Essay to be included in a volume from a conference celebrating
Susan Rose-Ackerman's contributions to scholarship.

CRIMINAL LIABILITY FOR CORPORATE BRIBERY
VARIATIONS ACROSS COUNTRIES

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Abstract

With respect to law enforcement, what characterizes the most 'actionable definitions' of corruption? If countries are to choose, should they go for a more precise definition of liability or a definition with a broader scope? What are the trade-offs for reform-friendly governments? Such questions motivated this draft paper, prepared for a volume upon a conference celebrating Susan Rose-Ackerman's contributions to scholarship. By zooming in on countries' regulation and enforcement of foreign bribery, we explain why, for a given scope of liability, lower precision in the definition of liability will always impede the enforcement system's ability to sanction and deter corporate bribery. The insight is important with respect to the increasing use of non-trial resolutions in corporate bribery cases, which (compared to trials) tends to reduce the clarifying role of case law. For empirical investigation, we draw on the materials presented in an OECD report on corporate liability from 2016, and rank 36 jurisdictions according to the scope and precision of their definition of corporate liability in bribery cases. We show that there is substantial variation across jurisdictions when it comes to how they regulate corporate bribery, even if they are signatories to the same conventions. Countries that perform well in terms of their corporate bribery definition, perform well on a range of other governance indicators too, and they are better able to enforce corporate liability. As a policy implication of the study, it should be noted that criminalization of foreign bribery takes many different forms; a broad scope of liability will easily make such regulation appear more functional than it is.

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1. INTRODUCTION

Susan Rose Ackerman, a pioneer in the research of corruption in economics, emphasizes how corruption is both a moral and a legal category, whose consequences depend on how the phenomenon undermines the goals of public programs. Those involved in corrupt deals seek personal benefits at the expense of political goals irrespective of whether these goals are legitimate or not. She claims: "Corruption can advance either nefarious or noble aims."

In her account, corruption "violates the rules of the game through payoffs from unethical actions that may or may not be consistent with state policy" (Rose-Ackerman 2018). While she joins Rothstein and Teorell (2008), Mungiu-Pippidi (2015) and Rotberg (2019) in embracing ethical universalism and impartiality, she claims, in contrast to them, that deviations from those values are not necessarily corrupt. Bad behaviors can be legal. Calling them "corrupt" does not help reforms that require the cooperation of officials and citizens, she claims. What is more helpful is rather to identify the "institutional structures that can produce incentives for payoffs and self-dealing" … [so that it becomes possible to solve the problem through]… "anticorruption policies and broad-based efforts at state reforms" (Rose-Ackerman and Palifka 2016:10).

The distinctions are not semantic. By reserving the corruption-related terms to the harmful mechanisms at play, they become possible to act on. In this article, we consider 'the most actionable' definitions of corruption. We consider acts where those involved should be held legally responsible. If enforcement then fails, political inaction or inability to curb the problem becomes evident. A legal definition includes only what (potentially corrupt) governments define to be corrupt. With a sufficiently narrow definition, there might be no corruption at all, while the problem is just as present.

Inspired by her discussion, we investigate applications of strict and narrow definitions of corruption as compared with less strict but more comprehensive definitions of such bad behaviors. We explore whether intolerance of corruption requires a clear view of what one does not tolerate. The flip side of this 'more means less hypothesis', suggests that defining corruption more broadly may result in weaker regulation and control, despite the anti-corruption ambition it appears to reflect.

We focus on how the definition of corruption varies across jurisdictions and what it means for societies' ability to control the crime. Because countries define corruption differently, with too composite or too different contents for meaningful country comparison, we chose to study one specific form of corruption: foreign bribery.

With some information ready at hand in an ongoing research agenda (Moene and Søreide, 2021), we narrow the broader research ambition by focusing on some specific questions: Does the enforcement of foreign corporate bribery legislation have a weaker impact on firms' inclination to bribe, the broader the scope of the liability and the less clarity in the definition? Does it matter if enforcement happens through court proceeding or negotiated settlement? If so, how does the clarity of the crime definition affect the enforcement process? And eventually, if there is variation in the quality

of countries' definitions of bribery and liability, will it reflect common perceptions of good or bad governance?

2. CROSS-COUNTRY VARIATION IN CORPORATE LIABILITY FOR BRIBERY

Airbus, Siemens, Alstom, Herbalife, Vimpelcom, Telia, BAE, Ericsson, Rolls Royce, Petrobras, Airbus, Yara all are examples of corporations that have been subject to one or more enforcement actions for foreign bribery.[2] In such cases, the offences happened across borders, often via complex corporate and financial structures, and the crimes are difficult to observe and prove according to criminal law standards.

As the responsible individuals are part of organizations, they are often protected from criminal liability because of the difficulty of determining individual culpability. Under these circumstances, the criteria for liability and the details of the jurisdiction's definition of foreign bribery are decisive for an enforcement system's ability to act on the crime. However, on a general basis, it is not clear which feature of the liability is the most important for successful enforcement.

2.1 Domestic enforcement of bribery abroad

There is substantial variation across countries when it comes to the regulation and enforcement of corporate criminal liability. While international conventions against corruption, such as the United Nations Convention against Corruption and the OECD Anti-Bribery Convention, easily leave an impression of harmonization in jurisprudence and joint international ambition in law enforcement, many governments apply a narrower scope of liability than what the text in the conventions suggests. In addition, corporate crime is an under-developed concept in many jurisdictions, and something criminal law scholars have found it difficult to align with criminal law values (Laufer, 2008; Pieth, 2020). While practioners welcome new trends towards 'failure to prevent' regulations, scholars warn against movements away from the basic criminal law requirement that those accused and punished must be the ones responsible for the crime (Ashworth 2018).

