EXPERT'S PAPER

PREVENTING CORRUPTION IN THE PRIVATE SECTOR AND THE ROLE OF PUBLIC-PRIVATE COLLABORATION IN CORRUPTION PREVENTION

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I. THE CONCEPT OF CORRUPTION

Corruption refers to acts of hindering economic activities that should be free and fair. Such acts pose risks to the financial interests of consumers and to the property of citizens as taxpayers. With this understanding and for the purpose of this report, corruption is defined as follows:

"Corruption refers to acts that deviate from the institutional framework assumed for transactions (i.e., 'exchanges based on free and voluntary decision-making concerning goods or services') and that create risks of infringing various legal interests that should be protected during free and fair transactions."

The rationale for this definition is explained below. There are diverse interpretations of corruption, particularly concerning its relationship to bribery. However, neither concept currently has a universally accepted definition. For example, corruption has been defined as "the misuse of entrusted power for private gain"[1] or "the abuse of public office for private benefit."[2] These broad definitions are useful for expanding the scope of legal sanctions targeting corruption, but they are not definite.

From such a comprehensive perspective, corruption can include many existing crimes, such as bid-rigging, fraud, extortion, embezzlement, breach of trust, prostitution, breach of confidentiality, and insider trading. However, this broad approach risks making the concept of corruption ambiguous, turning it into a "black box".[3] Thus, it is necessary to clearly define what constitutes corruption that warrants legal punishment.[4] It is challenging to link corruption to specific legal interests, as noted above. Nonetheless, considering the problem mentioned above, a more suitable understanding should be explored. It would be as follows: *"Corruption constitutes a highly specific form of attack capable of infringing diverse legal interests."* [5] This perspective is also useful for understanding bribery, which is often considered as a typical example of corruption.[6]

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[1] Transparency International, *Anti-Corruption Plain Language Guide*, 2009, p. 14.

[2] Cf. Till Zimmermann, *Die Universalgrammatik der Korruptionsdelikte*, GA 2024, p. 306.
Engels, *Heidelberger Zeitschrift für Wirtschaftsrecht* (HZ) 282 (2006), p. 313.

[3] Zimmermann, *ibid*., 302.

[4] Dölling, *Gutachten* C 61. DJT, Bd. 1, 1996, S. C 9.

[5] Kindhäuser, *Voraussetzungen strafbarer Korruption in Staat*, (ZIS) 2011, p. 461; Zimmermann, *ibid*., p. 307.

[6] This method of explaining the characteristics of a crime by focusing on forms that infringe upon multiple legal interests can also be observed in relation to other offences. For instance, the legal interest protected by the crime of document forgery is often understood as the social trust placed in documents, but this concept of trust is meaningless. Documents are protected from material forgery (*faux matériel*) and intellectual forgery (*faux intellectuel*) because various activities facilitated by documents involve the realization and protection of diverse legal interests. When documents are materially or intellectually forged, there is a risk of these legal interests being infringed. Accordingly, the crime of document forgery should be understood as a type of offence that infringes upon various societal interests through attacks on documents (see Takeyoshi Imai, "*An Examination of the Crime of Document Forgery (vol.6, Final),*" *Journal of the Jurisprudence Association(the University of Tokyo,Faculty of Law),* Vol. 116, No. 8 (1999), pp. 1297 et seq.).

II. THE LEGAL INTERESTS PROTECTED BY BRIBERY LAWS

The legal interest protected by anti-bribery laws is often considered to be society's trust in the impartiality of public officials' duties.[7] However, without analysing the substance of such trust, the term "trust" remains as an abstract and ambiguous notion, and is insufficient to adequately explain the scope of bribery laws.

Bribery involves acts such as offering or promising benefits to public officials performing specific duties, thereby distorting the decision-making process of public officials engaged in official activities and obstructing the realization of duties prescribed by law. In other words, public officials are paid salaries funded by taxpayers; therefore, they may not distort their decision-making processes under the influence of benefits other than their salaries.

Public duties, which are inherently services or goods that cannot be purchased through the market, should not be acquired through the presentation of non-salary benefits to public officials tasked with determining and executing those duties. Such actions constitute prohibited and illegal interference in free market transactions, which deserve to be forbidden in relation to public duties.

