LEARNING FROM EXPERIENCE: COMPARING LEGAL APPROACHES TO FOREIGN BRIBERY AND MODERN SLAVERY

HUMAN RIGHTS – SUPPLY CHAINS – BRIBERY – CORRUPTION – REGULATION – MODERN SLAVERY

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ABSTRACT

Corruption and human rights abuses are intrinsically linked, and the power and influence of corporate actors is a primary facilitator of this relationship. Despite this connection, efforts to combat corruption and human rights abuses have taken diverse legal approaches. This article explores the criminal law framework for tackling foreign bribery and compares it to the emerging disclosure-based framework to address modern slavery risks. The foreign bribery model appears 'hard,' focusing on criminality and corporate criminal liability. The modern slavery supply chain governance approach is 'softer,' based on disclosure with limited consequences for non-compliance. Effective enforcement of both frameworks remains elusive. This article argues for enhanced cross-over between the two approaches—to incentivize corporate actors through a combination of stakeholder engagement and the use of penalty defaults, designed to motivate innovative compliance strategies. Learning from the successes and limitations of each approach will enhance enforcement efforts with the goal of reducing the occurrence of bribery and modern slavery in international business.

TABLE OF CONTENTS

I. THE CORRUPTION HUMAN RIGHTS NEXUS

Corruption and human rights violations, including modern slavery, continue to occur around the world, despite a long history of condemnation and increasing regulatory efforts to address them. Corruption has been cited as costing the global economy over $3 trillion dollars annually, with over $1 trillion dollars spent on bribes.[1] The International Labor Organization (ILO) estimates that $150 billion dollars in illegal profits are generated in the private economy each year from modern slavery.[2] There are currently an estimated 40.3 million people enslaved around the world and 16 million of those are exploited within the private economy.[3] The challenge of successfully reducing both types of conduct is in part derived from the difficulties of detection, the measurement and effective enforcement in a complex environment of transnational interactions and powerful actors. This article explores these challenges, focusing on two specific activities: bribery in international business transactions, and modern slavery in the private economy.[4]

It can be challenging to detect both corrupt conduct and modern slavery, due to the clandestine nature of these activities and the

1 *International Anti-Corruption Day 9 December*, UNITED NATIONS, https://www.un.org/en/observances/anti-corruption-day.

2 *ORGANIZATION, ILO says forced labour generates annual profits of US $150 billion*, INTERNATIONAL LABOUR (May 20, 2014), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_243201/lang--en/index.htm .

3 *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, INTERNATIONAL LABOUR ORGANIZATION AND WALK FREE FOUNDATION (Sept. 19, 2017), https://www.ilo.org/global/publications/books/WCMS_575479/lang--en/index.htm.

4 Human Rights Council, Connecting the Business and Human Rights and Anti-corruption Agendas, UN Doc. A/HRC/44/43 (June 17, 2020) (Corruption can be defined generally as the abuse of entrusted power for private gain and comes in multiple forms. Bribery is a type of corruption. It is defined as the offering of gifts to another individual, in an attempt to influence their opinions or types of behaviour. The interconnections between human rights and corruption are explored in the Report of the Working Group on the issues of human rights and transnational corporations and other business enterprises).

involvement of powerful political actors and transnational corporations with diffuse supply chains. Bribery often results in indirect harms, with no one clearly identifiable victim. Furthermore, both parties to the crime generally have an incentive to keep the activity secret.[5] Modern slavery in the private economy principally manifests itself as forced labor and human trafficking.[6] These activities often occur at the lowest of complex and opaque global supply chains, which are difficult to uncover. The International Trade Union Confederation (ITUC) estimates that sixty percent of global trade in the real economy depends on the supply chains of fifty corporations, which employ only six percent of workers directly, but rely on a hidden workforce of 116 million people.[7] Furthermore, both bribery and modern slavery pose distinct cross-jurisdictional challenges. Bribery often occurs across jurisdictions, between corporations domiciled in one country and government officials or corporations in a foreign jurisdiction.[8] As such, it can be difficult to track the flow of illicit funds to prove that a bribe has occurred. Similarly, modern slavery in the private economy is commonly found within cross-border global supply chains.[9]

This transnational dynamic poses a significant legal challenge for enforcement efforts: requiring collaboration between enforcement actors who are not always operating under equivalent legal rules. Across jurisdictions, there may also exist different levels of political and corporate motivations and judicial independence, that are necessary to address these crimes. These factors further complicate enforcement which, despite the existence of a suite of international treaties separately targeting corruption and human rights (including forced labor and human trafficking), still primarily relies on domestic law for prosecution. An additional challenge is that of measurement, because while both bribery and modern slavery are difficult to detect, they are

5 *The Detection of Foreign Bribery*, OECD 9 (OECD ed. 2017), http://www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery.pdf.

6 INTERNATIONAL LABOUR ORGANIZATION AND WALK FREE FOUNDATION n. 3.

7 International Trade Union Confederation, *Scandal: Inside the Global Supply Chains of 50 Top Companies*, ITUC-CSI.ORG (2016), http://www.ituc-csi.org/frontlines-report-2016-scandal.

8 *The Detection of Foreign Bribery*, *supra* note 5.

9 Steve New, *Modern Slavery and the Supply Chain: The Limits of CSR?* 20 SUPPLY CHAIN MGMT. 697 (2015).

also difficult to accurately measure.[10] It is therefore challenging to evaluate the successes or failures of enforcement efforts, as well as the effectiveness of self-regulatory efforts by corporations.

Corruption is the grease that enables many forms of crime, including human rights violations such as forced labor and human trafficking.[11] Andersen asserts that "from the perspective of ordinary people, corruption and human rights cannot be separated."[12] Payment of bribes can facilitate illegal border crossing, enable use of fraudulent documents, and facilitate long-standing corrupt relationships between border officials and smugglers.[13] The United Nations (UN) High Commissioner for Refugees, recognizes that trafficking in persons both causes and results from violations of human rights[14] and migrant smuggling has been linked to forced labor and modern slavery practices.[15] As laws are developed to target modern slavery practices in global supply chains, the incentive to bribe government officials and law enforcement officers to ignore such practices may also increase. This bi-directional relationship contributes to the challenge of enforcement.

The links between corruption and human rights generally, and bribery and modern slavery specifically, justify exploration of the enforcement challenges that arise from efforts to address both activities. This article explores these challenges and suggests some possibilities

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10 Anne Gallagher, *What's Wrong With the Global Slavery Index,* 8(1) ANTI-TRAFFICKING REVIEW 90-112) 2017); Sharon Oded, *Trumping Recidivism: Assessing the FCPA Corporate Enforcement Policy*, 118 COLUMBIA L. REV. 136 (2018).

11 United Nations Global Initiative to Fight Human Trafficking, *Corruption and Human Trafficking: The Grease that Facilitates the Crime,* UNITED NATIONS (Vienna Forum to fight Human Trafficking 13-15, Feb. 2008), https://www.unodc.org/documents/human-trafficking/2008/BP020CorruptionandHumanTrafficking.pdf; Louisa Musing, Lindsey Harris, Aled Williams, Rob Parry-Jones, Daan van Uhm, & Tanya Wyatt, *Corruption and Wildlife Crime: A focus on caviar trade,* TRAFFIC.ORG (2019), https://www.traffic.org/site/assets/files/11818/corruption-and-caviar-final.pdf.

12 Morten Koch Andersen, *Why Corruption Matters in Human Rights*, 10 J. HUM. RTS. PRAC. 182 (2018).

13 Marie Chene, *Corruption at borders*, ANTI-CORRUPTION RESOURCE CENTRE (2018), https://www.u4.no/publications/corruption-at-borders.

14 United Nations High Commissioner for Refugees, *Human Rights and Human Trafficking* 4, *Fact Sheet No. 36,* OHCH (2014), https://www.ohchr.org/Documents/Publications/FS36_en.pdf.

15 Lauren Renshaw, *Migrating for work and study: The role of the migration broker in facilitating workplace exploitation, human trafficking and slavery*, 527 AUSTL. INST. OF CRIMINOLOGY 14 (2016).

for improvement, assisted by the application of experimental governance theory. We examine the criminal law frameworks to address bribery in international business transactions and compare these to the less prescriptive disclosure-based regulatory framework that is emerging, to address modern slavery in the private economy. Previous work has been done to demonstrate how the business and human rights agenda could be enhanced based upon the lessons learned from the anti-corruption movements.[16] Ramasastry notes the powerful role played by stakeholders in the evolution of the anti-corruption framework and emphasizes that "NGOs need to explore how to engage business as part of the governance process."[17] Another recommendation is to draw upon the economic arguments used by the anti-corruption movements that were effective in promoting the large scale international actions within that context.[18] More recently, LeBaron and Ruhmkorf have provided a cursory comparison of modern slavery and foreign bribery law in the context of the United Kingdom (UK), noting the stronger criminal law approach of bribery as compared to modern slavery.[19]

In this article, we build upon existing literature and illustrate the current discord between bribery laws and the emerging social disclosure laws addressing modern slavery. Foreign bribery law—targeting companies that supply bribes to foreign actors—is demonstrated by a focus on criminality and corporate criminal liability. The supply chain governance framework for modern slavery is soft, based on disclosure without significant consequence for non-compliance. There are lessons to be learned from each approach and a theoretical framework for experimental governance provides guidance on how to optimize regulation of bribery and modern slavery. Experimental governance is a regulatory theory that emphasizes a dynamic and innovative approach to regulation beyond a traditional command-and-control model and provides insight for achieving an optimal balance between responsiveness and deterrence.[20] This paper argues in favor of enhancing crossover between the foreign bribery and modern slavery approaches –

16 *See* Anita Ramasastry, *Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS 162-90 (Surya Deva & David Bilchitz eds., 2013).

17 *Id.* at 182.

18 *Id.* at 183.

19 Genevieve LeBaron, & Andreas Ruhmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, 8 GLOBAL POL'Y 15 (2017).

20 For a general introduction to experimentalism, *see* Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L. J. 271 (2008).

focusing on the elements of experimentalism that will incentivize corporate actors through a combination of stakeholder engagement and enforcement risk.

The following two sections separately explore the regulatory frameworks for bribery (Section 2) and modern slavery (Section 3). We map the significant features of each framework, including the use of international law and its relationship with domestic legislation. We also address the challenges and limitations of both regulatory frameworks. Section 4 compares the relative strengths and weaknesses of each approach, drawing on insights from experimentalist governance theory. We also suggest ways that the regulation of bribery and modern slavery risks may be optimized to increase the effectiveness of the two frameworks and reduce instances of corruption and human rights violations in international business transactions.

II. BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

A clear definition of corruption remains elusive, as does consensus regarding the harms that result from corrupt activity.[21] This has not prevented the evolution of a global anti-corruption regime. This regime involves numerous international treaties and domestic laws that aim to prevent and punish corrupt conduct.[22] We focus on one specific corrupt act: foreign bribery in international business transactions.

The act of foreign bribery involves the provision of some advantages by one actor (usually a representative of a corporation) to a foreign public official, with the goal of influencing this official to provide or retain some advantage to the bribing party.[23] This form of corrupt conduct was once considered an unavoidable reality of international business and, in some cases, an actual necessity.[24] In some jurisdictions, corporations were able to claim bribes as a tax deductible

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21 HANNAH HARRIS, THE GLOBAL ANTI-CORRUPTION REGIME: THE CASE OF PAPUA NEW GUINEA 11 (2019).

22 *See* Indira Carr, *Corruption, Legal Solutions and Limits of Law*, 3 INT'L J. L. CONTEXT 227, 230, 231 (2007) (noting that nine international treaties exist that specifically target corrupt activity. Of these nine treaties, eight require criminalization. The *OECD Anti-Bribery Convention* is the only international treaty that focuses specifically on bribery of foreign public officials in international business transactions).

23 Philip Nichols, *Regulating Transnational Bribery, in Times of Globalization and Fragmentation*, 24 YALE J. OF INT'L L. 257, 271 (1999).

24 *Id.* at 227; *See also* Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. 141, (2002).

expense.[25] Even now, Australia and the United States (US) have an exception to criminal liability for small bribes, which are referred to as 'facilitation payments.'[26] However, acceptance of bribery as "a cost of doing business," has eroded over the past half century, with States enacting increasingly stringent laws, meant to deter the payment and acceptance of bribes.[27]

The earliest significant piece of legislation conceived to target foreign bribery, was the *Foreign Corrupt Practices Act 1977* (*FCPA*).[28] The enactment of this law catalyzed the slow evolution of an international legal framework, that was based on consistent criminalization across various jurisdictions.[29] The *FCPA* was triggered by domestic concerns, primarily the "revulsion over the Watergate scandal"[30] and findings by the US House Committee on Interstate and Foreign Commerce that US companies were spending in excess of $300 million dollars bribing foreign officials for business purposes.[31] The *FCPA* remains the most actively enforced piece of bribery legislation in the world.[32] It prohibits the act of bribing a foreign official for the purposes of obtaining or retaining business. Furthermore, it establishes accounting measures that assist with anti-bribery compliance efforts.[33] Engle notes that these provisions have assisted significantly in efforts

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25 INSTIT. FOR INT'L ECON., CORRUPTION AND THE GLOBAL ECONOMY 157 (Kimberly Ann Elliott ed., 1997).

26 Under the *Foreign Corrupt Practices Act 1997*, facilitation payments fall outside of the definition of the offence. In Australia, section 70.4 of the *Commonwealth Criminal Code* establishes that a 'facilitation payment' is a complete defense for criminal liability under section 70.2 for bribery of a foreign public official. Both facilitation payment exceptions have been heavily criticized by the OECD Working Group on Bribery and Canada repealed the facilitation payment defense under its criminal code in late 2017.

27 *Foreign bribery Report: An Analysis of the Crime of bribery of Foreign Public Officials*, OECD (2014), https://dx.doi.org/10.1787/9789264226616-en.

28 15 U.S.C. 2B §§ 78m, 78dd-1, 3, 78ff (2006).

29 Abbott & Snidal, *supra* note 24, at 143.

30 *Id.* at 161.