Such features help to explain why there is substantial cross-country variation in foreign bribery enforcement activity. By 2019, the United States had been responsible for 66% of all completed foreign bribery cases, while nearly all the other such cases had been pursued in Europe (TRACE 2020). The picture is in flux. European countries were in 2019 responsible for more than half of ongoing foreign bribery investigations, and countries in other regions also began to pursue such cases. However, by 2019, around one third of countries that made foreign bribery illegal around year 2000, had not enforced the legislation in one single case (Transparency International, 2020).

[2] These firms have all been subject to enforcement by the US Department of Justice, and facts about the cases are available on its website: https://www.justice.gov/criminal-fraud/enforcement-actions

Enforcement practices and the level of sanctions differ as well. Even if the size of penalties for bribery is a core criterion for deterrence,[3] it is not a central aspect of this discussion. The form of enforcement practice is more relevant because it influences the de facto definition of criminal liability for bribery. Especially important is how countries, increasingly, enforce corporate bribery cases by offering non-trial resolutions (NTR) (OECD, 2019a).[4] Some countries, such as Austria, Belgium, and Japan, still enforce corporate liability by trial only, but there is a clear trend towards accepting non-trial solutions. Such enforcement is found faster and more flexible for those who offer incentives for firms that self-report their offences and cooperate with the law enforcers,[5] and this is why the OECD Working Group on Bribery (WGB), a main forum for government cooperation in this area of law enforcement, implicitly endorses the use of NTRs (Ivory and Søreide, 2020).

With respect to the definition of criminal liability for bribery, the practice may limit the relevant case law, even if it leads to a higher number of enforcement cases. The contents of an enforcement decision may depend on a wider variety of aspects than what is considered in court, including the offender's bargaining power under the circumstance and a non-transparent judgement of the offender's ex ante crime preventive systems. Besides, enforcement agencies tend to share far fewer facts about a case when solved by offering a settlement compared to cases solved by trial, and when this is so, it becomes harder for the public to know the exact difference between legal and illegal practice. Nonetheless, it is (still) possible to distinguish different jurisdictions from one another in terms of how they define foreign bribery.

2.2 Dimensions of corporate liability for bribery

The definition of corporate liability for bribery depends on what acts are included and how precisely they are stipulated. Conceptually, therefore, the liability in foreign bribery cases depends on both scope and clarity. Scope, in this context, refers to the categories of organizations, acts and circumstances covered by the legislation. More categories mean greater scope. The clarity of the liability refers to the precision with which one lists the criteria for liability and the categories of players. A two-dimensional characterization of the liability based on these aspects allows us to simplify the notion of country variation by sorting liability into the four classes, as described in Figure 1.

[3] For discussion about sanctions in corruption cases, see Rose-Ackerman (2010), Garrett (2014), Chapter 6 of Rose-Ackerman and Palifka (2016), Søreide (2016) and Arlen (2020).

[4] For the result of survey of enforcement practices in corporate bribery cases across 66 countries, see Makinwa and Søreide (2019).

[5] See Arlen (2012), Arlen and Kahan (2017), Søreide and Makinwa (2020). Note also, the benefits one hopes for, such as incentives for self-reporting, are difficult to achieve in practice because many governments fail to offer predictable benefits, they are not sufficiently open about their enforcement practices, and not able to protect corporate offenders from double jeopardy (Low and Prelogar 2020, Oded 2020).

Figure 1. Categories of corporate liability for bribery

	Scope		
Clarity		***Narrow***	***Broad***
	Clear	**A.** Enforcement made difficult by limited scope of acts that lead to liability.	**B.** Highly enforceable foreign bribery legislation.
	Unclear	**C.** Difficult to enforce the foreign bribery legislation.	**D**. Enforceability impeded by the difficulty of proving liability.

What feature of corporate liability in foreign bribery cases is the most important for law enforcement? Which of the two weaknesses poses the greatest impediment to an efficient anti-corruption agenda, a narrow scope or vaguely defined liability? How will the flaws impede enforcement? And consequently, what sort of strategy should reform-friendly governments prioritize to improve their prosecutors' ability to pursue foreign bribery cases? Clearly, definitions that fall into Figure 1's category B are the best able to promote a law's enforceability, while category C-definitions are the worst. It is the two remaining categories, A and D, that are difficult to rank, and in need of further scrutiny. We point at three mechanisms.

First, for a given level of precision in the foreign bribery definition, broader scope of the definition is always better for society if we could rely on the premise that (i) acts are criminalized only within the limits of what constitute harmful business practice, and (ii) criminalized acts never encompass honest and development-friendly activities,

Second, if precision declines while the scope of the definition increases, (as if the definition of liability moves from category A in the direction of D, Figure 1), there are two separate and rather divergent possibilities for the effect on enforceability, depending on whether broader scope is accompanied by (i) a "safety first behavior" or (ii) "a safety last" behavior. In the case of *safety first*, more uncertain limits of the law instigate a more careful law-abiding behavior by firms and their counterparts in government. This effect is likely if the consequences for those detected and found guilty are severe, even if the law is a bit unclear about exactly which acts lead to the consequences. The risk of consequences might induce agents to err on the safe side, staying on the right side of the law by a substantial margin. In this case, a broader scope combined with imprecise descriptions of liability, such as a movement from category B to D, Figure 1, can make actors *more cautious*. If so, a broader scope at the expense of precision implies a more efficient enforcement system in the sense of reducing firms' inclination to pay bribes.