This rationale underpins the basis for punishing bribery and explains why offering benefits to public officials responsible for specific duties is a necessary condition for bribery offences. It should be noted that influential traditional theories have effectively made similar claims. These include:

1. **Dr. Binding's Decision Theory:** This theory holds that the grounds for punishing bribery lie in the undue influence exerted on the decision-making processes of public officials in their official duties through the provision of benefits. It considers that the wrongness of the bribery offence lies in seducing or luring the public official to decide to act or refrain from acting for the benefit of the benefit-giver or a third party.

2. **The Non-Commercializability Theory:** This theory asserts that public duties are providing citizens with goods or services that cannot be purchased through the market, so actions involving their acquisition through benefits or inducements outside the market constitute punishable bribery.

Based on this understanding, this report examines approaches to preventing bribery as a typical example of corruption.

III. TYPES OF CORRUPTION

A. Overview

Corruption can be broadly categorized into Private Corruption and Public Corruption. The former, Private Corruption, is often referred to as business bribery. The latter, Public Corruption, can be further divided into Domestic Bribery (bribery within the country) and Foreign Bribery (bribery of foreign public officials).

Private Corruption can be punished under provisions such as Section 299(1) of the German Penal Code,[8, 9] while Japan's Penal Code lacks equivalent provisions.[10] In Japan, acts corresponding to Private Corruption are often prosecuted under crimes like embezzlement (Penal Code Sections 242, 253), breach of trust (Section 247), or fraudulent business interference (Section 233). The focus of this report is on the prevention of Public Corruption, which should be addressed by specific legal provisions (Section 197-198).

B. Public Corruption

1. Domestic Bribery

Hereafter, we will focus on Domestic Bribery within the context of Public Corruption. Domestic bribery occurs when a public official receives monetary or other benefits from a private party in relation to his or her official duties. These benefits are deemed bribes when the act is confirmed as domestic bribery.

[7] Feuerbach, *Themis, oder Beiträge zur Gesetzgebung*, 1812, p. 187.

As mentioned earlier, domestic bribery is often seen as an act that harms public trust in the impartiality of official duties and, therefore, should be punished. However, this explanation alone does not fully clarify the basis for punishing domestic bribery.

To understand the appropriate justification of the crime, let us look at the following example. Ex: an employee of a construction company offers benefits to a staff member in charge of awarding a contract in a government building department, with the objective of securing a repair contract for their company. In that case, both the bribe-taking offence (Penal Code Section 197) and the bribe-giving offence (Penal Code Section 198) could be established. The substantive basis for both punishments lays in the potential waste of public funds caused by awarding contracts at an inflated price, which would ultimately lead to financial harm for taxpayers.

In other words, public duties are provision of services or goods that private individuals cannot purchase through the market. When individuals attempt to "buy" public duties by offering benefits to public officials responsible for executing those duties outside the prescribed process, they violate the intrinsic non-purchasability of public duties. This obstructs the proper execution of public duties and jeopardizes the property interests of the public — the end users (i.e., beneficiaries) of these duties. Therefore, such actions should be punished.

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[8] Section 299

Taking and giving bribes in commercial practice

(1) Whoever, in commercial practice in the capacity as an employee or agent of a business,

1. demands, allows themselves to be promised or accepts a benefit for themselves or a third party in return for giving an unfair preference to another in the competitive purchase of goods or services in Germany or abroad or
2. without the permission of the business demands, allows themselves to be promised or accepts a benefit for themselves or a third party in return for performing or refraining from performing an act in the competitive purchase of goods or services, thereby breaching the duty incumbent on them towards the business,

incurs a penalty of imprisonment for a term not exceeding three years or a fine.

(2) Whoever, in commercial practice,

1. offers, promises or grants a benefit to an employee or agent of a business or a third party in return for giving that person or another an unfair preference in the competitive purchase of goods or services in Germany or abroad or
2. without the permission of the business offers, promises or grants an employee or agent of a business or a third party a benefit in return for performing or refraining from performing an act in the competitive purchase of goods or services, and thereby breaches the duty incumbent on them in relation to the business,

incurs the same penalty.