31 H.R. REP. NO. 95-640 (1977).

32 *Liability of Leal Persons for Foreign Bribery: A Stocktaking Report*, OECD (2016), https://www.oecd.org/corruption/liability-of-legal-persons-for-foreign-bribery-stocktaking-report.htm. This report provides statistics showing that the United States sanctioned a total of 81 individuals and 42 legal persons between 1999 and 2016, with the next closest OECD Member State being Germany with 57 individuals and 13 legal persons respectively; *see also The Stanford FCPA Clearing House,* http://fcpa.stanford.edu/statistics-analytics.html (which provides data on FCPA enforcement and illustrates a marked increase in enforcement activities between 2005 and 2019).

33 Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 332 (2013).

to detect bribery and thus, enforce the legislation's consequences upon those who violate its provisions.[34]

When the *FCPA* was first enacted, it put US companies at a comparative disadvantage internationally, as companies domiciled in other jurisdictions did not have comparative legislation.[35] This competitive disadvantage was the catalyst for international action. Corporate interests from the US, joined other actors with value based or moral reasons for opposing corruption and agitated for consistent criminalization of foreign bribery across jurisdictions.[36] At first, these efforts were unsuccessful, not least because European corporations benefitted from the status quo.[37] However, over time, the "stickiness" of moral arguments, meant that continued resistance to criminalization of foreign bribery became untenable.[38] This normative shift resulted in the negotiation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) which was made available for signature on December 17, 1997 and entered into force on February 15, 1999.[39]

The OECD Anti-Bribery Convention was the first international treaty to criminalize foreign bribery.[40] The treaty requires State parties to establish as a criminal offence, the intentional offer, promise, or gift of any undue pecuniary or other advantage to a foreign public official "in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."[41] The OECD Anti-Bribery Convention was negotiated on the basis that bribery in international business, is a widespread phenomenon "which raises serious moral and political concerns, undermines good

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34 Eric Engle, *I Get By With A Little Help From My Friends? Understanding the UK Anti-Bribery Statutes, by Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 THE INT'L LAW. 1173, 1176 (2010). In some cases, these provisions can also be used to pursue charges against corporations engaged in transnational bribery in the private sector, that does not involve a government actor or public official but is still deemed harmful and inappropriate.

35 *Id.* at 1176.

36 HARRIS, *supra* note 21, at 18.

37 Abbott & Snidal, *supra* note 24.

38 Kenneth W. Abbott & Duncan Snidal, *Taking Responsive Regulation Transnational: Strategies for International Organizations*, 7 REG. AND GOVERNANCE 95 (2013).

39 Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions art. 1, ¶ 1, Nov. 21, 1997, OECD.

40 HARRIS, *supra* note 21.

41 Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions art. 1, ¶ 1, Nov. 21, 1997, OECD.

governance and economic development, and distorts international competitive conditions."[42] Its primary focus is the "functional equivalence" of domestic law in State parties.[43] Article 1 establishes the offence of bribery of foreign public officials and Article 2 establishes the responsibility of legal persons.[44] State parties are required to implement both of these core provisions into domestic law. The convention largely mirrors the structure of the *FCPA* and its criminal law approach, although it allows Member States to adopt equivalent sanctions in cases where domestic law may not allow for criminal liability of corporations.[45]

The OECD Anti-Bribery Convention is supported by a unique implementation and review framework that is established by Article 12 and facilitated through the Working Group on Bribery.[46] The Working Group on Bribery is supported by the OECD secretariat and has been extremely successful in driving domestic legislative change through the peer review process for the convention.[47] Transparency International has referred to the OECD's peer review process, as the "gold standard" in monitoring.[48] Currently, the Convention has a total of forty one signatories, and each has enacted implementing legislation in compliance with the OECD requirements. Furthermore, the Working Group on Bribery has been credited as being central to the development and ultimate enactment of the recent *United Kingdom (UK) Bribery Act 2010* (*UK Bribery Act*).[49]

The Working Group on Bribery is undertaking its fourth phase of peer review for the Convention.[50] Analysis of this evolving peer review process demonstrates that the focus has shifted from

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42 *Id.* at Preamble.

43 *Id.* at para. 2.

44 *Id.* arts. 1, 2.

45 *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Negotiating Conference,* OECD 11 (Nov. 21, 1997).

46 CECILY ROSE, INTERNATIONAL ANTI-CORRUPTION NORMS: THEIR CREATION AND INFLUENCE ON DOMESTIC LEGAL SYSTEMS 63-66 (Oxford University Press, 2015).

47 Hortense Jongen, *The Authority of Peer Reviews Among States in the Global Governance of Corruption*, 25 REV. INT'L POL. ECON. 909, 910 (2018).

48 *Id.*

49 *Id.*; *see also* SUSAN ROSE-ACKERMAN & PAUL CARRINGTON, ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE? 152-54 (Carolina Academic Press, 2013).

50 *OECD Anti-Bribery Convention Phase 4 Monitoring Guide: Phase 4 Monitoring Guide*, OECD (Nov. 16, 2016), http://www.oecd.org/daf/anti-bribery/Phase-4-Guide-ENG.pdf.

implementation of the Convention through domestic legal change to effective enforcement of the legal frameworks in Member States.[51] The current phase focuses on three issue areas: detection, enforcement, and responsibility of legal persons.[52] The Monitoring Guide for Phase Four emphasizes that the "lead examiners should aim to have at least one of their experts be a law enforcement official with corruption related experience."[53] This enforcement focus reflects the criminal law approach to foreign bribery that has remained at the core of regulatory efforts since the enactment of the *FCPA*. For example, a criminal law approach emphasizes penalties for non-compliance with an emphasis on punishment and deterrence.[54]

Almost twenty years after the OECD Anti-Bribery Convention was entered into with full-force, domestic law has continued to evolve to criminalize foreign bribery in unique ways. The *UK Bribery Act,* which arose in July 2011, is the most recent and most expansive piece of domestic anti-bribery legislation to date.[55] The *UK Bribery Act* was a direct response to criticism espoused from the Working Group on Bribery and the continued pressure to update and improve the UK's outdated bribery legislation.[56] It extends liability beyond those established by the *FCPA*.[57] It does not allow "facilitation payments"[58] and it has significant extraterritorial reach. Under the *UK Bribery Act*, British nationals, foreign residents, UK companies, and overseas

51 The OECD notes that the four phases of monitoring began with a focus on adequacy of laws (phase one), then effective application (phase two), enforcement (phase three). A fourth phase was initiated in March 2016 and continues to focus on enforcement issues and cross cutting challenges. This phase will continue until 2024. *Country monitoring of the OECD Anti-Bribery Convention*, OECD, http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm.

52 *OECD Anti-Bribery Convention Phase 4 Monitoring Guide, supra* note 50.

53 *Id.* at 14.

54 Neil Gunningham*, Compliance, Deterrence and Beyond,* NET WORKING PAPER SERIES*,* Article 1 (2017).

55 UK Bribery Act (2010); *see* Cecily Rose, *The UK Bribery Act 2010 and Accompanying Guidance: Belated Implementation of the OECD anti-Bribery Convention*, 61 INT'L & COMP. L. Q. 485 (2012).

56 Cecily Rose, *The UK Bribery Act 2010 and Accompanying Guidance: Belated Implementation of the OECD anti-Bribery Convention*, 61 INT'L & COMP. L. Q. 485 (2012); Engle, *supra* note 34, at 1173.

57 Lee G. Dunst, Michael S. Diamant & Teresa R. Kung, *Hot off the Press: Resetting the Global Anti-Corruption Thermostat to the UK Bribery Act*, 12 BUS. L. INT'L 257, 262 (2011).

58 Engle *supra* note 34, at 1176.

organizations—are all subject to the Act's jurisdiction.[59] The *UK Bribery Act* also covers bribery between two private entities (commercial bribery or business to business bribery), without a requirement that there be a link to public office. This significantly expands the coverage of the Act beyond that of the *FCPA*, as well as the requirements under the OECD Anti-Bribery Convention.

One of the most interesting innovations of the *UK Bribery Act* is the unique approach that it takes to corporate liability. Section 7(1) of the *UK Bribery Act* holds that a company will be liable for the failure to prevent bribery. On this basis, a company (C) will be guilty of an offence where an 'associated person' has engaged in bribery, without the need to attribute any fault to the company.[60] However, "it is a defense for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct."[61] This "adequate procedures" defense creates "an implied command to companies to form soft law in this field."[62] It incentivizes corporations to develop policies and procedures to prevent bribery, reflecting the proactive and preventive due diligence approach implied, if not expressly required, in modern slavery legislation. The key difference here is that under the *UK Bribery Act*, failure to establish adequate procedures will result in criminal liability for bribery. By comparison, failure to conduct due diligence in the modern slavery context based on the disclosure framework has limited formal consequences.[63]

Another innovation of the *UK Bribery Act* is its interaction with the *Crimes and Courts Act 2013* to enable negotiation of Deferred Prosecution Agreements between regulators (in this case the Serious Fraud Office) and legal persons accused of bribery.[64] A Deferred Prosecution Agreement in the UK context involves "an agreement reached between a prosecutor and an organization which could be prosecuted, under the supervision of a judge. The agreement allows a prosecution to be suspended for a defined period provided the organization meets

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

60 UK Bribery Act (2010), § 7(1).

61 *Id*. § 7(2).

62 Engle, *supra* note 34, at 1185.

63 LeBaron & Ruhmkorf, *supra* note 19.

64 *See* Federico Mazzacuva, *Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosection Agreements in the UK and US Systems of Criminal Justice*, JCL 249 (2014).

certain specified conditions."[65] The US has been utilizing Deferred Prosecution Agreements to address corporate misconduct (including foreign bribery) for some time.[66] Because Deferred Prosecution Agreements can be used to require corporations to adjust their policies and practices and allow for monitoring and evaluation by third party monitors, this approach enhances the possibility of meaningful organizational change, moving beyond the punitive and deterrence-based rationale of a criminal penalty.[67]

Enactment of the *UK Bribery Act* has motivated action in other jurisdictions, notably Australia. The *Crimes Legislation Amendment (Corporate Crime) Bill 2017 (Cth)* mirrors the *UK Bribery Act* in its inclusion of a strict liability offence for failure to prevent bribery[68] and establishment of an "adequate measures" defense.[69] The Bill would also amend the *Director of Public Prosecutions Act 1983 (Cth)* to introduce a Deferred Prosecution Agreement scheme for serious corporate crime, including foreign bribery.[70] The Bill does not go as far as the *UK Bribery Act*, as it does not address commercial bribery or bribery exclusively in the private sector. The Bill has not yet passed into law, and the current approach to foreign bribery in Australia is much more limited. At present, foreign bribery is criminalized in Australia under the *Commonwealth Criminal Code*.[71] The primary offence is set out under § 70.2 and establishes a crime where a person bribes another person to influence a foreign public official to obtain or retain a business advantage. There are two defenses for this crime: the foreign law defense[72] and the facilitation payment defense.[73] The OECD and other

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65 *Deferred Prosecution Agreements, Guidance Policy,* UK SERIOUS FRAUD OFFICE (2019), https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/.

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

67 *Id.; see also* Sydney Fields, *Statutory Tools for Enhancing Multinational Corporation Compliance with Anti-Bribery Laws: Recommended Changes to Australia's Foreign Bribery Offense*, 49 G. WASH. INTL. L. REV. 411 (2006).

68 *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017*(Cth), Schedule 1, § 70.5A (May 8, 2018) (Austl.).

69 *Id.* § 70.5A(5).

70 *Id.* § 17A.

71 *Criminal Code Act 1995* (Cth) § 70.

72 *Criminal Code Act 1995* (Cth) § 70.3 establishes that a crime is not committed where the conduct is lawful in the foreign public official's country.

73 *Criminal Code Act 1995* (Cth) § 70.4 establishes a defence for facilitation payments where the value of the benefit was minor in nature and for the purpose of expediting or securing a routine government action, provided that the payment was recorded as such.

commentators have been critical of these limitations of Australian anti-bribery law.[74] Even so, the Australian approach still adopts a criminalization framework with significant penalties for non-compliance.[75] This approach contrasts with the soft disclosure approach in Australian modern slavery legislation. However, it is important to note that despite this "hard" criminal law approach to bribery, the relevant provisions are rarely enforced.[76] This raises serious questions about the utility of a criminal law involving a command and control approach, which relies heavily on adversarial enforcement action.

The criminal law framework for bribery has, until recently, focused on achieving consistency in domestic laws, facilitated through international treaty obligations.[77] However, a range of other transnational mechanisms have also evolved over the past two decades. These mechanisms assist domestic enforcement actors by creating parallel obligations and incentives at the transnational level.[78] For example, Multilateral Development Banks (MDBs) play an important role in promoting anti-bribery norms transnationally.[79] These actors do not directly enforce anti-bribery law, but they are able to disincentivize bribery through policies that mandate compliant behavior by the organizations they engage with, particularly corporations. The World Bank has in place a system to debar companies found to have acted corruptly in relation to a World Bank contract.[80] Sanctions can also be

74 *Implementing the OECD Anti-Bribery Convention Phase 4 Report: Australia,* OECD 57-9 (2018), https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf. In this report, the OECD made a number of recommendations for Australia to continue to improve its anti-bribery efforts; *See also* Fields, *supra* note 67; Cindy Davdis & Grant Schubert, *Criminalising foreign bribery: Is Australia's bark louder than its bite?*, 35 CLJ 98 (2011).

75 The *Criminal Code Act 1995* § 70.2(4) sets out the penalties for an individual which can be up to 10 years in prison and 10,000 penalty units. Section 70.2(5) sets out the penalties for a legal person which can amount to 100,000 penalty units, three times the value of the benefit or ten per cent of the annual turnover leading up to the offence.

76 Australia has only had two successful foreign bribery prosecutions: R v Ellery [2012] VSC 349 (against an individual) and CDPP v Note Printing Australia Pty Ltd and Securency International Pty Ltd [2012] VSC 302 (against two companies). Three people have also pleaded guilty to foreign bribery offences in R v Jousif [2017] NSWSC 1299.

77 *The Detection of Foreign Bribery*, OECD 9 (2017), http://www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery.pdf.

