through external engagement. There will always be limits to the impact of a single institution, and one of the benefits of a complex and plural regulatory framework is that many actors can interact and engage in diverse and dynamic ways. Experimentalism can be further enhanced through orchestration by actors external to the OECD. These actors should take up a coordinating role, drawing on the OECD framework to support related objectives. Outside orchestration could enhance the impact and effectiveness of the OECD Anti-Bribery Convention through development and use of penalty defaults in response to outcomes of Convention peer review, or through developing benchmarks on which to evaluate countries or corporations, based on their conformity with OECD rules and standards.

Another entry point is for actors to utilize the available data gathered by the OECD and combine this with other metrics, to develop a more complete view of the impact and effectiveness of the OECD approach. From this point of enhanced understanding, recommendations could be made to improve the Convention and the OECD approach to

120. OECD, *supra* note 98, at 9.

implementation and enforcement. Taking steps to institutionalize participation of diverse stakeholders in the OECD framework will increase the chance that such efforts will be fruitfully incorporated into the work of the OECD.

The ways in which diverse actors may productively interact with the OECD Anti-Bribery Convention framework should be the subject of further research and analysis. This Article has explored the experimentalist qualities of the Convention, but has not attempted to fully map the complex array of legal and institutional measures that make up the transnational anti-corruption framework. Further research in this area may provide novel suggestions for interaction, including between the OECD Anti-Bribery Convention, multilateral development banks, other international treaties such as UNCAC, and institutions such as the U.N., International Chamber of Commerce, and the World Trade Organization. The role of standard setting and soft law mechanisms such as the C2 principles, the U.N. Global Compact, and the Extractive Industry Transparency Initiative should also be explored. Hess and Dunfee provide an overview of the soft law mechanisms relevant to the transnational anti-corruption framework,[121] but more could be done to link these soft law mechanisms with harder legal mechanisms, such as the OECD Anti-Bribery Convention and UNCAC.

VI. Conclusion

This Article illustrates the value of an experimentalist approach to governance in the context of transnational anti-corruption efforts. It has shown that many features of the OECD Anti-Bribery Convention support experimentalism. The Convention encourages broad participation and the "functional equivalence" approach to criminalization allows state parties to experiment with the best method for implementation, based on unique domestic legal context. The OECD approach to monitoring the Convention and promoting anti-bribery law has continued to evolve and develop, based on practical experience of member states and feedback from diverse actors. This experimental and dynamic approach should be fostered and enhanced through the OECD and the WGB. Continuing to enhance the experimentalist features of the OECD approach will foster ongoing flexibility and maximize buy-in by diverse stakeholders. This will be essential to overcoming the enforcement challenges inevitable when targeting an activity as complex as corruption. In particular, the Convention

121. David Hess, *Catalyzing Corporate Commitment to Combating Corruption*, 88 J. Bus. Ethics 781 (2009); Hess & Dunfee, *supra* note 34.

framework will benefit from institutionalizing the participation of diverse stakeholders and expanding its approach to monitoring and review to improve measurement of foreign bribery and the impact of anti-corruption efforts. The OECD framework provides an entry point for engagement and orchestration by other transnational actors and an experimental approach would encourage these actors to play a more active role. Actors including states, NGOs and civil society, multilateral development banks, and international organizations such as the U.N., could draw on the OECD requirements and provision of public information to support their own anti-corruption objectives and motivate action. These actors will be in a position to take advantage of the benefits of experimentalism, utilize pluralism, foster engagement through uncertainty, and mobilize penalty defaults to encourage experimentation and innovation. This Article has shown that complex longstanding challenges can provide surprisingly fertile ground for experimentation, and even targeted transnational criminal law frameworks like the OECD Anti-Bribery Convention and its recommendations are capable of taking advantage of a flexible approach to governance. Experimentation should be encouraged, as regression to traditional command and control models of governance are likely to limit impact and could result in stagnation, misapplication, or de-legitimation of the transnational anti-corruption framework and related institutions.