The case of *safety last* refers to a situation where the uncertain limits of liability protect offenders from prosecution. For example, the lack of precision in the definition of liability may allow corporations to evade vicarious responsibility while they also manage to shield responsible employees from personal consequences of detection. For such employees, the imprecise definition of liability may intensify the temptation to secure personal gains from their corporation's successful bribery, for

example through compensation systems and career promotions, but also kickbacks from business partners. In this case, a broader scope at the expense of precision may fail to reduce bribery. If so, a legal grey zone serves as an invitation to bend the rules, and to stretch the interpretation of what is accepted business practice.

If authorities are unable to curb such bending and stretching through enforcement and court proceedings, a broad and imprecise definition of liability may induce firms to cut deals that would be illegal with a less ambiguous definition of liability. When several firms headquartered in one country share such a perception of the legislation, the members of the business community easily begin to condone and defend foreign bribery on a general basis, and thus a broader yet imprecise definition of such liability intensifies the problem it is meant to curb.

In contrast to the case of safety first, the *safety last* scenario weakens the law's enforceability: As described, a broader scope of the legal definition, at the expense of precision, i.e., movement from category C to D, Figure 1, may intensify the problem of foreign bribery.

Thirdly, a broader scope of liability, combined with a lower level of precision, will not adversely affect how actors behave vis-à-vis *new* forms of venal business practice. Considering newly detected methods of conducting bribery, a broadening of the law's scope for the sake of including these practices will hardly be at risk of worsening the bribery problem. The benchmark in this case is a situation with no regulation of such bribery, and therefore, a broader scope of a still imprecise legal definition will not intensify the bribery problem. Also, there is no reason to believe that the introduction of new imprecise regulation automatically reduces the level of precision of existing regulations. Per logic, therefore, a broadening of the scope of a legal definition, at the expense of legal precision, risks intensifying the bribery problem with respect to established business practices – in the 'safety last' sort of circumstances.

In sum, we find there are circumstances where a broader scope of liability at the cost of weaker precision may improve law enforcement (i.e., in the 'safety first' sort of circumstances), although the opposite effect is likely as well. For a given scope of liability, however, lower precision weakens the enforceability of the law, with the likely consequence of reducing the enforcement system's ability to sanction and deter corporate bribery.

2.3 Scope, precision, and the form of enforcement[6]

Generally, an improvement of the foreign bribery regulation's precision for a given scope of liability will have the same qualitative implications regardless of whether the authorities enforce by non-trial resolution (i.e., settlement) or trial. Likewise, the direction of the effect of extending the scope of liability for a given level of precision will not depend on the enforcement mode. Besides, despite an

[6] The arguments in this paper draw heavily on a theoretical analysis we did on a similar theme (Moene and Søreide, 2021).

imprecise definition of liability, settlement-based enforcement may strengthen the deterrence of bribery. For a given budget, it allows the enforcement system to pursue more cases per year. A higher frequency of enforcement cases implies more frequent reminders of the illegality of the act and the possible consequences of enforcement, and thus, settlement-based enforcement may serve as a better corrective against the temptations to bribe, compared to trial-based enforcement. However, for several reasons, there is also a risk that enforcement by settlement adds to the negative consequences of an unclear foreign bribery definition.

First, under settlement-based enforcement, a less precise definition of liability will easily strengthen the corporate defendant's bargaining position vis-à-vis the prosecutor. The prosecutor's offer of a non-trial resolution requires approval by the defendant, as if an agreement between the two replaces what would have been the result of a trial. A less precise definition of liability makes the outcome of an imagined court case less predictable and the gains from an out-of-court settlement may well rise for both sides. However, while both parties can gain, an unclear definition of liability, combined with the prosecutor's heavy burden of proof, might benefit the corporate defendant the most. Its bargaining power goes up as it more safely can let time pass. While its biggest worry might be the emergence of new information about the bribery, such as whistleblower-based information or details brought up by journalists, this worry decreases the less precise the legal definition of liability. When the law is imprecise, such new information becomes less likely to make a difference with respect to the case. That makes it safer for the defendant to wait and allow the prosecutor's settlement offer to reach a level it will accept, while the risk of having the case brought to trial is less of a worry.

Second, an imprecise definition combined with settlement-based enforcement implies more discretionary authority with the prosecutor, and this discretionary authority may leave the prosecutor less able to withstand the corporate offender's demands. As in any bargain, the stronger the counterpart, the more easily one is inclined to accept an inferior result, Likewise, the stronger the corporate defendant, the more inclined the prosecutor becomes to reduce the settlement penalty in exchange for a conclusion. However, the prosecutor's opportunity and inclination to offer 'soft treatment' depends on the agency's discretionary authority and the aspects on which it is evaluated. According to the mentioned IBA survey, most countries that apply settlements do so informally in largely unregulated and unchecked manners, allowing prosecutors the flexibility they desire. With respect to evaluation, enforcement agencies typically are considered more successful the larger the number of cases resolved, with less attention paid to fair procedure of each case. Settlement-based enforcement speeds up the enforcement of cases in ways that receive little media coverage (Transparency International, 2020). Under the circumstances, enforcement agencies may be inclined to concede, as long as concessions add to completed successes, while the corporate offenders accept a level of penalties that implies little more than a regular tax on doing business in certain markets.