78 Norber Seiler & Jelena Madir, *Fight against Corruption: Sanctions Regimes of Multilateral Development Banks*, J. OF INT'L ECON. L. 15(1), 5-28.

79 *Id.*

80 *WBG Policy: Sanctions for Fraud and Corruption,* WORLD BANK GROUP

applied for failure to comply with material terms in the Voluntary Disclosure Program terms and conditions for World Bank contractors.[81] In this context, even softer disclosure mechanisms are strengthened by penalties for failure to comply. Other MDBs have equivalent sanction systems, based on their membership in the International Financial Institutions Anti-Corruption Taskforce, which emphasizes the importance of transparency and accountability in combating corruption.[82] These mechanisms demonstrate that even non-State actors addressing foreign bribery seek to penalize non-compliance with established anti-bribery norms.

The criminalization framework and penalty approach to non-compliance with bribery norms has necessitated a shift of focus from consistency of law to effectiveness of enforcement. Successful enforcement of foreign bribery law on a global scale remains elusive[83] and has facilitated experimentation with alternative approaches and regulatory innovations. Many of these have been introduced above, including the transnational mechanisms of the MDBs, Deferred Prosecution Agreements and third-party corporate monitorships, as well as strict liability offences and adequate procedures defenses for corporations under the *UK Bribery Act*.[84]

(2016), https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/WBG%20Policy%20-%20Sanctions%20for%20Fraud%20and%20Corruption%20(June%2013,%202016).pdf.

81 *The World Bank Group's Sanctions Regime: Information Note,* WORLD BANK GROUP 9 (2016), https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/The_World_Bank_Group_Sanctions_Regime.pdf.

82 *Int'l Fin. Inst. Anti-Corruption Task Force, Agreement for the Mutual Enforcement of Debarment Decisions*, WORLD BANK GROUP 3 (2006), https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/AgreementforMutualEnforcementofDebarmentDecisions(4.9.2010).pdf.

83 The most recent published data on enforcement of the *OECD Anti-Bribery Convention* through domestic law shows that 21 parties to the Convention have never sanctioned an individual or company for foreign bribery. *Working Group on Bribery, Data on Enforcement of the Anti-Bribery Convention,* OECD 1 (2017), http://www.oecd.org/corruption/data-on-enforcement-of-the-anti-bribery-convention.htm. Bribery continues to be a major challenge in international business: *see Bribe Payers Index Report*, TRANSPARENCY INT'L 4 (2011), https://www.transparency.org/whatwedo/publication/bpi_2011 ("[T]here is no country among the 28 major economies whose companies are perceived to be wholly clean and that do not engage in bribery."). Even more notably, there was no significant improvement between perceptions of business corruption in the 2008 survey and the 2011 survey.

84 *See* David Hess & Cristie Ford, *Corporate Corruption and Reform Undertakings: A new Approach to an Old* Problem, 41 CORNELL INTL. L.J. 307 (2008); Sydney Fields, *Statutory Tools for Enhancing Multinational Corporation Compliance*

The adequate procedures defense in the *UK Bribery Act* can be seen as a shift toward a less prescriptive and more procedural approach to regulating foreign bribery. It allows companies to develop internal mechanisms and policies that may limit their culpability in cases of bribery by one of their associates. However, this defense places the burden of proof on the accused organization and if adequate procedures are found to be absent, significant penalties can be applied.[85] The emphasis on penalty and deterrence, combined with other mechanisms and approaches, like those discussed above, is consistent with an experimental governance approach.[86] This approach to regulation emphasizes flexibility and incentives for innovative solutions, bounded by penalty defaults for failure to take meaningful steps to comply with the legal and normative framework.[87] We discuss these elements further in Section 4.

It should be noted that even with these experimental aspects, the bribery framework contrasts markedly with the soft, disclosure-based model that has more recently evolved in response to the risks of modern slavery in the private economy.[88] We suggest that there may be important lessons to learn by comparing these approaches. The framework for regulating modern slavery in supply chains via legislated disclosures is introduced below, preceding a comparative analysis in Section 4. In comparing these two regulatory frameworks, we demonstrate the strengths and weaknesses of each and suggest possibilities for future regulatory success.

III. ADDRESSING MODERN SLAVERY IN SUPPLY CHAINS

Modern slavery in global supply chains is attracting increased attention from States, businesses, and civil society alike. There is

with Anti-Bribery Laws: Recommended Changes to Australia's Foreign Bribery Offense, 49 G. WASH. INTL. L. REV. 411 (2006).

85 Under the UK Bribery Act 2010 (Eng.) the penalty can be up to ten years in jail and there is no limit on the monetary penalty possible. In 2016, the Serious Fraud Office succeeded in their prosecution of Sweett Group PLC who were ordered to pay a fine of £2.25 million. Press Release, Serious Fraud Office (May 12, 2016), https://www.sfo.gov.uk/cases/sweett-group.

86 Charles Sable & Jonathan Zeitlin, *Experimentalist Governance*, *in* THE OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur ed., 2012).

87 Christine Overdevest & Jonathan Zeitlin, *Experimentalism*, *in* TRANSNATIONAL FOREST GOVERNANCE: IMPLEMENTING EUROPEAN UNION FOREST LAW ENFORCEMENT, GOVERNANCE AND TRADE (FLEGT) VOLUNTARY PARTNERSHIP AGREEMENTS IN INDONESIA AND GHANA, REGULATION & GOVERNANCE 12, 64 (2018).

88 LeBaron & Ruhmkorf, *supra* note 19.

recognition of the need to address these risks and avoid forced labor and related practices that can, and do, occur in modern business transactions.[89] In this section, we focus on the recently introduced legislative frameworks for addressing modern slavery through a disclosure regime and then consider relevant factors that impact the effectiveness, or ineffectiveness, of these frameworks.

Unlike the international framework regulating bribery, there is no single international treaty addressing modern slavery.[90] There are, however, a number of relevant UN and International Labour Organisation (ILO) treaties that reference conduct that is incorporated within the broader terminology of "modern slavery."[91] The term 'modern slavery' is not singularly defined in international law but rather used as an umbrella term to include human trafficking, slavery, servitude, forced labor, deceptive recruiting and debt bondage (which, are each delineated in international laws).[92] Modern slavery can be understood as referring to a range of exceptional circumstances where a person's freedom and ability to make choices for themselves has been very significantly undermined or entirely removed. Industries such as agriculture, quarries, brick-making, construction, electronics, fishing, mining, textile manufacture and other factory work—each of which are labor intensive and/or geographically isolated—have been found to be at high risk of exploiting forced labor.[93] Products tainted with modern

89 Radu Mares, *Corporate Transparency Laws: a 'hollow victory'?,* 36(3) NETHERLANDS QUARTERLY OF HUM. RTS. 189 (2018).

90 Nolan, Justine & Bott, Geoffrey. *Global supply chains and human rights: forced labour and modern slavery*, 24(1) AUS. JNL HUMAN RTS. 44 (2018).

91 *See, e.g.*, Convention Concerning Forced or Compulsory Labour (ILO No. 29), adopted June 28, 1930, 29 U.N.T.S. 55; Protocol of 2014 to the Forced Labour Convention, 1930, June 11, 2014, 53 I.L.M 1227; International Covenant on Economic, Social and Cultural Rights art. 8, Dec. 16, 1966, 993 U.N.T.S 3 (entered into force Jan. 3, 1976); G.A. Res. 217 (III) A art. 4, Universal Declaration of Human Rights (Dec. 10, 1948); United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, U.N. Doc. A/55/383 art. 3, Palermo Protocol (Nov. 15, 2000); International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, 999 U.N.T.S. 171.

92 Mares, *supra* note 89.

93 Andrew Crane, *Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation*, 38 ACAD. OF MGMT. REV. 49 (2013); Benjamin Thomas Greer & Jeffrey G. Purvis, *Corporate supply chain transparency: California's seminal attempt to discourage forced labour*, 20 INT'L J. OF HUM. RTS. 55 (2016); JUSTINE NOLAN & MARTIJN BOERSMA, ADDRESSING MODERN SLAVERY (2019).

slavery are circulated in the global economy via vast and often opaque supply chains.

Recent efforts to address modern slavery have emanated from Australia, the UK and California. These laws particularly emphasize corporate disclosure as a means of combating modern slavery.[94] In 2018, Australia was the latest jurisdiction to take this approach and adopted the *Modern Slavery Act* which defines modern slavery as "conduct which would constitute an offence under Division 270 or 271 of the Criminal Code."[95] This includes offenses such as slavery, servitude, forced labor, deceptive recruiting, trafficking in persons, debt bondage, forced marriage and organ trafficking.[96] The definition also includes trafficking in persons, as defined in the international Trafficking Protocol, and the worst forms of child labor, as defined in *ILO Convention (No. 182)*.[97] Thus, while the emerging legal frameworks for addressing modern slavery are State-based laws, there is a clear link between domestic and international law in this area.

The Australian *Modern Slavery Act* requires business entities with an annual consolidated revenue of more than AUD $100 million (including the Australian Federal Government), to report annually on the risks of modern slavery in their operations and supply chains and the actions taken to address these risks.[98] The Act follows a lengthy period of consultation including the 2017 parliamentary inquiry report,[99] a Federal Government Public Consultation Paper[100] and Regulation Impact Statement,[101] and a Senate Inquiry in 2018.[102] The Act also follows the *Modern Slavery Act 2018* (NSW) ('*NSW Act*'), which was passed on June 21, 2018.[103]

The Australian *Modern Slavery Act* follows similar laws adopted in the UK and California that also address the prevalence of modern

94 JUSTINE NOLAN & MARTIJN BOERSMA, ADDRESSING MODERN SLAVERY (2019).
95 *Modern Slavery Act 2018* (Cth) s 4 (Austl.).
96 *Id.*
97 Int'l Labour Org. [ILO], *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,* No. 182, art. 3 (adopted June 17, 1999, entry into force: Nov. 19, 2000).
98 *Modern Slavery Act 2018* (Cth) s 16 (Austl.).
99 Commonwealth, *Parliamentary Inquiry Report*, Hidden in Plain Sight, Dec. 2017 (Austl.).
100 ATTORNEY-GENERAL'S DEPARTMENT, MODERN SLAVERY IN SUPPLY CHAINS REPORTING REQUIREMENT PUBLIC CONSULTATION PAPER (2017) (Austl.).
101 *Regulation Impact Statement –Department of Home Affairs*, AUSTL. GOV'T. (July 18, 2018), https://ris.pmc.gov.au/2018/07/18/modern-slavery-reporting-requirement.
102 Modern Slavery Bill [Provisions] 2018 (Cth) (Austl.).
103 *Modern Slavery Act 2018* (Cth) s 4 (Austl.).

slavery in global supply chains. California's *Transparency in Supply Chains Act,* which came into effect in 2012, requires large retail and manufacturing firms to disclose efforts to eradicate slavery and human trafficking from their supply chains.[104] Companies must report in compliance with a set of mandatory criteria and post their reports on their websites. The adoption of the UK's *Modern Slavery Act* in 2015 focused broader global attention on the use of legislative disclosure requirements to address the human rights impacts of businesses.[105] Section 54 of the UK's *Modern Slavery Act* requires specified commercial organizations which supply goods or services in the UK to disclose information about their response to modern slavery in their supply chains.[106]

The idea of utilizing corporate transparency as a means to promote responsible business conduct was also the premise behind the introduction of an earlier law in the US—section 1502 of the *Dodd Frank Act* (2010).[107] Although not specifically focused on modern slavery, the law is premised on the disclosure model and creates a reporting requirement for publicly traded companies in the US for products that contain specified conflict minerals.[108] The aim is to expose and stem the trade in these minerals and thus reduce the related human rights abuses. In 2010, the UN Joint Human Rights Office in the Democratic Republic of the Congo (DRC) reported that over 300 civilians were raped by armed groups in three villages located close to mining sites in North Kivu province.[109] The UN investigation revealed a link between the violence and competition over access to so-called conflict

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104 California Transparency in Supply Chains Act of 2010, CAL. CIV. CODE §1714.43 (Deering 2010).

105 LeBaron & Ruhmkof, *Steering CSR through home state regulation: A comparison of the impact of the UK Bribery Act and the modern slavery on global supply chain governance,* 3 GLOBAL POLICY 15 (2017).

106 Modern Slavery Act 2015, c. 30, § 54 (UK), https://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted. Section 54 of the UK Act requires commercial entities with a total annual turnover of £36 million to publish an annual statement on steps taken to assess and manage the risk of slavery and human trafficking. The UK Act defines modern slavery to include slavery, servitude and forced or compulsory labor and 'human trafficking.

107 Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 1502 (2010).

108 Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L. J. 2, 419, 419-63 (2015).

109 MONUSCO and United Nations Office of the High Commissioner for Human Rights, *Final report of the fact-finding mission of the United Nations Joint Human Rights Office into the mass rapes and other human rights violations committed by a coalition of armed groups along the Kibua-Mpofi axis, in* WALKIKALE TERRITORY, NORTH KIVU, FROM 30 JULY TO 2 AUGUST 2010, JULY 2011.

minerals (gold, tin, tungsten and tantalum) some of which are commonly used in the production of electronic goods, such as phones and computers.[110] Similar to the UK, Californian and Australian laws, this US law does not place a ban or penalty on the activity itself (i.e. the use of conflict minerals) but rather mandates certain disclosures in order to make it more transparent. For example, if companies discover they have been sourcing conflict minerals from the DRC or adjoining countries, it is not illegal for them to continue doing so; however, they must report this to the US Securities Exchange Commission. Functionally, it relies on the adverse reputational impact of such a disclosure rather than mandating penalties for actually sourcing minerals from conflict-afflicted regions.[111] The European Union has also adopted a similar law targeting conflict minerals, which will be effective from 2021 (Conflict Minerals Regulation 2021 (EU)).[112]

The disclosure-based framework of these laws is evidence of a change in regulatory strategy that reflects a growing consensus that both State and corporate actors have a role to play in addressing the human rights impacts of businesses, and furthermore that the State has a role in regulating these impacts (most recently in respect of modern slavery).[113] Modern slavery laws have the potential to harden

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110 *The Dodd Frank Act's Section 1502 on Conflict Minerals*, GLOBAL WITNESS, (Apr. 10, 2011), https://www.globalwitness.org/en/archive/dodd-frank-acts-section-1502-conflict-minerals.