Cf. https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

[9] The *UK Bribery Act 2010 (UKBA)* addresses private corruption through *Section 1* and *Section 2*, which respectively penalize *active bribery* and *passive bribery*. The *Section 1* and *Section 2 are as follows*:

1. *Section 1: Bribing Another Person (Active Bribery):* When a person offers, promises, or gives a financial or other advantage to induce or reward improper performance of a relevant function or activity, which includes activities in the private sector.
2. *Section 2: Being Bribed (Passive Bribery):* When a person requests, agrees to receive, or accepts a financial or other advantage, intending that, as a result, a relevant function or activity will be performed improperly.

The "relevant function or activity" includes roles in both the public and private sectors where there is an expectation to act with integrity, impartiality, or good faith.

A detailed examination of the specific application of *Sections 1* and *2* is beyond the scope of this paper.

[10] As an exception, for example, section 967, Paragraph 2 of the Companies Act in Japan stipulates the offence of bribery involving directors and other officers of a joint-stock company.

Section 967

(1) When any one of the following persons accepts, solicits or promises to accept property benefits in connection with such person's duties, in response to a wrongful request, such person is punished by imprisonment for not more than five years or a fine of not more than five million yen:

(i) any one of the persons listed in the items of section 960, paragraph (1) or the items of section 960, paragraph (2);

(ii) the person prescribed in section 961; or

(iii) financial auditor or a person who is temporarily to perform the duties of a financial auditor appointed pursuant to the provisions of section 346, paragraph (4).

(2) A person who has given, offered or promised to give the benefits set forth in the preceding paragraph is punished by imprisonment for not more than three years or a fine of not more than three million yen.

Cf. https://www.japaneselawtranslation.go.jp/ja/laws/view/3207#je_pt4at8

2. Foreign Bribery (Foreign Public Official Bribery)

Another form of public corruption is foreign bribery. This occurs when, for example, a person from Country α provides money or other benefits to a public official from Country β with the intention of obtaining favourable treatment regarding the official's duties, and the official accepts the bribe.

This type of offence gained international attention after the enactment of the US Foreign Corrupt Practices Act (FCPA) in 1977, followed by the adoption of the OECD Anti-Bribery Convention in 1999, which led to the incorporation of laws against foreign bribery into the domestic legal systems of OECD member countries.

The justification for punishing foreign bribery under domestic law can be explained as follows. For example, a company (Company X) from Country A, after undergoing a bidding process, attempts to provide goods or services to a public official (Official O) in Country B. Even if the goods or services offered by Company X are of inferior quality compared to those offered by a company (Company Y) from Country C through the bidding process, if Company X bribes Official O and wins the contract, citizens of Country B will end up receiving relatively inferior goods or services. This results in financial harm to the citizens, who unknowingly suffer from receiving substandard goods or services. In this case, the malicious nature of Company X's and O's actions justifies punishment.

Thus, it can be interpreted as follows: foreign bribery is to be punished because it hinders the free and fair transactions that citizens of the foreign country should expect, thereby endangering their economic rights. This justification for punishment is the same as domestic bribery.

3. Justification for Punishing Domestic and Foreign Bribery: A Recap

The crime of domestic bribery is often said to protect the trust in the duties of domestic public officials, as these duties cannot be bought or sold in the marketplace. When a public official engages in bribery, it undermines the trust in their ability to perform their duties impartially. In fact, it could violate the financial rights of the citizens, which justifies punishment.

Similarly, foreign bribery is often said to protect fair business transactions between businesses in different countries. It should be restated as follows: Foreign public officials are prohibited from selling their authority outside of their official capacity, and when they violate this prohibition, it disrupts fair trade and harms the economic interests of citizens in the foreign country, which deserves to be punished.

Both domestic bribery and foreign bribery have an aspect of crime against property. In both cases, the crime is not victimless and results in harm to citizens' financial interests. It is important to note that both types of bribery occur in competitive situations[11] and are not crimes without victims.[12]

This understanding of the protected legal interests is crucial for interpreting both types of bribery (domestic and foreign). To develop a deeper understanding of them, it would be useful to look at some precedents.

IV. SPECIFIC EXAMPLES

A. General Overview

In order for us to understand the substance of corruption concretely, it is helpful to review a few notable cases where corruption has been identified. Here, we will focus on cases from Germany and Japan. The reason for selecting these two countries is twofold:

1. Germany has a significant number of cases involving foreign public official bribery, making it a convenient context to study the application of foreign bribery laws.