Third, a broader scope and lower precision of liability for foreign bribery, combined with settlement-based enforcement, allow governments to enforce the law inconsistently. Governments can

point to higher number of enforcement cases, and at the same time, treat corporate offenders variably. This is convenient for officials who want to be seen as acting against crime without punishing large corporations too hard. Since the true amount of foreign bribery is unobservable, elected officials can in fact 'have their cake and eat it too' – in the sense that they evade the difficult trade-off between shielding and sanctioning important corporations for the profit-motivated crimes they commit abroad. The use of settlement-based enforcement allows elected officials to harvest recognition for their commitment to international anti-bribery efforts, even if they condone foreign bribery and protect certain or many corporate offenders from heavy penalties (Tullock 2005, Søreide 2016, Ch 6). The double political gain is more accessible when the scope of the law is broad, and the precision is low.

Considering these three mechanisms in combination, we find enforcement of foreign bribery legislation by largely unregulated use of settlement-based enforcement, combined with imprecise definitions of foreign bribery, allows governments far more flexibility than precise regulation and enforcement by trials. For the reasons listed, bribery in international markets may be found less risky, even if the use of non-trial resolutions increases the number of enforcement actions.

2.4 The Bribery Liability Index (BLI)

In the enforcement of laws against corruption, both type I errors, where corrupt corporations go free, and type II errors, where law-abiding corporations are found guilty of violating them, may occur. Type I errors are likely to dominate because the scope of the law *must* be incomplete, and because the definition of corporate misconduct can never be 100% precise. For a clearer notion of cross-country variation in corporate liability for foreign bribery, we have constructed a simple descriptive index.

Let the vector Y describe what is illegal according to prevailing norms. Foreign bribery is one sort of economic crime, and thus, an element in Y, denoted y_i. For our purpose, we assume that y_i captures a common idea of what people associate with foreign bribery, for example in line with references to the problem by civil society, the press, and international organizations such as the OECD, the United Nations, and the World Bank.

We let a vector S describe the *scope* of the law as compared to the prevailing norm, whereas its elements, $s_i \in [0,1]$, denote the scope of the legal definition with respect to crime i. Normally, s_i is strictly below 1 because the scope of the legal definition normally is narrower than the idea of a certain form of crime. Considering the news about a specific case, people may have an idea of what practices constitute foreign bribery, while the *de jure* liability might be too narrow for enforcement agencies to pursue the case. When s_i is close to unity, the de jure liability nearly overlaps the prevailing norm, and when s_i approaches zero, what citizens consider crime is by legal definition, legalized.

In a similar vein, we introduce a vector P, reflecting the *precision* of the law, which elements are denoted $p_i \in [0,1]$. When the concepts of the law are vague and imprecise, a corporation cannot be

punished effectively: Low precision in the description of what qualifies as bribery (p_i approaching zero) makes it more difficult for enforcement agencies to prove criminal responsibility.

There is variation across jurisdictions in the importance of legal precision. Some enforcement agencies manage to pursue cases of foreign bribery despite a weak definition, while others seem to exploit the legal imprecision to skip such cases, possibly because their governments want to shield corporate offenders from sanctions.[7] To capture some of this variation, we introduce a vector Z, which elements $z_i \in [0, y_i]$, reflect a "vagueness rebate" associated with the level of precision, p_i, as the cost of legal imprecision in terms of lower ability to enforce and sanction misconduct. When z_i is close to zero, the lack of precision does not impede investigation and enforcement. One reason can be that the jurisdiction in question places more weight on the purpose of the law relative to the letter of the law. When z_i is close to y_i, however, the imprecision implies gaps in law enforcement as the letter of the law means more than its purpose.

If we now let an observed act of suspected foreign bribery be represented by the scalar x_i, the act qualifies for investigation in most citizens' view if x_i is an element in Y. Whether the act will also be found illegal according to law, depends on whether x_i is an element in $s_i[y_i - (1 - p_i)z_i]$.

However, the precision and the scope of law are rarely exact measures, since in practice both are subject to interpretation in court or to opaque appraisals when cases end with non-trial resolution – as is typically the case in corporate bribery cases. The ensuing uncertainty around the limit values of p_i and s_i means that the parameters resemble random variables. The probability that an act x_i of suspected corporate bribery will be found illegal is then the same as the probability that:

$$x_i < s_i[y_i - (1 - p_i)z_i]$$

The case where $z_i = y_i$, implying that the vagueness rebate is just a liability reduction proportional to the imprecision, the inequality reads $x_i < s_i[y_i - (1 - p_i)y_i] = s_i p_i y_i$. This expression shows that the probability of being found guilty depends on the product of precision and scope.

Let the precision p_i depend negatively on the scope s_i. The probability of being found guilty then increases with the scope of the law as long as the elasticity of the precision $(p_i' \, s_i/p_i) > -1$.

Notice also that the calibration makes good sense since a full scope and a complete precision, $s_i = p_i = 1$ imply that suspected corporate bribery will be found illegal as long as $x_i < y_i$, as it should be.

The expected average values represent the average "quality" of the law, so that $(1/2)E\{s_i[y_i - (1 - p_i)z_i]\} = \text{BLI}$ where BLI (the Bribery Liability Index) is the quality of bribery liability calculated as the average value of scope and precision.

[7] Søreide (2016, Ch 3) reviews OECD country evaluation reports and discusses variation across countries when it comes to their apparent willingness to enforce their foreign bribery legislation.