111 *Dodd Frank Act Section 1502 on Conflict Minerals*, *supra* note 111. Section 1502 does impose penalties for not reporting or complying in good faith. However, the information filed by companies is subject to s18 of the *Securities Exchange Act* 1934 which attaches liability for any false or misleading statements.

112 Conflict Minerals Regulation 2017/821/EU.

113 *See* the *Tariff Act of 1930,* 19 USC § 1654 (US) (s307 amended in 2016). The US, at a federal level, has adopted various approaches to addressing human rights risks in supply chains. For example, the *Tariff Act of 1930,* 19 USC § 1654 (US) (s307 amended in 2016), which applies to all US importers allows the government to apply a temporary withholding or conclusive ban of goods that are suspected to be the result of forced labor and the *Federal Acquisitions Regulation (FAR)* 48 CFR 1, 22.17 (US), (subpart 22.17 amended in 2015) requires qualifying government contractors and subcontractors to certify that they have made efforts to ensure their supply chain is free from forced labor and human trafficking. Failure to comply may result in a termination of the procurement contract. The US Department of Labor also issues a list of products it believes are produced by forced labor. For example, in February 2019, the US issued a detention order on Taiwanese imported seafood emanating from a Fishing Vessel (Tunago No. 61) which Greenpeace had exposed as using forced labor. Greenpeace documented working conditions that included the crew working 20-hour days, seven days a week and facing physical violence, verbal abuse and a lack of food and water. *See also*: Greenpeace International, *Taiwanese seafood giant linked to human rights violation*, GREENPEACE (2018),

responsible business conduct principles that have traditionally been cast in a soft format.[114] Over the last thirty years, there has been an emphasis on the development of 'soft law' aimed at regulating the impact of business practices on human rights, for instance, through multi-stakeholder initiatives, institutional declarations or guidelines, or industry codes of conduct.[115] Many of these earlier initiatives embody strong elements of corporate self-regulation and relied heavily on corporate codes of conduct (voluntary standards that are often loosely based on international labor standards) to regulate behavior.[116] The development of, and reliance on, self-regulatory initiatives to address corporate human rights abuses is, in part, a response to an inadequate legal framework at both international and domestic levels, for addressing corporate human rights abuses. These modes of corporate self-governance that emerged in the 1990s and continue today have been criticized for their lack of robustness, legitimacy, and effectiveness.[117] In 2011 the UN Guiding Principles on Business and Human Rights[118] were unanimously adopted by the UN Human Rights Council, and in the same year, the OECD Guidelines for Multinational Enterprises were

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https://www.greenpeace.org/international/press-release/16676/taiwanese-seafood-giant-linked-to-human-rights-violations-greenpeace/.

114 Mares, *supra* 89.

115 *See, e.g.*, D. Kinley & J. Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44(4) VA. J. INT'L L. 931 (2004); P. Utting, *Rethinking Business Regulation: From Self-Control to Social Control*, UNITED NATIONS RES. INST. FOR SOC. DEV., TECH., BUS. & SOC'Y PROGRAMME, Paper Number 15 (2005), http://www.unrisd.org/unrisd/website/document.nsf/462fc27bd1fce00880256b4a0060d2af/f02ac3db0ed406e0c12570a10029bec8/$FILE/utting.pdf); L. Baccaro & V. Mele, *For Lack of Anything Better? International Organizations and Global Corporate Codes*, 89 PUB. ADMIN. 451; RM Locke, *The Promise and Limits of Private Power* (New York: Cambridge, 2013); D. O'Rourke, *Outsourcing Regulation: Analysing Nongovernmental Systems of Labour Standards and Monitoring*, 31(1) POL'Y STUD. J. 1 (2003).

116 JUSTINE NOLAN & MARTIJN BOERSMA, ADDRESSING MODERN SLAVERY (2019).

117 Utting, *supra* note 116, at 1.

118 UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK iv (United Nations, 2011). For the history of the movement, *see* PETER MUCHLINSKI, *The Development of Human Rights Responsibilities for Multinational Enterprises*, *in* BUSINESS AND HUMAN RIGHTS: DILEMMAS AND SOLUTIONS 33 (Rory Sullivan et al. eds., 2003); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2011). On the topic of interaction between hard and soft law, *see* Radu Mares, *Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy*, 1 TRANSNAT'L LEGAL THEORY 221 (2010).

revised to incorporate elements of the Guiding Principles.[119] Since 2011, an international consensus has been coalescing around these instruments as expressions of the basic norms that define responsible corporate behavior.[120]

In this field where business interests merge and often clash with human rights, the distinction between and effect of both soft and hard law is not binary, but more of a continuum.[121] What is legally sanctioned is distinguishable from what is not, but reputational sanctions can be crucial to business.[122] Some argue that "it is useful to think of business and human rights norms not as a hierarchy of binding provisions, but as a Galaxy comprised of multiple forms of guidance with differing legal effects, formulated by both public and private entities."[123] The reality is that both law and "not-law" are only as strong as their uptake and enforcement capacity. The normative value of soft and hard law comes from its ability to shape corporate and public culture as to what is and is not expected of companies in overseeing their supply chains. Even without direct penalties for non-compliance, this normative dimension may, to some extent, motivate uptake by corporations and reduce enforcement burden on State regulators. At a meeting of the G20[124] in 2017 there was clear acknowledgement that it is the responsibility of governments to "communicate clearly on what we [government] expect from businesses with respect to responsible business conduct,"[125] reaffirming a critical role for the State in both setting standards and enforcing them.

While the new disclosure-based modern slavery laws harden the expectation that business will conduct itself responsibly, they are ultimately founded on a soft approach with the assumption that the transparency gained from disclosure will incentivize corporate action to

119 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011).

120 *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Surya Deva and David Bilchitz eds, 2013).

121 Barnali Choudhury, *Balancing Soft and Hard Law for Business and Human Rights*, 67 BRITISH INST. INT'L & COMP. L. 961 (2018).

122 Chikako Oka, *Accounting for the Gaps in Labour Standard Compliance: The Role of Reputation-Conscious Buyers in the Cambodian Garment Industry*, 22 EUR. J. DEV. RES. 59 (2010).

123 Elise Groulx Diggs et al., *Business and Human Rights as a Galaxy of Norms*, 50 GEO. J. INT'L L. 309, 317 (2019).

124 The G20 (or Group of Twenty) is an international forum for the governments and central bank governors from 20 major economies (19 countries plus the European Union). *See G20 Summit 2017*, HAMBURG.COM, http://www.hamburg.com/g20-2017/ (last visited October 16, 2020).

125 G20 Labour and Employment Ministers Meeting, Ministerial Declaration, *Towards an Inclusive Future: Shaping the World of Work*, 7 (May 19, 2017).

address human rights risks.[126] The broad premise behind these types of social reporting requirements is that the reputational implications of forced disclosure will compel companies to undertake a substantive human rights focused examination (due diligence) of their supply chain practices. What these schemes implicitly assume but do not explicitly require is that companies will undertake some form of human rights due diligence in order to adequately prepare a modern slavery statement for presentation to the market. [127] For example, section 16 (1)(d) of the Australian *Modern Slavery Act* asks reporting entities to describe the actions taken "to assess and address those [modern slavery] risks, including due diligence and remediation processes."[128] This reference to due diligence in section 16 of the Act, combined with the reference to the Guiding Principles in the Explanatory Memorandum, suggests that the Australian Government envisages due diligence (even if it does not explicitly require it) as a means by which Australian businesses can fulfill the goal of taking "proactive and effective actions to address modern slavery."[129]

The concept of human rights due diligence was introduced in the Guiding Principles as a mechanism by which companies might discharge their responsibility to respect rights.[130] Its effective development and implementation are considered a shared responsibility of both government and business. As opposed to corporate due diligence which focuses on the risks to a company, human rights due diligence instead focuses on the human rights risks that a company may pose to others.[131] As such, human rights due diligence is designed to be an ongoing interactive mechanism that keeps a company apprised of its impact on workers, the community, and a broader set of

126 Barnali Choudhury, *Social Disclosure,* 13 BERKELEY BUS.L.J, 183 (2016).

127 Landau I., *Human rights due diligence and the risk of cosmetic compliance*, 20 MELBOURNE J. OF INT'L L. 222-247 (2019).

128 *Modern Slavery Act 2018* (Cth) 16 (2018).

129 Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) ¶ 2.

130 UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, GUIDING PRINCIPLES, *supra* note 119, at n. 97.

131 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, ¶ 15, U.N. Doc. A/73/163 (July 16, 2018). *See also*, Jonathan Bonnitcha & Robert McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. INT'L L. 899 (2017); Karin Buhmann, *Neglecting the Proactive Aspect of Due Diligence?*, 3 BUS. AND HUM. RTS. J. 23 (2018).

stakeholders.[132] However, it is not a legal obligation and there is no legal liability if a company does not conduct such activity either under the Guiding Principles or under the modern slavery disclosure laws discussed above.[133]

There are at least two significant problems in relying on this soft approach to address modern slavery: 1) the paucity of meaningful information being disclosed, and 2) the lack of accountability for non-compliance with disclosure obligations.[134] For transparency to be effective and an incentivizing action, there must be meaningful disclosure that can be evaluated and compared. Fung, Graham, and Weil note the power of targeted transparency laws that require companies to disclose information "in a format that poor performers would most like to avoid - in labels, reports, or websites that allowed consumers, investors, employees and community residents to compare products and practices."[135] At the same time, Landau and Marshall note the risks of cosmetic compliance when modern slavery regulation allows for excessive breadth of interpretation and variability in what is reported and how.[136] Verifiable information is needed to allow external actors to make an assessment of the company's efforts to eradicate slave labor and related practices.

Analysis of corporate modern slavery statements submitted under the UK and California laws indicate that the majority of corporate responses to date, tend to be symbolic with limited information provided.[137] Year to year analysis of compliance with the Californian Act shows some slight improvement with compliance requirements but still indicates that 48% of companies are not complying with the basic

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132 McCorquodale, Robert, et al., *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2(2) BUS. & HUM. RTS. J. 195-224 (2017).

133 *Id.*

134 There is a range of literature on the utility of transparency-based regimes (not restricted to modern slavery) including Alexis Bateman & Leonardo Bonanni, *What Supply Chain Transparency Really Means*, HARV. BUS. REV. (Aug. 20, 2019); Omri Ben-Shahar & Carl Schneider, *The Failure of Mandated Disclosure* 159 U. PA. L. REV. 647, 647-746 (2011); OMRI BEN-SHAHAR & CARL SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014); Marcia Narine, *Disclosing Disclosure's Defects: Corporate Responsibility for Human Rights Impact*, 47 COLUM. HUM. RTS. L. REV. 84 (2015).

135 ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 6 (2007).

136 Ingrid Landau & Shelley Marshall, *Should Australia be Embracing the Modern Slavery Model of Regulation?,* 46 FED. L. REV. 313 (2018).

137 R. Birkey, R. Guidrey, M. A. Islam, & D. Patten, *Mandated Social Disclosure: An Analysis of the Response to the California Transparency, in Supply Chains Act 2010,* J. OF BUS.ETHICS (2016).

disclosure requirements of the law.[138] Another study concluded: "analysis of the extensiveness of the disclosure suggests that, overall, the responses tend to be more symbolic than substantive."[139] Various studies conducted on the corporate statements issued under the UK *Modern Slavery Act* indicate mixed results. While select corporate statements have been praised, more generally the law has engendered a corporate response that falls short of any serious effort to address modern slavery in their supply chains.[140] These findings also reflect earlier analysis of the corporate disclosures submitted under the *Dodd-Frank Act*, which also found that the disclosures tend to be more symbolic than substantive.[141] For example, in a study analyzing the initial statements issued under section 1502 of the *Dodd-Frank Act*, research indicated a low level of compliance with the requirements of the law[142] and many companies failed to follow the basic procedural requirements of the transparency provision. Chilton and Sarfaty conclude that "[a]lthough consumers may be interested in whether a company's supply chain is free from human rights abuses, current corporate disclosures do not help consumers determine which companies are making comprehensive efforts to achieve that goal."[143]

With respect to the second issue—the lack of accountability for non-compliance with disclosure obligations—the problem stems in part from the fact that enforcement of each of these modern slavery laws is essentially outsourced to the market.[144] None of these modern slavery disclosure laws incorporate a holistic compliance framework

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138 CHRIS N. BAYER & JESSE N. HUDSON, CORPORATE COMPLIANCE WITH THE CALIFORNIA TRANSPARENCY, *in* SUPPLY CHAINS ACT: ANTI-SLAVERY PERFORMANCE IN 2016 5 (2017).

139 Rachel N. Birkey, et al., *Mandated Social Disclosure: An Analysis of the Response to the California Transparency, in Supply Chains Act of 2010*, J. OF BUS. ETHICS, (Oct. 27, 2016); Benjamin Thomas Greer & Jeffrey G. Purvis, *Corporate Supply Chain Transparency: California's Seminal Attempt to Discourage Forced Labour*, 20 INT'L. J. HUM. RTS. 55 (Jul. 2, 2016) https://www.tandfonline.com/doi/abs/10.1080/13642987.2015.1039318.

140 Ergon Associates, *Reporting on Modern Slavery: The Current State of Disclosure* (May 2016); Core Coalition & Business and Human Rights Resource Centre, *Register of Slavery & Human Trafficking Corporate Statements Released to Date to Comply with the UK Modern Slavery Act of 2016,* MODERN SLAVERY REGISTRY, https://www.modernslaveryregistry.org (last accessed Oct. 11, 2020).

141 Birkey et al., *supra* note 139.

142 Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L. J. 2, 419, 419-63 (2015).

143 Adam S. Chilton & Galit Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT'L L. 1, 46 (2017).

144 Ingrid Landau & Shelley Marshall, *Should Australia be Embracing the Modern Slavery Model of Regulation?,* 46 FED. L. REV. 313 (2018).

providing the State with a central role in enforcing non-compliance. Under both the UK and Californian laws there is provision for the UK Secretary of State or the Californian Attorney General to seek injunctive relief to enforce compliance, but to date this has not been utilized. Section 16A of the Australian *Modern Slavery Act* introduces a "comply or explain" provision, which enables the relevant government Minister to write to a reporting entity if it is believed that entity has not complied with the reporting requirements for a modern slavery statement. The Minister can request that within twenty-eight days the entity either undertake remedial action or explain why they are not compliant with reporting.