[11] Pieth, *Bekämpfung der Korruption im internationalen Geschäftsverkehr* in Festschrift for FS Rehberg (1996), p. 233, 235.
[12] Zimmerman, *op.cit.*, p. 312.

2. In Japan, cases involving business bribery, which are related to corruption offences such as bid-rigging, provide insight into the extent of corruption deterrence in the country.

B. Specific Examples: Cases from Germany and Japan

Below are specific cases (with the case names and URLs for reference) from Germany and Japan, showcasing examples of private corruption and public corruption.

Nation	Case Name	Private Corruption	Public Corruption
Germany	Siemens (2008)[13]	○	○
	Ferrostaal (2011)[14]	○	
	VW Emission Scandal (2020)[15]	○	Possible
	Airbus (2020)[16]	○	○
Japan	Lockheed Scandal (1970s)[17]	○	Possible
	Recruit Scandal (1980s)[18]	Possible	○
	Dango (Bid-Rigging Scandals, 1990s-2000s)[19]	○	Crime of Collusion (section 96-2-2 of the Criminal Code)
	Olympus Scandal (2011)[20]	Crime of Violating the Financial Instruments and Exchange Act	
	Toyota Emission Check Scandal (since 2023)[21]	Crimes of Violating Consumer Law	

Note: *Private corruption* refers to cases involving bribery or unethical practices in private business transactions or corporate settings, while *public corruption* refers to cases where public officials are involved in bribery or unethical conduct related to their official duties.

The table highlights various corruption-related offences, such as domestic bribery, foreign bribery, collusion, and violations of specific laws like the Financial Instruments and Exchange Act and Consumer Law in Japan. These cases serve as concrete examples to understand how corruption manifests in both the private and public sectors in different legal and cultural contexts.

V. MEASURES AGAINST CORRUPTION: IMPORTANCE OF COLLABORATION BETWEEN THE PUBLIC AND PRIVATE SECTORS

A. Measures Needed for Combating Corruption: Proper Role Allocation between Regulatory and Criminal Sanctions

We will hereafter examine the measures applicable to natural and legal persons involved in public and

[13] https://www.reuters.com/article/business/-siemens-battles-corruption-scandal-idUSTRE4BE4ID/
[14] https://www.spiegel.de/international/business/corruption-investigation-germany-s-ferrostaal-suspected-of-organizing-bribes-for-other-firms-a-686513.html
[15] https://www.reuters.com/article/business/volkswagen-says-diesel-scandal-has-cost-it-313-billion-\euros-idUSKBN2141JA/
[16] https://www.occrp.org/en/investigation/as-bribery-probe-unfolded-airbus-kept-in-touch-with-middleman-on-controversial-kuwait-helicopters-deal#:~:text=In%202020%2C%20Airbus%20struck%20deals%20with%20French%2C%20U.K.%2C,secure%20contracts%20in%20at%20least%20a%20dozen%20countries.
[17] https://asiatimes.com/2016/12/lockheed-scandal-40-years-downfall-prime-minister-kakuei-tanaka/
[18] https://web.archive.org/web/20120627190521/http://www.yomiuri.co.jp/dy/business/T120626005277.htm
[19] https://www.mfj.gr.jp/web/lunch_seminar/documents/Ohashi20070122.pdf
[20] https://www.nytimes.com/2011/12/09/business/deep-roots-of-fraud-at-olympus.html
[21] https://english.kyodonews.net/news/2024/01/ae5a9a8eaf58-urgent-toyota-group-firm-rigged-data-on-diesel-engine-power-output.html

private corruption. More precisely, we will focus on how regulatory as well as criminal sanctions should be appropriately balanced and applied.

B. Analysis from the Traditional Legal Perspective

1. Viewpoint from the Comparison of Related Systems in Germany, the US and Japan

To prevent corruption, it is necessary to effectively differentiate and apply regulatory and criminal sanctions. As mentioned earlier, the concept of corruption is likely to be understood expansively within this framework, where some acts are deemed illegal but do not or should not necessarily lead to criminal sanctions.