3. ESTIMATING THE BRIBERY LIABILITY INDEX (BLI) ACROSS JURISDICTIONS

Classification of jurisdictions according to their definition of foreign corporate bribery requires information about their legal definitions' scope and clarity. A 2016 OECD WGB stocktaking report on "the features of the systems for liability of legal persons found in the 41 Parties to the Anti-Bribery Convention" contains comprehensive information for our purpose (OECD 2016:3).

The benefit of the report is the detail with which it provides information about the opportunity to hold perpetrators responsible for foreign bribery. Also, the information was gathered in one turn, using the same 'round' of OECD WGB country evaluations.[8] The report, therefore, gives a proper snapshot of the status in 2016. The downside is the ease with which such information is outdated.

The report presents detailed facts about the scope and clarity of the bribery definitions. It addresses many different aspects of corporate liability, including criteria for legal person liability and how that depends on the types of legal persons covered, standards of liability, what acts trigger liability, and requirements with respect to the natural persons involved in the crime. In addition, it addresses whether the presence of a compliance system precludes liability, the relevance of more or less related intermediaries (consultants), and various questions with respect to sanctions. For each of the aspects considered, the report informs about the scope of liability and marks it unclear if difficult to know. The information is presented in a manner that makes it easy to count the number of areas covered by liability and the number of areas for which the legislation is imprecise. Applying the information in Tables 3-6, 8, 10 and 11 of the OECD WGB stocktaking report, we prepared a table with scores given to countries depending on their system for holding corporate offenders liable for bribery. This table facilitated the preparation of an index, for simplicity referred to as the Bribery Liability Index (BLI). The index is prepared as an arithmetic mean of indicators developed from the information presented in the report, with the information on each indicator normalized for the purpose and given equal weight. The scaling is based on 'more is better'. The broader the scope of liability, the 'better' the liability, and likewise, the clearer its contents, the higher the score of our liability estimate. See the Appendix for more details.

Table 2 presents the index score for each jurisdiction included in the sample, including the scores on scope and clarity, and thus the information required for the Bribery Liability Index (BLI).

[8] The evaluations are all available at the OECD anti-bribery website: http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm

Table 1. Countries included in the sample and their Bribery Liability Index score. The BLI score ranges from 1 to 13, with a larger number referring to better definition of liability with respect to both scope and clarity.

Country	**Scope**	**Clarity**	**BLI**
US	6,09	5,71	11,80
Canada	5,22	5,75	10,97
Netherlands	4,95	5,57	10,52
Germany	5,18	5,30	10,48
Colombia	5,05	5,18	10,23
UK	4,68	5,05	9,73
Norway	4,93	4,30	9,23
Portugal	4,22	4,93	9,15
Italy	4,40	4,70	9,10
Chile	4,46	4,50	8,96
Czech Rep.	4,08	4,79	8,86
NewZealand	4,45	4,16	8,61
Iceland	5,04	3,41	8,45
Slovakia	4,70	3,70	8,40
Denmark	4,71	3,09	7,80
Slovenia	4,32	3,45	7,77
Hungary	4,45	3,16	7,61
South Korea	3,62	3,91	7,53
Austria	4,04	3,46	7,49
Australia	3,54	3,91	7,45
Luxembourg	4,17	3,17	7,33
Spain	3,63	3,67	7,29
Belgium	3,79	3,45	7,23
Israel	4,04	3,08	7,11
Latvia	4,10	2,95	7,04
Poland	4,17	2,88	7,04
Japan	3,87	3,16	7,03
Finland	4,00	2,88	6,88
Turkey	3,75	3,13	6,88
Mexico	3,66	3,20	6,86
Ireland	2,95	3,91	6,86
Sweden	2,93	3,89	6,82
France	3,54	3,24	6,78
Switzerland	2,87	3,49	6,36
Estonia	3,76	2,47	6,23
Greece	3,58	2,29	5,88

The table shows that several of the most active enforcers have the most functional definitions of liability for corporate bribery, including United States, the Netherlands, Germany, and the United Kingdom. However, those who hardly enforce this legislation are spread all over the list.

Considering the four Table 1 categories, examples of countries that appear closest to category A (better score on clarity than scope) are Sweden, Portugal, Ireland, and the Czech Republic; examples of countries in category B (clear and broad liability) are the United States, Canada, Netherlands, Germany, and Colombia; examples of countries in category C (unclear and narrow liability) are Switzerland, Estonia and Greece, and examples of countries in category D (better score on scope than clarity) are Iceland, Denmark, and Poland.

Countries' scores on clarity and scope exhibit a strong correlation. The more ambitious countries are in terms of securing broad liability for corporate bribery, the better they are at describing the

criteria for liability in a precise way as well. Figure 2 shows the correlations, where scope is measured on the horizontal axis and clarity on the vertical. Here, countries spread out in the graph so that they come up close to their Table 1 category. However, given the correlation between the values on the two axes, all countries are close to the upward sloping regression line.