These social disclosure laws assume active participation of stakeholders, such as consumers and investors, as regulators and enforcers of the law. The argument is akin to the idea that if we as consumers, know that the fish we eat was harvested by slaves, then we will be less likely to buy it, which will force the company to change its practices.[145] Likewise, investors, it is assumed, may withhold funding to companies to enforce compliance with social requirements. The "co-governance" rationale on which the modern slavery disclosure laws rest—of deliberately harnessing the "regulatory power" of business[146] is underpinned by the basic premise is that it is not only governments who can address human rights issues, but that we must engage business in efforts to respect the human rights that their activities affect.[147] Government still leads but does so by, among other things, requiring reporting on risk management processes. Such disclosure regimes are established policy tools utilized elsewhere (from child protection to workplace gender quotas). The logic involved posits that effective regulation is not just about rules and inspectors but enrolling and encouraging the ordering power of the regulatees own systems.[148] State regulators may then either audit those risk management systems or, as

145 *Id.* at 45 (noting the limitations of the consumer activist logic, stating "simply posting information about supply chain audits on company websites does not necessarily lead to changes in consumer behavior.").

146 JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000); F. David et al., *Starting a Dialogue: Harnessing the Power of Business to Eliminate Modern Slavery*, (Walk Free Foundation, 2012); JOHN BRAITHWAITE, REGULATORY CAPITALISM, (Edward Elgar 2008).

147 Kofi Annan, *UN Global Compact with Business' UN Secretary-General's speech*, WORLD ECONOMIC FORUM, DAVOS (1999).

148 IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION (1992); *see also* CHRISTINE PARKER, THE OPEN CORPORATION (2002).

with the recent modern slavery disclosure laws, essentially leave oversight and action to the market or citizen actors.[149]

An independent review of the UK *Modern Slavery Act* in 2018 highlighted the shortcomings of the current UK compliance framework and recommended establishing a more ambitious enforcement model.[150] The review suggested amending the law to incorporate four stages of State enforcement for non-compliance: "initial warnings, fines (as a percentage of turnover), court summons and director disqualification."[151] A holistic compliance framework might incorporate a number of different elements, including but not limited to the possible imposition of a penalty. Fines, director disqualification, or the ability to allow civil or criminal liability to be imposed for non-compliance are all viable penalty options. A more holistic compliance framework might also consider other incentives for business to comply including: the publication of a government approved list of all entities required to report under the law (so at least the 'market' is guided as to which companies should be regulated); and a requirement that companies must comply with modern slavery reporting requirements in order to be eligible to bid on government procurement contracts.

To be effective, the compliance framework also requires sufficient resourcing (public and private) to monitor and evaluate the statements. The State may collaborate with and involve third party actors in this process, but at present, there is very limited government oversight aimed at checking if companies are reporting.[152] There are also few consequences for failing to report. Addressing these limitations is essential and reporting quality should also be actively monitored and evaluated if the disclosure approach is to have meaningful impact. There is a role for the State in this evaluation: coordinating, if not directly assessing and comparing reports.[153]

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149 Peter Grabosky, *Meta-Regulation*, *in* REGULATORY THEORY: FOUNDATIONS AND APPLICATIONS 149 (Peter Drahos ed., 2017).

150 Frank Field, Maria Miller & Baroness Butler-Sloss, Home Office (UK), *Independent Review of the Modern Slavery Act*, *Second Interim Report: Transparency in Supply Chains*, para. 2.5.2 (2019) (*hereinafter* UK Home Office January 2019 Independent Review).

151 Frank Field, Maria Miller & Baroness Butler-Sloss, Home Office (UK), *Independent Review of the Modern Slavery Act*, *Second Interim Report: Transparency, in Supply Chains*, para. 2.5.2 (2019) (*hereinafter* UK Home Office January 2019 Independent Review).

152 JUSTINE NOLAN & MARTIJN BOERSMA, ADDRESSING MODERN SLAVERY (2019).

153 Sinclair and Nolan, *Modern Slavery Laws in Australia: Steps in the Right Direction?*, 5 BUS. AND HUM. RTS. J., 164 (2020).

Increased State engagement with compliance and enforcement may be on the horizon for modern slavery laws. In contrast to the development of the three modern slavery laws already discussed, one Australian state—NSW—passed its own modern slavery act, which proposes a different compliance framework. The *NSW Act* applies to commercial organizations with NSW employees and an annual turnover above AUD$50 million.[154] The *NSW Act* requires reporting entities to file an annual modern slavery statement and, broadly, has equivalent provisions to the UK and federal Australian Acts, with the significant and critical exception that it includes financial penalties (up to $1.1 million) for failure to meet the reporting requirements.[155] The *NSW Act* will be complementary to the federal law and will focus on those companies that meet the reporting criteria and whose annual turnover is $50–100 million.[156] The *NSW Act* was introduced as a private member's bill and quickly passed through the state parliament. There was no assessment undertaken during the drafting process to forecast how many companies would be affected and how the government would effectively monitor compliance and issue penalties for non-compliance. Forthcoming NSW regulations may provide further guidance on how compliance will be framed but as at the time of writing, the law is yet to enter into force. While a penalty for failure is likely to incentivize some corporate action, it may be limited in promoting innovation and optimization of compliance processes and procedures. It will also increase the regulatory burden to enforce the law, a challenge highlighted in the foreign bribery context. A penalty default approach, drawn from experimental governance theory, may assist in overcoming this limitation, facilitating a more dynamic approach to compliance. This possibility is discussed further in Section 4 below.

The focus of this discussion is on the comparison of approaches in enforcing legal compliance to address foreign bribery and modern slavery risks. However, it should be acknowledged that, in recent years, several countries are working on or have developed broader supply chain governance laws that assess human rights risks more generally, not just those associated with modern slavery.[157] These laws incorporate differentiated and varied enforcement frameworks. Two

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154 *NSW Modern Slavery Act 2018 No. 30,* Part 3. The Act was adopted in 2018 but is not yet in effect as October 19,2020.

155 *NSW Modern Slavery Act 2018 No. 30,* Part 3, s.24.

156 *NSW Modern Slavery Act 2018 No. 30,* Part 3, s.24.

157 Clifford Chance, *Business and Human Rights: Navigating a changing legal landscape,* May 2020.

relevant examples are the "duty of vigilance" law passed in France in 2017[158] and the Netherlands *Child Labour Act* adopted in 2019. Since 2010, at least eleven national or regional laws have been approved, or are under consideration, that require companies to report on their supply chain practices and incorporate a broader variety of enforcement mechanisms.[159] For example, the French law provides for stronger enforcement measures than the Australian, UK and Californian modern slavery laws: a court may impose an injunction on companies to comply with the vigilance requirements (akin to a duty of care) and companies may potentially be held liable under a civil lawsuit (not criminally liable) where companies have failed to implement due diligence plans and harm has occurred that can be causally linked to that failure.[160] On April 29, 2020, the European Commissioner for Justice, announced that the European Council will introduce rules for mandatory corporate environmental and human rights due diligence in 2021.[161]

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158 Law 2017-399 of March 27, 2017 on the Duty of Vigilance of Parent companies and Instructing companies, Official Gazette of France, March 28, 2017 No. 0074.

159 *See, e.g.,* Tariff Act, 19 U.S.C. § 1654 (1910); Federal Acquisition Regulation (FAR), 48 CFR 1, 22.17; Child Lavour Due Diligence Law 2019 (Netherlands); Modern Slavery Act 2015, s. 54 (Eng.); Law 2017-399 of March 27, 2017 on the Duty of Vigilance of Parent companies and Instructing companies Official Gazette of France; Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 1502 (2010); Cal. Code. Transparency in Supply Chains Act §1714.43; Eur. Comm'n Conflict Minerals Regulation 2021; Responsible Business Initiative (Switzerland); *Modern Slavery Act 2018* (Cht) (Austl.); Modern Slavery Act 2018 (NSW) (Austl.).

160 For further discussion on these laws and their enforcement frameworks, *see* Fair Labor Association, *Supply Chain Traceability And Transparency: Shifting Industry Norms, Emerging Regulations and Greater Interest from Civil Society* (June 16, 2017); Business Human Rights And Resource Centre & ITUC CSI IGB, *Modern Slavery. in Company Operations and Supply Chains: Mandatory Transparency, Mandatory Due Diligence and Public Procurement Due Diligence,* (Sept. 2017), https://www.ituc-csi.org/modern-slavery-in-company; Sherpa, *Vigilance Plans Reference Guide,* (2018) https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-ilovepdf-compressed.pdf; Anneloes Hoff, *Dutch Child Labour Due Diligence Law: A Step Towards Mandatory Human Rights Due Diligence*, (June 10, 2019) http://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/.

161 British Institute of International and Comparative Law, Civic Consulting and the London School of Economics and Political Science, *Study on Due Diligence Requirements through the Supply Chain*, EUROPEAN COMMISSION (Jan. 2020), file:///C:/Users/z3112936/Downloads/DS0120017ENN.en.pdf. For an overview of the announcement, *see also*, *European Union Justice Commissioner Commits to Regulation on Corporate Human Rights and Environmental Due Diligence,* GLOBAL POLICY WATCH (May 7, 2020), https://www.globalpolicywatch.com/2020/05/european-union-justice-commissioner-commits-to-regulation-on-corporate-human-rights-and-environmental-due-diligence/. The second revised draft of the UN

The announcement is the latest in a series of developments representing a rising tide of human rights and environmental due diligence obligations.[162] The new EU regime will add to existing legal obligations and further codify existing soft law frameworks.[163] It will also be relevant to legal actions for alleged human rights abuses, establishing the standard of conduct expected from companies. However, the enforcement framework remains as yet unclear.

Both the French and the Dutch laws (along with the proposed EU regime) aim to be proactive, rather than reactive, and mandate due diligence. For example, under the French law companies are required to establish and implement a "vigilance plan."[164] This plan must include:

> [R]easonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls . . . as well as from the operations of the subcontractors or suppliers with whom it maintains an

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business and human rights treaty includes the requirement of human rights due diligence and failure to conduct such activity could result in civil and/or criminal liability. It also contemplates using human rights due diligence as a defense (Article 8), *see Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, OEIWG CHAIRMANSHIP SECOND REVISED DRAFT (Aug. 6, 2020), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf.

162 *Study on Due Diligence Requirements through the Supply Chain*, *supra* note 161.

163 *Id.*

164 French Law (n158). Article 1 provides that the law applies to "any company that employs, at the end of two consecutive years, at least five thousand employees within itself, as well as within its direct or indirect subsidiaries headquartered on French territory, or at least ten thousand employees within itself, as well as within its direct or indirect subsidiaries headquartered on French territory or abroad" (Author's trans.). Claire Bright, *Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: Is the French Law on the Duty of Vigilance the Way Forward?,* EUI WORKING PAPER 2020/01 (2018), https://ssrn.com/abstract=3262787; *see also* A. Triponel & J. Sherman, *Legislating Human Rights Due Diligence: Opportunities and Potential Pitfalls to the French Duty of Vigilance Law,* (May 17, 2017) https://www.ibanet.org/Article/ Detail.aspx?ArticleUid=e9dd87de-cfe2-4a5d-9ccc-8240edb67de3.

> established commercial relationship, when such operations derive from this relationship.[165]

Critically, compliance here is not linked simply to a failure to report, but a failure to implement. This trend demonstrates the increasing importance placed on regulating corporate supply chains and demonstrates a trend towards developing stronger enforcement measures for non-compliance with social disclosure rules.[166] Each of the modern slavery disclosure laws discussed above incorporate a mix of hard and soft approaches to addressing human rights risks in supply chains. The mandated transparency requirement hardens expectations around reporting of social issues, but the ambiguity around compliance softens the approach (except for the *NSW Act* that is not yet in effect). The role of the State in these regimes is essentially to act as the orchestrator of private actors to encourage compliance. This is distinct from the hard law and strict enforcement approach evident in domestic bribery legislation.[167] However, based on early reviews of the corporate responses to the UK and California laws, it is not obvious that this tactic is proving to be effective, nor that disclosure alone will guarantee improved outcomes.[168]

The current modern slavery disclosure laws seek to draw a compromise between the strong regulation of business on the one hand and deregulation on the other and instead looks to optimize a mix of public and private regulation to achieve compliance.[169] In this context, each of the laws focus on compliance in a narrow sense of being "obedient to a regulatory obligation,"[170] with the primary obligation being to report. What is increasingly apparent based on the results of the corporate modern slavery statements issued under the UK and Californian laws, is that the current legal compliance frameworks in place are not equal to the task of meeting this goal and will likely fail in achieving

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165 French Law (n158), art. L. 225-102-4.

166 Marcia Narine, *Disclosing Disclosure's Defects: Corporate Responsibility for Human Rights Impact*, 47 COLUM. HUM. RTS. L. REV. 84 (2015).

167 *See, e.g.,* the explanation of Australia's approach in compliance with international obligations noting strict enforcement, *Foreign Bribery: Fact Sheet 6*, AUSTRALIAN GOVERNMENT, http://www.ag.gov.au/foreignbribery (last visited Jan. 15, 2021).

168 *See* OECD GUIDELINES, *supra* note 119.

169 Ingrid Landau & Shelley Marshall, *Should Australia be Embracing the Modern Slavery Model of Regulation?,* 46 FED. L. REV. 313 (2018).

170 Christine Parker & Vibeke Lehmann Nielsen, *Compliance: 14 questions*, *in* REGULATORY THEORY: FOUNDATIONS AND APPLICATIONS 217, 218 (Peter Drahos ed., 2017).

more meaningful organizational change to overcome the risks of modern slavery in the private economy.[171] One possible limitation of the current approach is that, unlike the bribery approach where non-compliance results in criminal penalty, the modern slavery approach lacks a meaningful penalty default and thus the orchestration of power by the State is also limited, particularly when it may be costly for corporations to comply.