This understanding can be meaningful in some cases. Indeed, when considering legal sanctions for those involved in bribery, one should first consider civil and administrative sanctions before considering criminal sanctions. In those stages, it is not unreasonable to understand the concept of corruption in a relatively broad sense. In Japan, the regulation of bribery as corruption is often based on criminal sanctions for individuals. However, in other countries, administrative sanctions[22] play a significant role. Therefore, we will overview the situations in Germany and U.S. federal law.

Firstly, in Germany, when a corporation is involved in bribery, an administrative fine may be imposed on the corporation.[23] A corporation may be fined up to 10 million euros based on the profits obtained through bribery. In addition to this maximum fine, the illegal profits may be confiscated.[24] This is not a criminal but an administrative penalty applied when a corporation fails to take measures to prevent illegal acts. Secondly, under U.S. federal law, both natural persons and corporations involved in bribery face civil, administrative and criminal sanctions.

- Civil sanctions under the FCPA:
  - The FCPA allows for the forfeiture of illegal profits and the imposition of fines as civil sanctions.[25]
  - These civil penalties are relatively easy to apply because the standard of proof is "preponderance of the evidence" rather than "beyond a reasonable doubt".[26]
  - Furthermore, companies and individuals involved in bribery may be debarred from federal government contracts.[27]
- Criminal penalties under the Foreign Corrupt Practices Act (FCPA, 1977) and the Federal Bribery Statute (18 U.S.C. § 201):
  - Individuals or corporations engaged in bribery may face fines or imprisonment.
  - The fine amount can be twice the profit obtained from the illegal act[28] or a specific amount[29, 30]). Additionally, profits derived from bribery may be subject to civil forfeiture.[31]

Thirdly, in Japan: In cases of bribery, criminal penalties are imposed on individuals involved under the

[22] In this context, the term "administrative penalty" is more suitable than "regulatory sanctions" because it specifically highlights the nature of the sanction as distinct from civil and criminal sanctions. Administrative penalties typically refer to sanctions imposed by administrative agencies (such as government bodies) for violations of rules or regulations, and they are not criminal or civil in nature.
[23] Ordnungswidrigkeitenrecht (OWiG), Sections 30 and 130.
[24] OWiG, Section 30.
[25] 15 U.S.C. § 78u(d)(3); 15 U.S.C. § 78dd-2(g)(1).
[26] The FCPA also addresses violations of accounting and record-keeping obligations, which can play a key role in uncovering information relevant to suspected bribery cases (15 U.S.C. § 78u(d)(1), 15 U.S.C. § 78m(b)(2)(A), 15 U.S.C. § 78m(b)(2)(B)).
[27] 48 C.F.R. § 9.406-2, 48 C.F.R. § 9.406-3.
[28] 18 U.S.C. § 3571(d).
[29] For example, under the FCPA, up to 2 million dollars for corporations.
[30] 15 U.S.C. § 78dd-2(g)(1)(A).
[31] 18 U.S.C. § 981(a)(1)(c).

Penal Code (especially sections 197-198). Regarding corporations involved in bribery, Japan does not have an administrative fine system for corporations like Germany. However, administrative measures such as business suspension orders or the cancellation of permits to participate in bidding may apply in certain cases. Specifically, administrative sanctions similar to the debarment under U.S. federal law may also apply to corporations in Japan. These sanctions are enforced under the Antimonopoly Act, Public Works Contract Law, Administrative Procedures Act and Local Government Act, as well as exclusion clauses in competitive bidding rules established by public institutions and local governments.

In Japan's legal system, criminal penalties are not directly applied to corporations. An important exception to this is in cases of foreign bribery, where under the *dual penalties provision*, if an individual involved is identified, a corporation may be held liable for negligence based on the failure to supervise the individual.[32]

Thus, the systems of legal sanctions for natural persons and corporations involved in bribery differ across Japan, the U.S. and Germany in terms of the scope of corporate punishment, types of administrative sanctions and whether civil judicial proceedings are required to apply them.

With this understanding in mind, this paper will examine how to design an optimal division of roles between administrative and criminal penalties for natural persons and corporations. The analysis will first be approached from the traditional criminal law theory perspective, and then, insights from law and economics will also be considered.