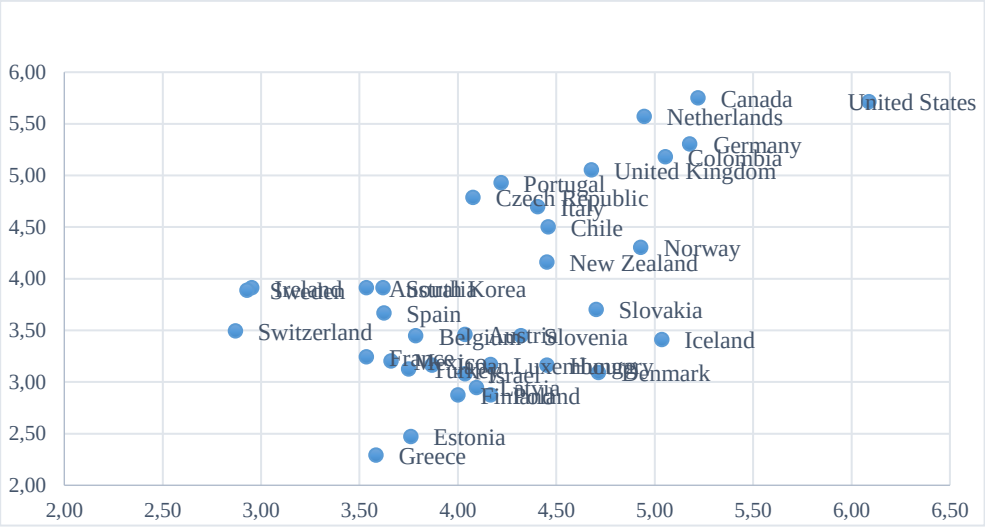

Figure 2. Liability with respect to scope (horizontal axis) and clarity (vertical axis)

4. THE BLI AS A REFLECTION OF GOOD OR BAD GOVERNANCE

To see whether jurisdictions that perform well in terms of its bribery liability, perform well on other governance indicators too, we look for some simple associations. In Table A2 (in the Appendix) we list correlations between BLI scores and publicly available data on countries' legal system, their economy, and political system. As expected, there is a clear correlation between countries' bribery liability score and the number of completed enforcement actions for foreign bribery.[9] Similarly, countries with a high BLI score tend to have more ongoing investigations, they impose more sanctions on both individuals and firms, and they allocate more funding for their enforcement agencies.[10] However, these serious enforcers do not allow their prosecutors broader freedom for negotiating cases with corporate offenders. In fact, there is a negative correlation between BLI score and both *de jure* and *de facto* prosecutor independence.[11]

[9] Enforcement data in this context are not weighted against factors such as the size of the economy or a country's private sector's exposure to bribery risk. Such weighting is difficult because the ratio between the number of underlying cases and other factors is unknown. The bigger the difference between actual bribery cases and the number of enforcement cases, the less relevant the ratio between these figures becomes. In this context we classify jurisdictions depending on their proven ability and inclination to pursue cases once they are detected, regardless of other country characteristics.

[10] Simple regressions with enforcement data (OECD 2019b), TRACE (2019), and Gibney (2019).

[11] Simple regressions run against data on prosecutor independence provided by Van Aaken, Feld and Voigt (2010).

As foreign bribery is attached to commercial activity the associations with trade-related variables are of special interest. Are countries that are largely dependent on international trade less inclined to hold 'their firms' liable for foreign bribery? The relationship is not so obvious. On average, countries with a high BLI score have a larger economy and bigger populations, according to World Bank Development Indicators. According to OECD National Accounts Statistics, they are engaged in more trade, both imports and exports.

Considering trade in both goods and services, using the OECD Services Trade Restrictiveness Index, countries with a high BLI score have fewer trade restrictions and fewer barriers to entry in their own societies. In this respect, the countries that are the most open to trade have the more functional definition of corporate bribery. This association does not rule the possibility that some governments condone bribery if their commercial sector is dependent on securing contracts abroad.

In fact, once we consider trade as a percentage of GDP, the correlation with the BLI score is negative, suggesting that the most *trade-dependent* countries have a less enforceable definition of foreign bribery than countries that are *trade-friendly* in terms of their trade-promoting policies.[12] Hence, a trade-oriented political agenda does not seem to provide intuitive reason for an inadequate anti-bribery regulation. When it comes to variations depending on important commercial sectors in society, expressed by OECD National Accounts Statistics, we find countries whose GDP level relies heavily on financial intermediation services (in terms of size of economy with respect to GDP) have a lower BLI score, whereas countries at the forefront with respect to technology/science, and those with a large public administration, have higher BLI scores, which means, they operate with more enforceable definitions of corporate liability for foreign bribery.

In various ways, the associations we emphasize indicate that 'good things go together'. For instance, we find that countries with a higher BLI score have less inequality. It does not matter how the disparities are measured (Gini-coefficient, Palma ratio, P90/P10 ratio, or the presence of inequality reducing inheritance taxes all produce similar correlations[13]). Higher BLI scores are also associated with higher employment rates (OECD National Accounts Statistics), lower labor market insecurity (OECD Better Life Index), and tax policies. Countries with hardly any corporate taxes (as reported by KPMG Corporate Tax Insights) are also among the countries with the weakest definition of liability for foreign corporate bribery as captured by the BLI score.

Regarding political system, we find countries that score well in terms of how formal stakeholder engagement is part of the development of primary laws and subordinate regulations also perform better in terms of their ability to hold corporations liable for bribery, i.e., they have a higher BLI score. The variable 'formal stakeholder engagement' is a component of the OECD's Better Life Index and calculated as a composite estimate of various measures established to secure consultation and

[12] The negative correlation between BLI and trade as a percentage of GDP captures the fact that the most trade-dependent countries have other governance challenges as well. None of the correlations show causality.