IV. ANALYSIS, INSIGHTS, AND FUTURE DIRECTIONS

The above analysis of the regulatory framework for bribery and modern slavery has demonstrated differing approaches, each with their own strengths and weakness, particularly regarding effective implementation and enforcement. At present, neither approach can be deemed "successful." However, some aspects of the criminal law framework for bribery, may be usefully applied to enhance the regulatory approach to addressing modern slavery risks, particularly considering recent innovations. The need for corporations to innovate and develop their own compliance systems and strategies is something that is acknowledged by the modern slavery framework. This is also important to regulatory quality generally and should be embraced by anti-bribery efforts. In this section, we discuss the relative strengths and weaknesses of the two approaches and point to ways that each may enhance the other. We begin by summarizing the enforcement challenges facing the two approaches. We then draw on the regulatory theory of experimental governance to provide possible solutions to these enforcement challenges. Specifically, we argue that the frameworks for addressing foreign bribery and modern slavery should embrace and experiment with (1) penalty defaults and (2) stakeholder collaboration as two of the key qualities in developing an effective regulatory framework.

171 Frank Field, Maria Miller & Baroness Butler-Sloss, Home Office (UK), *Independent Review of the Modern Slavery Act*, *Second Interim Report: Transparency, in Supply Chains*, para. 2.5.2 (2019) (*hereinafter* UK Home Office January 2019 Independent Review).

A. Enforcement Challenges

The regulation of foreign bribery has struggled to secure high levels of enforcement across jurisdictions.[172] The most up to date OECD statistics show that twenty-two of the forty-one *OCED Anti-Bribery Convention* Member States have never imposed a sanction for foreign bribery.[173] Australia's enforcement statistics are particularly uninspiring. Australia has only two successful convictions for foreign bribery, one against an individual and one jointly against two corporate entities.[174] In Australia's Phase Four Monitoring Report for the OECD Anti-Bribery Convention it was noted that more enforcement was needed:

> …in view of the level of exports and outward investment by Australian companies in jurisdictions and sectors at high risk for corruption, Australia must continue to increase its level of enforcement of foreign bribery and related offences against individuals and companies.[175]

The lack of enforcement against corporations was given particular emphasis.[176] The report also referenced representatives of the Commonwealth Director of Public Prosecution who stated that "[o]ne of the biggest barriers to successful foreign bribery outcomes is the level of resources required at both the pre-brief and brief-assessment stages." The report goes on to note:

> Prosecutors were candid in their comments that they work in a resource constrained environment and that matters before the court tend to take priority…with its current level of funding, there is a risk that CDPP it may not be able to continue

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172 OECD Working Group on Bribery, *2016 Data on Enforcement of the Anti-Bribery Convention* 1 (Nov. 2017), http://www.oecd.org/daf/anti-bribery/Anti-Bribery-Convention-Enforcement-Data-2016.pdf.

173 *Id.*

174 *R v Ellery* [2012] VSC 349 (Austl.); *DPP v Note Printing Australia Limited and Securency International Pty Ltd* (*Vic*) [2012] VSC 302 (Austl.).

175 OECD *Anti-Bribery Guide, supra* note 50, at 6.

176 *Id.* at 49. The OECD Report notes that of the 28 allegations received by Australian authorities at the time of the report, only one (Securency) resulted in enforcement action against a corporation. Further, the general rate of corporate prosecution under the *Commonwealth Criminal Code* is noted as "extremely low," with the just 16 prosecutions commenced since the relevant division of the act came into force in 2001, "only nine of which resulted in convictions."

> to provide the same level of pre-brief engagement if it is also required to resource a number of foreign bribery trials.[177]

Resource and capacity limitations are well recognized in regulatory literature as a limiting factor in enforcement.[178] Even in States where anti-bribery law is actively enforced, such as the US, occurrences of bribery remain frequent and arguments have been made that many foreign bribery enforcement actions are the result of conduct that would have been easy to disguise.[179] On a global scale, perceptions of bribery and corruption have remained relatively constant over the past two decades.[180] This reality is concerning, considering the apparent strength of the foreign bribery framework and the possibility of harsh criminal penalties for violations of anti-bribery laws.

The current modern slavery framework poses different challenges for enforcement and accountability. Under the *UK Modern Slavery Act*, non-reporting is widespread, with fewer than half of all businesses required to publish a statement, reportedly having done so.[181] The standard of disclosures is also poor, with minimum requirements often not being met.[182] It is too early to determine whether this experience will be repeated in Australia. A UK activist group, Focus on Labour Exploitation (FLEX), argues that the transparency requirement of the Modern Slavery Act needs to be recognized for what it is: a soft requirement that requires businesses to take no specific actions against

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177 *Id.* at 43.

178 Andrew Tyler, *Enforcing Enforcement: Is The OECD Anti-Bribery Convention's Peer Review Effective?*, 43 GEO. WASH. L. REV. 137, 2011(explaining that sometimes resource and capacity limitations are practical, all agencies have a finite number of resources at their disposal and must distribute their staff across regulatory objectives while competing with other agencies to secure funding. More concerning is the relationship between political will and regulator funding. In certain situations, underfunding of an enforcement agency can demonstrate unwillingness on the part of the government to support the objectives of that agency. In this case, a lack of capacity may be symptomatic of a larger problem).

179 Hess & Ford, *supra* note 66.

180 *See* Transparency International, *2020 Corruption Perceptions Index,* TRANSPARENCY INTERNATIONAL, https://www.transparency.org/en (last visited Feb. 7, 2021).

181 Andrew Phillips & Alexander Trautrims, Off. Indep. Anti-Slavery Comm'r & Univ. Nottingham's Rights Lab, *Agriculture and Modern Slavery Act Reporting: Poor Performance Despite High Risks,* RESEARCHGATE (2018) www.researchgate.net/publication/327060615_Agriculture_and_Modern_Slavery_Act_Reporting_Poor_Performance_Despite_High_Risks.

182 *ICAR and Focus on Labour Exploitation, in Full Disclosure: towards better modern slavery reporting* 25 (Mar. 2019).

slavery and only to report on what, if anything, they are doing.[183] In 2017, in the context of the *UK Modern Slavery Act,* 43% of the FTSE 100 failed to comply with this law alongside only 58% of the top 100 companies awarded government contracts.[184] This reality throws into sharp relief the regulatory dilemma of when to punish and when to persuade.[185] Fines and sanctions are, of course, not the only way to regulate misconduct, but the broader business and human rights agenda has been laboring under reliance on the self-regulatory corporate "self-enlightenment" model for some time, to limited effect.[186] The modern slavery laws, while hardening the corporate reporting requirements, still provide insufficient incentives to comply.[187] The poor quality and limited quantity of corporate modern slavery statements produced under the Californian and UK modern slavery laws to date, illustrate the limits of an enforcement framework that is primarily reliant on market pressure.[188]

Considering these enforcement challenges, it is appropriate to consider how each regulatory framework may be improved to enhance effectiveness. In the following paragraphs, we introduce the regulatory theory of experimental governance and suggest that adoption of certain key features of experimentalism may benefit efforts to enforce modern slavery and foreign bribery laws. Experimentalism has many commonalities with "new governance" theories and both have been recognized as a subset of process-oriented regulation[189] or meta-regulation.[190] The common theme for these regulatory theories is that

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183 Emily Kenway*, FLEX welcomes recommendations to give Modern Slavery Act "transparency" requirement more teeth*, LABOUR EXPLOITATION (2019), https://labourexploitation.org/news/flex-welcomes-recommendations-give-modern-slavery-act-transparency-requirement-more-teeth.

184 Focus on Labour Exploitation (FLEX), *FLEX welcomes recommendations to give Modern Slavery Act 'transparency' requirement more teeth,* LABOR EXPLOITATOIN (Jan. 22, 2019), https://www.labourexploitation.org/news/flex-welcomes-recommendations-give-modern-slavery-act-transparency-requirement-more-teeth.

185 AYRES & BRAITHWAITE, *supra* note 102.

186 HUMAN RIGHTS OBLIGATIONS OF BUSINESS (Surya Deva and David Bilchitz eds., 2013).

187 Barnali Choudhury, *Social Disclosure,* 13 BERKELEY BUS. L.J., 183 (2016)

188 Frank Field, Maria Miller & Baroness Butler-Sloss, Home Office (UK), *Independent Review of the Modern Slavery Act*, *Second Interim Report: Transparency in Supply Chains*, para. 2.5.2 (2019) (*hereinafter* UK Home Office January 2019 Independent Review).

189 Sharon Gilad, *It runs in the family: Meta-regulation and its siblings*, 4 REG. GOV. 485, 487 (2010).

190 Cristie Ford, *Macro- and Micro-Level Effects on Responsive Financial Regulation*, 44 UBC L. REV. 589, 597 (2011).

they are an alternative to command-and-control models of regulation and emphasize productive interactions between regulators and regulated actors. We draw some practical examples from new governance literature, but our focus in this article is on the experimentalism.[191] Experimentalism provides a macro-level framework for governance and is simultaneously specific about the features of an ideal model.[192] Providing a specific list of ideal elements allows experimental governance theory to be applied as a lens to analyze current governance efforts, as well as providing a road map towards *more effective* methods of governance. The emphasis of experimental governance on facilitating recursive learning and adapting regulation based on feedback from regulators and regulated actors is also valuable.[193]

B. Experimental Governance

Experimental governance has its foundations in the democratic theory of political philosopher John Dewey[194] and has more recently been applied to the analysis of a wide range of regulatory efforts.[195] The focus of experimentalism is on maximizing the productive interaction between regulators and regulated actors.[196] 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.[197] Experimentalism

191 Christine Overdevest & Jonathan Zeitlin, *Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector*, 8 REG. & GOV. 22 (2012).

192 Charles F. Sabel & William H. Simon, *Democratic Experimentalism*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 477 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

193 Cristie Ford, *Macro- and Micro-Level Effects on Responsive Financial Regulation*, 44 UBC L. REV. 589, 625 (2011).

194 J. DEWEY, THE PUBLIC AND ITS PROBLEMS (Swallow Press, 1927).

195 *See* Sabel & Zeitlin, *supra* note 20; Ford, *supra* note 125; Gráinne de Búrca, Robert O. Keohane & Charles Sabel, *New Modes of Pluralist Global Governance*, 45 N.Y.U. J. INT'L. L. & POL. 723 (2013); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501 (2009); Christine Overdevest & Jonathan Zeitlin, *Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector*, 8 REG. & GOV. 22 (2012).

196 Charles F. Sabel & William H. Simon, *Democratic Experimentalism*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 477 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

197 *See* discussion in the context of the FCPA in Joseph Yockey, *Choosing Governance in the FCPA Reform Debate*, 38(2) THE J. OF CORP. L. 325 (2013).

has a different perspective and 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.[198]

The experimental governance literature emphasizes a range of elements that contribute to an effective regulatory framework. First, stakeholder engagement and collaboration where the State orchestrates but does not strictly control the regulatory regime.[199] Second, open-ended rather than proscriptive regulation, implementation, and elaboration of the regime by lower-level actors with local "grass roots" knowledge.[200] Third, transparency and feedback through continual reporting and monitoring of the regime. Fourth, revision of the regime and its goals through peer review to enable regular reconsideration and evolution of established rules and practices.[201] Fifth, the use of penalty defaults to motivate innovative compliance efforts by regulated actors.[202] For the purpose of this discussion, we focus on two elements of the experimental governance framework that are most relevant to understanding how prohibitions on bribery and efforts to reduce risks of modern slavery can be effectively enforced. These are: the use of penalty defaults and the encouragement of stakeholder engagement and collaboration. Each of these elements can be orchestrated by the State and can lead to and support the other elements noted above.[203]

1. Penalty Defaults

Penalty defaults are not present in all experimental governance frameworks, but they often appear as a necessary condition for

198 Christine Overdevest and Jonathan Zeitlin, *Experimentalism in transnational forest governance: Implementing European Union Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana, Regulation & Governance* 12, 64 (2018).

199 *See* Abbott & Snidal, *supra* note 24, at 128 (asserting that regulatory regimes should be orchestrated by the state and intergovernmental organizations, but should be decentralized, with an emphasis on soft law and dispersed expertise); de Búrca, *supra* note 197 (discussing the value of broad participation and orchestration).

200 *See* Hannah Harris, Experimenting with Corruption - an analysis of the OECD Anti-Bribery Convention through the lens of Experimentalism, Georgetown Journal of International Law, Vol 51, 565, 567.

201 de Búrca et al., *supra* note 197, at 780.

202 Sabel & Zeitlin, *supra* note 20, at 306; Sabel & Simon, *supra* note 198, at 24; de Búrca et al., *supra* note 197, at 749; Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33(3) FLA. ST. U. L. REV. 861, 866 (2005-2006); Abbot & Snidal, *supra* note 24.

203 Harris, *supra* note 200, at 572.

success. Sabel notes, "it is not correct to conflate experimentalism with 'soft law.'"[204] Some regimes have quite conventional coercive sanctions and even unconventional sanctions often involve tangible harm.[205] The idea of a penalty default originates in contract law, where default rules are designed to fill gaps if parties failed to negotiate a relevant term.[206] Often, these rules will turn out to be harsher than those the parties originally agreed to, and this then motivates parties to disclose relevant information and to negotiate on a basis to secure a mutually beneficial outcome.[207] The term is now used extensively in experimental governance literature to refer to a regulatory penalty that motivates regulated actors to engage and innovate.[208]

The threat of "draconian trade sanctions" is a useful example of a penalty default in practice.[209] The threat of sanctions was used to facilitate the 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*.[210] There are many other mechanisms that can act as penalty defaults: for example, the Financial Action Task Force uses a combination of a grey and blacklist to motivate compliance with money-laundering policy.[211] This system has been described as an example of a penalty default.[212] Another example of this approach in the

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204 Charles Sabel & William Simon, *Democratic Experimentalism*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 477, 496 (Desautels-Stein and Tomlins eds., 2007).

205 Sabel & Simon, *supra* note 198, at 496.

206 Karkkainen, *supra* note 204, at 865 (citing I. Ayres & R. Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 91-3 (1989).