2. Introductory Considerations on Enhancing the Effectiveness of Corruption Deterrence

The enhancement of corruption deterrence effectiveness must take into account the vital role of the private sector. To better understand this, let us consider a case of public corruption, such as domestic bribery. It is usually subject to initial investigation and sanction by the regulatory authorities. Once discovered, the regulatory agency typically conducts an investigation and considers sanctions. Then, a public prosecutor decides on whether or not to indict the case to the court for proving the offender to be criminally liable. After the case was charged, the court will decide on the conviction, and if deemed guilty, on the sentence (imprisonments or fine).

In relation to domestic bribery, the effectiveness of both regulatory and criminal sanctions lies in their potential to deter similar offences. It can be argued that regulatory sanctions should be aimed at addressing and deterring illegal activities without the need for criminal sanctions. However, this assumption may not always be sufficient, especially when an act of corruption involves public officials who hold discretionary power, which could hold a presumption of legality. But even in this case, the abuse of the discretionary power may be identified as the result of the bribe he or she received. So in this paper, such a case is also to be dealt with as a typical case of domestic and foreign bribery.

While a broader perspective, *retributive justice* — the legal condemnation of a wrongdoer based on their actions — has been a traditional focus of criminal sanctions, focusing purely on retribution may undervalue the deterrent effects of (not only criminal but also) regulatory sanctions. Retributive justice, which relies heavily on societal ethical intuitions, may not provide an objective basis for calculating the optimal amount of resources to be invested in deterring crimes including domestic bribery.

Both regulatory and criminal sanctions require the allocation of finite resources, and the implementation of these measures, which ultimately involve taxpayer money, should aim to maximize social benefits. The goal should be to optimize the deterrent effect of *domestic bribery* by considering the relationship between the effectiveness of regulatory and criminal sanctions, maximizing overall social utility.

This perspective is useful when discussing the prevention of corruption in the private sector, taking into account the collaboration between the public and private sectors in anti-corruption efforts. The prevention of domestic bribery, which is one of the key concerns of civil society, requires businesses to work closely with the relevant public authorities, especially when corruption is suspected. In such situations, private-sector businesses are likely to collaborate with the relevant public agency and consult with public prosecutors, keeping future possible criminal prosecution in mind.

[32] Unfair Competition Prevention Act, sections 22(1)(i), 18(1).

In each phase of this process, businesses should consider the potential losses they may face, the deterrent power of regulatory sanctions, and the role of criminal sanctions in supplementing these deterrent efforts. Therefore, by providing businesses with a predictable legal framework, including the potential legal outcomes, their willingness to cooperate in clarifying corruption cases could be increased. This approach will also enhance the overall effectiveness of anti-corruption measures, as businesses become more engaged in the resolution of such issues.

Thus, the integration of *regulatory and criminal sanctions*, along with *collaboration between the public and private sectors*, is critical to enhancing the effectiveness of corruption deterrence.

C. Analysis from a Law and Economics Perspective

1. Basic Perspective

When domestic bribery is uncovered, the private sector individual involved (such as an employee of a company) is supposed to be subject to internal sanctions by their employer (e.g., a violation of the employment contract leading to disciplinary actions[33]). Additionally, the company may report the suspicion of bribery to the relevant public authority, where the suspected public official works.

Upon receiving the report, the public authority (i.e., regulatory agency) may initiate an internal investigation to assess the allegations of bribery.[34] If the facts are established, the public official may face regulatory fine (denoted as "s", cf chart 2 below). It is important to note again that the accuracy of fact-finding by the regulatory agency does not need to reach the level of certainty required in a criminal trial (i.e., beyond a reasonable doubt). For a disciplinary procedure, the facts need only to be established in the degree of preponderance of the evidence.

As to the regulatory fines on the public official involved, if its expected deterrence effect is deemed sufficient to prevent future bribery offences of the same kind, further criminal prosecution may not be necessary. On the other hand, if the deterrence effect of the regulatory measure (denoted as "m", cf chart 2 below) is insufficient to prevent similar bribery cases, criminal prosecution may be required. In such a case, the prosecutor would bring charges, and the court would make a judgment. If the court convicts the public official for bribery, it may impose a penalty, such as a criminal fine (denoted as "f", cf chart 2 below),[35] on the official.

To assess the deterrence effect of the said legal sanctions to the suspected offender of bribery, both the regulatory sanction (f) and the potential criminal sanctions (s) should be evaluated together, considering the probability of enforcement. The total deterrence effect will depend on the combined impact of both types of sanctions (f+s) and the likelihood of each being imposed.