[13] All indicators provided by OECD National Accounts Statistics, and higher inheritance tax (by Tax Foundation Tax Foundation: https://taxfoundation.org/estate-and-inheritance-taxes-around-world/

engagement ahead of new primary laws as well as subordinate regulations.[14] With respect to indicators of the quality of democracy more generally, such as political participation, electoral process, and civil liberties, country performance correlate positively with the BLI score (using data from the OECD's Better Life Index). Consistently with such correlations, press freedom, as presented by *Reporters without Borders*, is better secured in countries' BLI score. Journalists are safer in countries that have defined foreign bribery in a way that facilitates law enforcement.

In sum, the correlates of liability in foreign bribery, as captured by the BLI, indicate how both scope and clarity in the jurisdictions' definitions of foreign bribery go to together with a high score on a range of good governance indicators. Countries that are governed well simply seem to prefer a functioning approach to corporate liability in foreign bribery cases, suggesting that good policies go together with good politics including with respect to international commitments. But the opposite is also true; a weak approach to corporate liability in foreign bribery is associated with weaknesses in governance and bad policies. This is a serious warning.

5. THE POLITICS OF SCOPE AND PRECISION

Imprecision in the legal definition of corporate foreign bribery easily impedes efficient enforcement, irrespective of the definition's scope. As practiced in many countries today, the use of non-trial resolutions relative to trials intensifies the consequences of poorly defined liability. Rather than curbing firms' inclination to pay bribes abroad, flexible law enforcement with an imprecise definition, may intensify the problem.

If this is right, and if our index reflects current regulatory realities, it must (in the light of Table 1) be more important for countries like Iceland, Denmark, and Poland to improve the clarity of their definitions of bribery, than for Ireland, Portugal, Sweden, and the Czech Republic to broaden the scope of their law. Countries that resemble category C in Table 1, Switzerland, Estonia, and Greece, might have an even greater potential for improvement, yet in this area of regulation, the need for reform is generally greater among the non-OECD countries, for which we have no similar data.

[14] According to the OECD website https://stats.oecd.org/Index.aspx?DataSetCode=BLI, this indicator describes the extent to which formal stakeholder engagement is built in the development of primary laws and subordinate regulations. The indicator is calculated as the simple average of two composite indicators (covering respectively primary laws and subordinate regulations) that measure four aspects of stakeholder engagement, namely i) systematic adoption (of formal stakeholder engagement requirements); ii) methodology of consultation and stakeholder engagements; iii), transparency of public consultation processes and open government practices; and iv) oversight and quality control that refers to existence of oversight bodies and publicly available information on the results of stakeholder engagement. The stakeholder engagement indicator has been computed based on responses to the 2017 OECD's regulatory indicators survey for OECD countries as well as Colombia and Costa Rica, and to the OECD-IDB Survey on Regulatory Policy and Governance 2015 for Brazil. Respondents to all surveys were government officials. The scores for primary laws refer exclusively to processes for developing primary laws initiated by the executive. There is no score for primary laws for the United States, where all primary laws are initiated by Congress, and Brazil. In the majority of countries, most primary laws are initiated by the executive, except for Mexico and Korea, where a higher share of primary laws are initiated by parliament/congress (respectively 66% and 87%).

Considering the likelihood of reform, we should keep in mind how foreign bribery legislation is an area of regulation where realpolitik may trump governments' ambitions to promote international development. One clear indicator of such profit-oriented opportunism is the large share of *passive enforcers*, consisting of export-oriented countries that made foreign bribery illegal two decades ago, yet to date, they have completed no, or very few, enforcement cases. The group of passive enforcers includes countries like Japan, Russia, Turkey, Finland, India, China, Poland, Belgium, Hungary, Mexico, Ireland, and South Korea (Transparency International 2020). Examples of governments that strongly endorse doing business with highly corrupt autocratic regimes, and elected officials who interfere in enforcement actions, point in the same direction. UK Prime Minister Tony Blair's intervention to halt the investigations of corruption in BAE's arms export to the Saudi regime is a case in point. To defend his blunt intervention, Blair emphasized "real and immediate risk of collapse in UK/Saudi security, intelligence, and diplomatic cooperation" (Feinstein, 2011: 141-142).

The politics of foreign bribery enforcement has some alarming trends. It has become too simple to act as an advocate for anti-corruption, while at the same time, vigorously promoting commercial ambitions in the defense sector, production of non-renewable natural resources, or large infrastructure projects in countries with too weak barriers against corruption, for example with generous offers of export credit support (Hawley,).[15] A report by the Basel Institute of Governance shows that governments of the 20 largest economies fail consistently in approving and implementing anti-corruption initiatives promoted by the private sector, as presented by the largest business organizations, the B20 (Wannenwetsch, 2020).

Such signals suggest we have no reason to believe that a weak definition of corporate liability for foreign bribery is a matter of coincidence. The correlations between features of good governance and a high BLI score makes it tempting to suspect that some governments with a weak bribery liability definition fail intentionally in their international anti-corruption ambitions. These correlates tell us that a weak definition of foreign bribery goes together with restrictions on press freedom and civil society, weak standards with respect to law reform, high income inequality, and a lower inclination to tax corporations. At the same time, we have seen how easily governments inclined to condone foreign bribery may conceal their true intentions by pointing to the broad scope of corporate liability in foreign bribery cases, while remaining silent about how this liability is combined with an imprecise definition of corporate liability. There is a considerable 'vagueness-rebate', it seems, as exemplified by a largely unregulated use of non-trial resolutions for corporate offenders. When political leaders in a loud voice emphasize the scope of liability, and a low voice when they call for law enforcement, we may well face an attempt to establish an international anti-corruption façade behind which foreign bribery may thrive (Moene and Søreide, 2015).