207 *See* Sabel & Zeitlin, *supra* note 20, at 306 (discussing this concept and its history in contract law).

208 *See* Sabel & Simon, *supra* note 198; Karkkainen, *supra* note 204; Sabel & Zeitlin, *supra* note 20.

209 de Burca *et al.*, *supra* note 197, at 745.

210 *Id.* at 747(The authors note how, in the case of tuna fishing and dolphin by-catch, innovative solutions discovered through independent monitoring were not implemented until trade sanctions were established as a penalty default in the form of 'an embargo on imports of Eastern Tropical Pacific tuna from any country without a precisely defined regulatory program closely keyed to the latest U.S. practice and a kill rate "comparable" to that of the U.S. fleet.'; *Id.* at 747 (Following the La Jolla Agreement of 1992, "data shows that there has been a reduction of mortality rates to levels below the best previously achieved by the U.S. fleet.")).

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

212 *Id.* The author discusses how this 'two list approach' has been more effective than the previous single list approach in motivating states to improve their money laundering policies. The two list approach places states on a grey list first, based

modern slavery context is the "dirty list" (Ministry of Labor and Employment Decree No. 540/2004), launched by Brazil in 2004.[213] The dirty list is a public register of companies found by governmental inspectors to have forced labor in their supply chains. Companies named on the list are monitored for two years and are also potentially subject to fines.[214] The "dirty list" is reinforced by a further governmental decree (Decree No. 1 150), which recommends that financial bodies refrain from granting financial assistance to companies on the list. While a penalty for failure alone may not be considered sufficiently experimental, the monitoring aspect and timeline for removal from the list suggest an emphasis on prevention of future misconduct, rather than deterrence and retribution alone. Furthermore, the governmental decree and possible loss of financial assistance engages third party actors in the regulatory effort and creates significant uncertainty for companies, which is likely to further incentivize engagement and innovative compliance.[215]

Using reform undertakings, *Deferred Prosecution Agreements* in conjunction with corporate monitoring is another example of a penalty

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whether they are 'cooperative or un-cooperative, not whether they are compliance or non-compliant.' *Id.* at 142-43. The state is removed from the list once they make credible plans to improve their anti-money laundering systems. *Id.* Thus, the harmful sanction of blacklisting is only triggered if the state fails to take meaningful efforts to improve their policies, rather than non-compliance being punished through immediate blacklisting.

213 Leonardo Sakamoto, *Slave Labour, in Brazil, in* FORCED LABOUR: COERCION AND EXPLOITATION IN THE PRIVATE ECONOMY 15-34 (Beate Andrees & Patrick Belser ed., 2005).

214 *Id.*

215 *See* Karkkainen, *supra* note 132, at 871-72. The author explores the experimentalist approach of one California law, the Safe Drinking Water and Toxic Enforcement Act, popularly known as Proposition 65, which requires companies to disclose risks of exposure to carcinogens and toxins. Failure to give "clear and reasonable warning" can result in stiff penalties and civil actions. It is very uncertain what level of disclosure will be considered clear and reasonable in each context, so the legal risk is high. *Id.* at 873. The author notes the questionable value of disclosure-based models but goes on to say that "many observers credit Proposition 65 with playing a significant role in reducing environmental releases of listed pollutants." *Id.* at 872. This success is attributed to the uncertainty created by the penalty default: "Against this harsh backdrop of uncertain and potentially large-scale liability, Proposition 65 invites polluters to contract around the penalty provision by cooperating with regulators: first, by revealing (and if necessary, by generating) information needed to establish health-protective numerical regulatory standards, and then by voluntarily reducing emissions below the established numerical thresholds." *Id.* at 875. Thus, the uncertainty of a penalty default can encourage action, innovation, and collaboration because the impact of the penalty cannot be easily calculated and factored into a cost-benefit analysis by the company.

default in the context of corporate crime.[216] In the US, regulators have used reform undertakings with companies found to have engaged in bribery. In these cases, the reform undertaking consists of an agreement by the company to engage in a process of organizational change, focused on reforming the policies and procedures that enabled the crime to occur. A reform undertaking is often part of a *Deferred Prosecution Agreements* where the enforcement actor agrees that the company will not be subject to the criminal law penalty, provided it engages in the reform process. As part of this agreement, third party monitors may be situated within the company, to oversee and report on the company's efforts. This approach is seen as one "that straddles the divide between self-regulation and traditional, command-and-control regulation."[217] A benefit of this approach is that it incentivizes corporations to agree to reform their organizational structure and practices to avoid the harsh penalty otherwise available to the regulator. This is important because:

> Although monetary penalties may deter companies from engaging in open and obviously illegal conduct, such penalties are unpredictable as tools for effecting large-scale reform of organizational culture. Encouraging firms to appear law-abiding through, for example, the use of cosmetic compliance programs or calculated cooperation with the government is not the same as encouraging firms to actually be law-abiding, particularly in the face of collective action problems and the perceived business necessity of engaging in bribery in certain countries.[218]

Furthermore, enforcement and deterrence by prosecution are often ineffective in the bribery context:

> many convictions [have] relied on actions that the corporation could have easily disguised to avoid detection, suggesting that more careful firms are able to make similar payments without significant fear of prosecution.[219]

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216 *See* Hess & Ford, *supra* note 50.
217 *Id.* at 312.
218 *Id.* at 311.
219 *Id.* at 314.

A penalty default approach allows for opportunities to improve on existing practice, learn from application of policies within companies, and develop novel approaches that may not have been discovered if companies were only concerned with avoiding liability through static or cosmetic compliance programs.[220]

Another example of penalty defaults in the bribery context is the use of strict liability offences, such as those under the *UK Bribery Act*, accompanied by an adequate procedures defense. As discussed above in Section II, the strict liability offence of failure to prevent bribery is triggered by a criminal act, but the defense means that a sanction will not apply unless the regulated actor failed to take meaningful steps to self-regulate. In this case, the punishment is not the result of the act of bribery, but the failure of the company to establish an internal system or framework to prevent bribery from occurring. This is akin to the "duty of vigilance" established under the 2017 French law and the broader concept of human rights due diligence as set out in the Guiding Principles.[221] One limitation of this form of penalty default is that, without some way to evaluate diverse compliance programs and their effectiveness, the risk of cosmetic compliance is increased. At present, the content of human rights due diligence is still open to interpretation. This does not mean, however, that there are no sources of guidance available.[222] As consensus continues to develop around the practical aspects of implementing human rights due diligence, it will be accompanied by jurisprudence as laws, such as those in France and the Netherlands, begin to be tested.[223]The involvement and collaboration of diverse stakeholders will be beneficial in further advancing and refining this aspect of the regulatory process. Foreign bribery law could also

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220 I. Landau, *Human rights due diligence and the risk of cosmetic compliance*, 20 MELBOURNE JOURNAL OF INTERNATIONAL LAW 222-247 (2019).

221 *See supra* note 158.

222 Since the publication of the Guiding Principles (and updated OECD Guidelines) in 2011, there have been significant advances in further defining and refining the concept. The OECD has been particularly active in this space, and in 2016 and 2017 it released updated sector-specific guidelines for conducting due diligence for supply chains in the conflict minerals, garment and footwear and agricultural sectors. *See, e.g.*, OECD & FAO, OECD-FAO GUIDANCE FOR RESPONSIBLE AGRICULTURAL SUPPLY CHAINS (2016); OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS IN THE GARMENT AND FOOTWEAR SECTOR (2017); OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (3rd ed. 2016).

223 *See Oil Company Total Faces Historic Legal Action in France for Human Rights and Environmental Violations, in Uganda*, FRIENDS EARTH INT'L (Oct. 23, 2019), https://www.foei.org/news/total-legal-action-france-human-rights-environment-uganda.

benefit from similar levels of collaboration and engagement that facilitate new knowledge and understanding around effective regulatory and compliance strategies.

The key feature of a penalty default is that the penalty is not simply a deterrent. While it may be punitive in nature, it is applied to facilitate achievement of the regulatory goal by incentivizing innovative compliance by regulated entities.[224] This is particularly powerful in situations where the optimal approach to regulation is unknown,[225] either because the activity being regulated is a new phenomenon, or because the environment in which regulation must occur is complex, dynamic and continually evolving.[226] The optimal regulatory approaches to foreign bribery and modern slavery remain elusive, enforcement of existing regulation is piecemeal and instances of bribery and modern slavery in corporate supply chains continue despite regulatory efforts. The transnational dimensions of both activities further complicate regulation and enforcement. Thus, an experimental governance approach that makes use of penalty defaults may assist in overcoming the challenges in both these regulatory contexts.

Penalty defaults can act as a powerful mechanism to motivate regulated actors where moral persuasion or public embarrassment alone are insufficient.[227] It is becoming quickly apparent in the context of the California and UK modern slavery laws that disclosure alone is likely to be insufficient to drive improved respect for human rights in supply chains.[228] Laws that include some form of penalty default go beyond primary reliance on naming and shaming tactics. Not to say such tactics are not useful, but rather that alone, their impact is limited. Ayres and Braithwaite, when developing their responsive regulatory theory, argued that "[r]egulatory agencies will be able to speak more softly when they are perceived as carrying big sticks."[229] What is missing from the UK, California, and Australia modern slavery laws is the stick. Drawing on the theory of experimentalism, the stick should take a specific shape and be wielded in a particular way, to encourage continual and innovative compliance by the regulated entities, rather than

224 Gilad, *supra* note 191.
225 *Id.* at 489.
226 *Id.*
227 Sabel and Zeitlin, *supra* note 20, at 305, 306.
228 OMRI BEN-SHAHAR & CARL SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (Princeton University Press 2014).
229 AYRES & BRAITHWAITE, *supra* note 150, at 6.

acting purely as a punitive sanction based on the logic of deterrence.[230] However, even the addition of penalty defaults will likely be insufficient to secure compliance and overcome enforcement hurdles. Their use alone does not go far enough in embracing the experimental governance model.

2. Stakeholder Collaboration

Engaging a diverse range of stakeholders in the regulatory process helps regulators to evaluate the quality of compliance efforts, facilitate learning amongst regulators and regulated actors and assess whether a penalty should be triggered.[231] Existing literature emphasizes the importance of stakeholder engagement in both the human rights and anti-corruption contexts. Durbach and Machado assert:

> To implement a successful human rights management framework, it is essential to take inclusive and participatory stakeholder engagement into consideration at every step of the process as well as at the local, national and international levels. Ongoing stakeholder engagement is a key success factor in meeting the responsibility to respect human rights, especially when operating in conflict-affected countries and high-risk areas.[232]

Carr and Outhwaite explore the role of non-government organizations (NGOs) in anti-corruption efforts, highlighting that the United Nations Convention Against Corruption expressly promotes broad stakeholder participation through Article 13(1).[233] Further, they note that the African Union Convention on Preventing and Combating Corruption requires States to ensure the participation of civil society in monitoring and implementation of that treaty.[234] The development of global anti-corruption frameworks was aided by the involvement of a diverse range of stakeholders including civil society, States,

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230 Neil Gunningham, *supra* note 54, at 87.

231 Harris, *supra* note 200.

232 Barbara Durbach & Maria Teresa Machado, *The importance of stakeholder engagement in the corporate responsibility to respect human rights*, 94:887 IRRC 1047, 1068 (2012).

233 Indira Carr & Opi Outhwaite, *The Role of Non-Governmental Organizations (NGOs) in Combating Corruption: Theory and Practice*, 44 SUFFOLK U. L. REV. 615, 617(2011).

234 *Id.*

international institutions and the private sector.[235] As noted by Ramasastry, "the anti-corruption story highlights the steps it takes to achieve consensus around the types of private sector behavior that should be criminalized."[236]

Stakeholder engagement is particularly important in experimentalism. Experimental governance scholars provide examples of how stakeholder engagement can be facilitated.[237] One example discussed by De Burca, Keohane, and Sabel is the establishment of the *Inter-American Tropical Tuna Commission* ("IATTC").[238] The goal of the framework was to maintain tuna stocks in the Pacific while minimizing the number of dolphins that die from bycatches. In this context, broad participation in the development of the IATTC framework and monitoring process was essential to its success.[239] Experimentalism establishes the State regulator as an orchestrator of implementation and enforcement, rather than placing the entire monitoring and enforcement burden on the State alone.[240] Stakeholder engagement and collaboration are therefore important features of experimental governance.[241] Involving diverse stakeholders reduces the regulatory burden placed on the State[242] and facilitates discourse between actors impacted by the regulatory framework. If the framework is designed appropriately, this collaboration between stakeholders can also contribute to other key elements of experimentalism. This includes recursive feedback loops that facilitate learning from experience and reshaping the regulatory framework based on practical lessons learned during

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235 HARRIS, *supra* note 21.

236 Ramasastry, *supra* note 16, at 178.

237 de Burca et al, *supra* note 197.

238 *Id.*

239 de Burca et al., *supra* note 197, at 748.

240 Overdevest & Zeitlin, *supra* note 87.

241 de Burca, *supra* note 1, at 197; Overdevest & Zeitlin, *supra* note 87; Sabel & Zeitlin, *supra* note 20.

242 Iris Chiu & Anna Donovan, *A New Milestone in Corporate Regulation: Procedural Legislation, Standards of Transnational Corporate Behaviour and Lessons from Financial Regulation and Anti-bribery Regulation*, 17 J. CORP. L. STUD. 456 (2017) (noting that the challenges of holding corporations accountable for meaningful compliance within a new-governance framework requires that they be "vigilant and critical in their supervision". However, there will often be practical limitations of regulatory capacity, including resource constraints and lack of expertise. Here, involving third parties in regulation can be valuable); *see* Overdevest & Zeitlin, *supra* note 87 (noting that the ideal model of experimentalism requires that a regulatory framework be implemented at the "grass roots" level, close to where the conduct being regulated is likely to occur and that lessons from this implementation are fed back up the hierarchy to impact the framework and enhance its effectiveness); de Burca et al., *supra* note 197.

implementation. Collaboration and stakeholder engagement may also help to balance power disparities between actors and secure accountability where the risk of capture is high, political will to act is low, or state resources and capacity are limited.[243]

Third-party certification schemes for sustainable forestry products are an example of collaborative regulation in practice.[244] Overdevest and Zeitland demonstrate how the *Forest Stewardship Council* (FSC) was able to engage directly with stakeholders and balance their interests to develop a voluntary certification scheme where government efforts had failed to achieve consensus.[245]

> The FSC was quickly followed by industry imitators with weaker standards, which were broadly adopted and threatened to undermine the nascent experiment in multi-stakeholder forest certification. However, through public comparison and benchmarking for equivalence, the competition between private schemes resulted in mutual adjustment and upward convergence of standards.[246]

The authors go on to argue that the voluntary third-party certification schemes, combined with public benchmarking and comparison, worked in collaboration with State efforts.[247] The US and EU both have in place trade restrictions requiring assurances of legality for timber imports. In the EU case, private certification can act as such an

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243 Harris, *supra* note 200.