This approach follows a law and economics framework, where the optimal deterrence is determined by evaluating the expected social utility of different sanctions (regulatory and criminal one) and considering the costs and benefits associated with their enforcement. The goal is to maximize deterrence against bribery while balancing the resources and efforts required for enforcement.

The key consideration here is that private sector businesses have a critical role to play in collaborating with public authorities to prevent bribery. On the one hand, if the regulatory sanctions are effective in deterring bribery, businesses might not be involved in criminal proceedings. On the other hand, if regulatory sanctions fall short of this aim, criminal prosecution would be necessary. In both cases, the effectiveness of

[33] If a public official engages in misconduct such as accepting a bribe, the following disciplinary actions may be imposed in Japan as those stipulated in section 29 of the Local Public Service Act and section 82 of the National Public Service Act.

[34] Public officials who accept bribes may also face disciplinary actions, such as dismissal by their respective employers (i.e., governmental agencies). This is similar to how private-sector employees involved in bribery on the giving side are treated. With this in mind, this paper will discuss the administrative and criminal penalties applicable to public officials involved in bribery.

[35] Section 197 of the Japanese Penal Code prescribes imprisonment of up to five years as the lightest statutory penalty for the crime of simple acceptance of bribe. In contrast, section 198 provides that the offence of a giving bribe carries a penalty of imprisonment of up to three years or a fine of up to 2.5 million yen. This means that a bribe-giver may only be subject to a fine.

such sanctions should be assessed based on their expected impact on deterrence and the costs of enforcement. By conducting a cost-benefit analysis, it is possible to identify the most effective combination of regulatory and criminal sanction to reduce bribery in the public as well as the private sectors.

2. Model 1

The above understanding can be represented in a simple model which explains the bribery utility function. It is as follows:

$$U=E(B)-[P(D)\times C(D)]-[P(A)\times C(A)]$$

The words used in Model 1 are as follows.
(Chart 1)

U	*Utility* of engaging in bribery
B	Bribery
D	Detection by police or pubic prosecutor
A	Administration by the regulatory authorities
E(B)	*Expected benefit* from paying the bribe
P(D)	*Probability* of being detected for bribery
C(D)	*Cost* of criminal sanctions for bribery
P(A)	*Probability* of being sanctioned by the regulatory agency
C(A)	*Cost* of regulatory sanctions for bribery

To understand how each of these factors influences the *utility* of engaging in bribery, we can calculate the partial derivatives with respect to each independent variable. For example, the partial derivative of utility with respect to the expected benefit E(B) would be:

$$\frac{\partial U}{\partial E(B)} = 1$$

This means that as the expected benefit from bribery increases, the utility of committing bribery also increases, assuming other factors remain constant.

As another example, for the partial derivative with respect to the probability of detection P(D) would be:

$$\frac{\partial U}{\partial P(D)} = -C(D)$$

This suggests that as the probability of being detected for bribery increases, the *utility* of committing bribery decreases in proportion to the cost of criminal sanctions, assuming other factors remain constant. The magnitude of this effect depends on the *cost* C(D) associated with criminal sanctions. Other partial derivatives can similarly be calculated for the *cost* of criminal sanctions C(D), the probability of regulatory sanction P(A) and *the cost associated with regulatory sanction C(A)*. By performing partial differentiation for each variable, we can identify which variables have the strongest relationship with *utility*. This allows us to understand which factors most strongly influence the decision to engage in bribery.

Based on this model, we could design a system that would specifically target the most influential variables to achieve *optimal deterrence* of corruption. For example, if the probability of detection P(D) or the severity of the criminal sanctions C(D) has the strongest impact, then increasing detection rates or imposing stricter criminal sanctions may be the most effective way to deter bribery. In this way, we can approach the design of anti-corruption policies with a *cost-benefit analysis* framework, targeting the factors that most strongly influence the *utility* of engaging in bribery, ultimately leading to a more effective anti-corruption system. However, this view is limited to short-term economic fluctuations caused by bribery. In the long term, bribery is likely to reduce social utility. Considering the earlier example, the following problems are to be

mentioned:

1. **Priority of Self-Interest over Optimal Outcomes**
   Officials receiving bribes may prioritize their personal gain over providing optimal services or favourable trade conditions, potentially decreasing overall societal utility.