[15] A recent OECD recommendation suggests the risk of corruption attached to export credit agencies still needs to be addressed by several governments (see the Recommendation of the Council on Bribery and Officially Supported Export Credits, OECD/LEGAL/0447, as adopted by the OECD Council on Wednesday 13 March 2019).

Susan Rose-Ackerman, therefore, is very right in her opposition to a diluted corruption concept. A broader recognition of the importance of precision in the definition of corporate bribery will make it easier to reach consensus in law reform – and in fighting corruption around the world.

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APPENDIX

A.1 The Bribery Liability Index

As explained in Section 3, the construction of the BLI is based on information from the OECD (2016) stocktaking report on corporate liability, specifically: Table 3. *Type of legal person covered*; Table 4. *What acts covered by liability*. Table 5. *Standard of liability /strictness of vicarious liability (VL)*. Table 6 *Compliance defense*; Table 8. *Liability for related firms/partners*; Table 10. *Successor liability*; and Table 11. *Jurisdiction over legal persons*.

For each table we plotted the scope per country, i.e., what is included in the jurisdiction's liability and the lack of clarity in terms of question marks reflecting that it is difficult to tell. Table 5 was relevant for scope only, while apart from that table, all the tables were used for both dimensions of the BLI.

The OECD report covers well the spectrum of relevant 'components'. Composing the index, we applied the most straightforward approach, that is, the arithmetic mean. We gave each component equal weight because we cannot justify why one would be more important than another. We then scaled them so that 'more is better'. That means, the broader scope of liability the 'better' the definition, and likewise, the clearer its contents, the higher the score on our bribery liability estimate. Eventually, we normalized each sub-indicator (i.e., scope and clarity) so that regardless of the amount of underlying information, the score would be a figure between 1 and 7. Even if there are six indicators on scope and seven on clarity, clarity and scope have the same weight for the BLI.

The OECD stocktaking report that contains all the information applied for the construction of the Bribery Liability Index is openly available on the OECD website.

A.2 Data applied for studies of correlations and correlation coefficients[16]

Variable mentioned in the text	Correlation coefficient	Data source
Country foreign bribery enforcement actions	15,38 (cases)	OECD Anti Bribery Convention Enforcement Data 2018
Ongoing investigations	7,29	TRACE Global Enforcement Report 2019
Total number of sanctions imposed (1999-2018)	48,82	OECD Anti Bribery Convention Enforcement Data 2018
Budget for enforcement (in thousands)	USD 10,674.46	Gibney (2019)
Prosecutor independence de jure	-0,02	Van Aaken, Feld & Voigt (2010)
Prosecutor independence de facto	-0,02	Van Aaken, Feld & Voigt (2010)
Size of economy (GDP per capita)	USD 525,99	World Bank Development Indicators
Size of population (people)	16391294	World Bank Development Indicators
Exports in USD (2016) (in million)	USD 148, 601,7	OECD National Accounts Statistics[17]
Imports in USD (2016) (in million)	USD 168,633.55	OECD National Accounts Statistics
Trade restrictions (average STRI) (trade in services)	-0,01	OECD Services Trade Restrictiveness Index
Barriers to entry (STRI Legal)	-0,06	OECD Services Trade Restrictiveness Index
Trade Policy Regime (determined for trade in services)	0,018	OECD Services Trade Restrictiveness Index
Exports, percentage of GDP (2016)	-4,97	OECD National Accounts Statistics
Imports, percentage of GDP (2016)	-4,07	OECD National Accounts Statistics
Financial intermediation services (as % of GDP)	-0,38	OECD National Accounts Statistics
Technology/science (as % of GDP)	0,45	OECD National Accounts Statistics
Inequality per Gini-coefficient (post taxes and transfers)	0,01	OECD STAT Inequality (Social Protection & Wellbeing, Income Distribution and Poverty
Inequality per Palma ratio (highest 10% to lowest 40%)	0,02	OECD STAT Inequality (Social Protection & Wellbeing, Income Distribution and Poverty
Inequality per P90/P10 ratio	0,22	OECD STAT Inequality (Social Protection & Wellbeing, Income Distribution and Poverty
Inheritance taxes	0,85	Tax Foundation (see 'Estate and Inheritance Taxes around the World by Alan Cole')
Employment rates	1,24	OECD National Accounts Statistics
Long-term unemployment rates	-0,57	OECD Better Life Index
Labor market insecurity	-0,79	OECD Better Life Index
Corporate taxes (average correlation coeff. 2010-2020)	1,17	KPMG Corporate Tax Insights[18]
Formal stakeholder engagement in regulations/laws reform	0,08	OECD's Better Life Index
Political participation	0,08	OECD's Better Life Index
Electoral process and pluralism	0,12	OECD's Better Life Index
Overall democracy score 2019	0,16	OECD's Better Life Index
Civil liberties (2016)	0,20	OECD's Better Life Index
Press freedom Abuse Score 2016	-1,27	Reporters without Borders
Free Press Overall Score 2016	0,88	Reporters without Borders

[16] All data are easily available online, except Van Aaken, Feld & Voigt (2010) for which we received the dataset from the authors. All coefficients refer to simple correlations.
[17] In several OECD data sources, Colombia was not included. In these cases, we found the comparable figures in the OECD Economic Survey Report on Colombia.
[18] https://home.kpmg/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html