244 Overdevest & Zeitlin, *supra* note 87, at 41, 42 (demonstrating how the Forest Stewardship Council (FSC) was able to engage directly with stakeholders and balance their interests to develop a voluntary certification scheme where government efforts had failed to achieve consensus. The continued role for stakeholders is further emphasized by this case study: "The FSC was quickly followed by industry imitators with weaker standards, which were broadly adopted and threatened to undermine the nascent experiment in multi-stakeholder forest certification. However, through public comparison and benchmarking for equivalence, the competition between private schemes resulted in mutual adjustment and upward convergence of standards. . . ." The author's go on to demonstrate that the voluntary third-party certification schemes and public benchmarking and comparison worked in collaboration with state efforts: the US and EU both have in place trade restrictions that effectively required assurances of legality in order to allow timber imports, in the EU case, private certification can act as such an assurance. In the US case, the relationship is less clear, although it "is also likely to stimulate importing firms to enroll in private certification systems as a means of demonstrating 'due care' in avoiding illegally logged wood . . . .").

245 *Id*. at 41.

246 *Id.* at 42.

247 *Id.*

assurance.[248] In the US case, the relationship is less clear, although it "is also likely to stimulate importing firms to enroll in private certification systems as a means of demonstrating 'due care' in avoiding illegally logged wood."[249] Australia has also acted on this issue, enacting the *Illegal Logging Prohibition Act 2012 (Cth)*, which incorporates due diligence requirements that obligate the importers and processors of timber into Australia to initiate verification and certification processes aimed at ensuring the imported timber had not been illegally obtained.[250] This law incorporates both penalty defaults and third-party collaboration utilizing the Forest Stewardship Council standards.[251]

In the case of modern slavery, this type of third-party certification and validation of processes that 'back-end' reporting may valuably enhance accountability and enforcement efforts. Although not specifically focused on tackling modern slavery, the mandatory retailer code introduced in NSW in 2005 targeting garment retailers and their workplace standards, provides one example of how social disclosure coupled with mandated public and private collaboration may reduce the

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248 *Id.*

249 *Id.* at 41.

250 Ryan J Turner, *Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier*, 17(1) MJIL 188 (2016).

251 If an importer or processor intentionally, knowingly, or recklessly imports or processes illegally logged timber, they could face significant penalties, including up to five years imprisonment and/ or heavy fines, however the criminal penalties do not apply to non-compliance with the due diligence requirements. The regulations attached to the Act provide clear guidance as to what will constitute compliance with the due diligence requirements. The *Illegal Logging Prohibition Amendment Regulation* 2012 provides that: Step 1 is information gathering (the importer must obtain as much of the prescribed information as is reasonably practicable); Step 2 is an option process that involves assessing and identifying risk against a prescribed timber legality framework (Section 11) or a country-specific guideline (once they are prescribed); Step 3 is risk assessment (Section 13); and, Step 4 is risk mitigation (Section 14), which should be adequate and proportionate to the identified risk. Illegally logged timber is defined broadly in the *Illegal Logging Prohibition Act (*2012) as timber "harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested" (Section 7). The due diligence requirements are outlined in the *Illegal Logging Prohibition Regulation* 2012). Conducting the requisite due diligence can be used as a defense to negligence. The law came into effect on 30 November 2014 but had a soft start to compliance with the penalty regime commencing from January 1, 2018. In November 2018, a Queensland-based importer was served with the first infringement notice issued under Australia's illegal logging laws. The notice was issued for ongoing non-compliance with the laws' due diligence requirements and resulted in the business being penalized $12,600. *See* AUSTRALIAN GOVERNMENT DEPARTMENT OF AGRICULTURE E-UPDATE 27, (Dec. 2018).

risk of labor exploitation in supply chains.[252] The NSW code sets up a regulatory framework that requires the insertion of contractual tracking mechanisms in supplier contracts to follow production and mandate disclosure up and down the supply chain about labor standards.[253] The information must then be provided to a designated trade union so that the supply chain is transparent and able to be monitored by a third-party. This law formalizes the role of third-party collaborators and provides them with legal authority and access to workplaces deemed at risk.

Enhanced collaboration between regulators and third-party actors may also be valuable in anti-bribery efforts. The role of multilateral development banks (MDBs) was noted earlier in Section 2. NGOs such as Transparency International have been extremely successful in raising awareness about the harms of corrupt conduct and promoting ratification of international law to combat corruption, but their focus to date has been on State level engagement, more than company level compliance.[254] Some form of third-party evaluation and comparison of corporate foreign bribery compliance policies could provide valuable information for interested parties and provide incentives for companies to demonstrate how their approach works in practice, rather than just on paper. Third party evaluations may also help to establish understandings of what policies and practices should be considered 'adequate procedures' in the *UK Bribery Act* context and in Australia if the *Crimes Legislation Amendment (Corporate Crime) Bill 2017 (Cth)* is passed. The mandatory collaboration established through the NSW code for garment retailers is one possible model for enhanced

252 *See* Michael J. Rawling, *Cross-Jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations,* 27.3 AUSTL. J. OF LAB. L. 191 (2015). *Ethical Clothing Trades Extended Responsibility Scheme* 2004 (NSW) (NSW Mandatory Retailer Code). The Code applies to all retailers, wherever they are based, who sell clothing products within NSW that have been manufactured or altered in Australia. It also applies to all suppliers and their contractors, wherever they are based, that supply NSW retailers with such clothing products. Under the code, retailers and suppliers must include mandatory terms in their contracts that require contractors and subcontractors in the chain to inform them where and under what conditions goods are produced, including (a) all the addresses where work is performed; (b) whether outworkers are used; (c) the name and address of each outworker and the employer of the outworker; (d) the name and address of each contractor engaged by the supplier; and (e) the number and type of clothing products made under the agreement. Retailers at the top of supply chains are also required to record this information for work performed under all contracts for the supply of clothing products at every level of the supply chain and to disclose it regularly and on request to the state enforcement agency and relevant trade union.

253 Rawling, *supra* note 254.

254 HARRIS, *supra* note 21.

collaboration, as is the voluntary disclosure and certification approach in the context of forestry regulation.[255] All such collaborations necessarily involve increased transparency and thus facilitate other aspects of experimentalism—including learning from regulatory experience and the experiences of regulated actors on the ground, as well as feedback and adaption of regulatory frameworks in light of new knowledge and information.[256]

C. Lessons Learned

We conclude this analysis by suggesting that the frameworks for addressing foreign bribery and modern slavery should embrace and experiment with the key features discussed above: 1) penalty defaults; and 2) stakeholder collaboration. Some jurisdictions and enforcement agencies have begun experimenting with penalty defaults in the foreign bribery context. These efforts should continue, with special attention paid to the role of third-party corporate monitors as agents of organizational change. Modern slavery regulation could be strengthened significantly by the inclusion of penalty defaults as part of existing law. We do not suggest that penalty defaults should necessarily, or exclusively, be in the form of punitive sanctions. A more nuanced approach could incorporate different forms of penalty defaults to encourage corporations to innovate and continually improve their approach to reporting.

Structuring an appropriate penalty default may be challenging. One possibility is to mirror (in part) the foreign bribery approach and include some punitive sanctions such as fines and director disqualification, but also incorporate incentives (such as eligibility to bid on government procurement contracts only if reporting requirements are met). It may also be appropriate to include some form of adequate procedures defense by mandating the human rights due diligence requirement. This could operate in a manner like the *UK Bribery Act*, or in the form of the due diligence defense set out in Australia's *Illegal Logging Prohibition Act*.[257] A structure more aligned with the goals of

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255 Overdvest and Zeitlin, *supra* note 87.

256 For an overview of these additional elements of experimentalism *See* Sabel and Simon, *supra* note 198; de Burca, *supra* note 197; Sabel and Zeitlin, *supra* note 20. While we focus in this article on penalty defaults and stakeholder engagement, further research is warranted to understand the interaction between these and other elements of the experimentalist framework, particularly in the context of bribery and modern slavery regulation.

257 Ryan J. Turner, *Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier*, 17(1) MJIL 188 (2016).

experimental governance would be to incorporate a penalty for failure to report, combined with a requirement to engage an external expert in developing more robust due diligence measures to address the risks of modern slavery in supply chains. Embracing the experimental governance understanding of penalty defaults as a mechanism to motivate self-regulation and innovative compliance will positively incentivize companies to engage with the regulatory framework, to avoid potentially harsh alternative outcomes. This in turn may reduce some of the regulatory burden on enforcement actors and increase compliance levels.

Multi-stakeholder engagement and collaboration in the regulatory process is another way that the enforcement burden and related challenges may be overcome.[258] Here, the modern slavery framework (and the broader business and human rights scaffold) may provide some guidance for foreign bribery efforts. Enhancing the role of third-party stakeholders in regulatory efforts is likely to increase transparency of corporate compliance processes, enable benchmarking and cross validation of corporate compliance efforts and outsource some of the burden for monitoring corporate conduct while retaining an orchestrative role for State regulators.[259] Requiring disclosures and enabling third-party comparison of compliance efforts has been adopted in the modern slavery context and may be usefully translated to anti-bribery efforts. This approach has been used to a limited degree transnationally to motivate governments to enact anti-bribery and money laundering legislation, through pressure and rankings from Transparency International and with the FATF grey and blacklists.[260] However, the criminal law approach to bribery law domestically has meant that less effort has been placed on evaluating corporate compliance efforts. There is an assumption that the criminal liability will encourage corporate compliance, but this approach relies on successful prosecution for deterrence and may encourage companies to hide criminal conduct, rather than being transparent about anti-bribery efforts.[261]

A strict criminal law approach, which relies on an adversarial relationship between the regulator and the regulated, may limit

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258 *Setting and Enforcing Industry-Specific Standards for Human Rights: the Role of Multi-stakeholder Initiatives in Regulating Corporate Conduct*, *in* BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 107 – 127 (J. Nolan J, Pauly D. Baumann eds., 2016).

259 JUSTINE NOLAN & MARTIJN BOERSMA, ADDRESSING MODERN SLAVERY (2019).

260 Nance, *supra* note 213.

261 Gunningham, *supra* note 54.

innovation in compliance efforts.[262] Corporations may be slow to adopt new methods to reduce bribery in their transactions. Corporations may prefer to use compliance methods that have kept regulators happy or protected them from liability up to this point, regardless of the effectiveness of these measures in preventing bribery or overcoming risks of bribery or other misconduct in business transactions. This is a severe limitation, as criminal conduct evolves over time and in response to regulatory efforts and thus compliance efforts may be ineffective yet continue to be accepted. One example is bribery in purely commercial transactions (between two private actors). This type of bribery has recently been linked to indentured labor and modern slavery practices,[263] but companies are not actively addressing or engaging with these risks in their compliance programs. This may be because current foreign bribery laws are directed at bribery of public officials (except for the *UK Bribery Act*).[264] Including a broader range of stakeholders to supplement traditional compliance and enforcement efforts is appealing in light of the risks of "tick the box" or symbolic compliance, stagnation of compliance policies and regulatory requirements, limited enforcement resources and expertise and lack of political will. Certainly, the modern slavery framework should not forego its demonstrated willingness to engage a broad range of stakeholders in the regulation, monitoring and evaluation of corporate actors. However, the modern slavery framework should provide support for external review and stakeholder engagement in the form of penalty defaults that complement such collaboration.

V. CONCLUDING REMARKS

Bribery and modern slavery are endemic risks in international business transactions. A mixture of international and national soft and hard law approaches have been employed to reduce the occurrence of these activities, with mixed success. We have discussed the relative strengths and weaknesses of the current regulatory frameworks addressing foreign bribery and modern slavery. Using the lens of experimental governance theory, the benefits of embracing penalty defaults and increasing multi-stakeholder engagement in monitoring and enforcement of both frameworks are clear. Strengthening the modern slavery framework with penalty defaults for failure to report or other

262 *Id*.

263 *See*, *e.g*., Renshaw, *supra* note 15 (who discusses the role of brokers in facilitating and contributing to modern slavery risks in international labor markets).

264 ROSE-ACKERMAN & CARRINGTON, *supra* note 49.

forms of non-compliance could substantially increase the law's impact on practice and outcomes. However, it is important that strict criminal law approaches and punitive sanctions are not seen as panacea. The continued challenges of enforcing anti-bribery laws show the limitations of a purely criminal law approach.[265]

Recent innovations by enforcement actors and regulators in the bribery context suggest a potentially powerful middle ground. Fostering greater interaction with regulated entities and promoting State orchestrated forms of self-regulation (through *Deferred Prosecution Agreements*, corporate monitoring and adequate procedure defenses) may be a more sustainable and effective path towards strengthening modern slavery laws. This approach uses penalties to incentivize action, rather than simply as a punishment for non-compliance. Learning from the modern slavery approach, the engagement of external stakeholders could be incorporated into anti-bribery efforts. Other regulatory frameworks, including those governing forestry and environmental protection have already adopted a more inclusive stakeholder engagement approach. The challenges facing efforts to reduce foreign bribery and modern slavery warrant this type of regulatory innovation.

Reconceptualizing the idea of regulatory penalties and combining penalty defaults with other tools and collaborative efforts may enhance the effectiveness of current laws and generate powerful insights into what works and what doesn't when regulating corporate actors. Effective enforcement and learning from experience are essential to the success of the laws designed to combat corruption and human rights abuses in international business transactions.

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265 Harris, *supra* note 200.