2. **Disruption of Market Functions**
   Widespread bribery undermines market mechanisms (in this case, the fair customs clearance system based on regulations), leading to increased prices for goods equivalent to the bribe amount. This negatively impacts consumers' economic interests in the importing country.

3. **Obstruction of Systematic Reforms**
   If customs delays are caused by outdated procedures, introducing new systems, such as electronic customs processes, could address the delays. Ideally, the appropriateness of such reforms should be determined through competitive bidding. However, if bribery is involved, this competitive process is bypassed, blocking pathways to protect consumer interests and ultimately harming consumers in the importing country.

In light of these points, Model 1 alone cannot adequately explain all the aspects of bribery. In fact, Model 1 is an equation that calculates the net gains of individual criminals involved in bribery. While it takes into account the activities of regulatory authorities and public prosecutors responsible for overseeing bribery, it does not analyse whether bribery results in net gains or losses to society as a whole.

Therefore, to examine the optimal system for deterring bribery, it is necessary to identify the societal gains or losses caused by bribery and construct a model that considers the activities of government agencies involved in regulating bribery. From this perspective, Model 2 will be introduced.

3. Model 2

With Model 1 in mind, a more sophisticated model to evaluate the level of the optimal deterrence against (domestic and foreign) bribery can be devised.[36] The words used in Model 2 are as follows.

(Chart 2)

W	Social welfare
Wi	Ideal Social welfare with no bribery in the society
Wa	Actual social welfare. It is calculated by subtracting the amount of cost resulting from the bribery offence from Wi.
b	The offender's gain from committing bribery
p(b)	The probability density function (PDF) of the distribution of illegal gains for each bribery opportunity in society, which is assumed to decrease monotonically as illegal gains increase[37]
g(b) (for reference)	Probability density function of b
G(b) (for reference)	Cumulative distribution function (CDF) of g(b)
d of G(b) (for reference)	Differential operator used in calculus to represent a small increment in a function or variable. In this case, d represents a marginal probability change over a small interval of b

[36] The following discussion is inspired by Nuno Garoupa and Fernando Gomez-Pomar's article, *Punish Once or Punish Twice: A Theory of the Use of Criminal Sanctions in Addition to Regulatory Penalties, American Law and Economics Review*, Vol. 6, No. 2 (2004), p. 415. However, Model 2 is conceived from the perspective of this paper. For example, the cost (denoted as θ 2) is borne by the public prosecutor, not the criminal court, as defined by Garoupa and Gomez-Pomar (*ibid.*). In their paper, no clear distinction is made between an ordinary regulatory agency and the public prosecutor, who alone has the authority to decide whether the offender should be charged in a criminal court. Additionally, the integral used to calculate W (i.e., social welfare) is based on b rather than G(b).

[37] p(b) could be considered as a component of g(b), as defined in the next footnote, but these concepts could be separated to clarify their respective meanings.

h	Social damage or harm
h+b (for reference)	Net social harm from the crime
m	Measures taken by the regulatory agency such as investigation or proof of wrongdoing; m could be used to explain the agency's enforcement effort[38]
p(m)	Probability of an offender be detected and sanctioned by the regulatory agency which cannot impose criminal sanction to offender.
$\theta 1$	Cost borne by the regulatory agency further investigation to the bribe-giver and bribe-taker (i.e., offender)
p(pp)	Probability of the suspect being investigated and indicted by the public prosecutor for bribery[39]
$\theta 2$	Costs borne by the public prosecutor to prove in criminal court that the defendant committed bribery[40]
f	Penalty imposed by a regulatory agency except the public prosecutor (i.e., fine as a regulatory penalty)
s	Sanction imposed by a criminal court (i.e., fine as a criminal penalty)
z(m,$\theta 1$,$\theta 2$,f,s)	The expected sanction to the offender

Using these terms, the actual social welfare (Wa) is calculated by deducting the costs incurred to address the bribery from Wi. In this process of cost deduction, the profits (i.e., b) seemingly obtained by the perpetrator are reduced to zero. This is because the apparent profits (i.e., b) gained through the bribery are, in the end, losses borne by the citizens, namely, the taxpayers.

Clarifying this reasoning process contributes to an accurate understanding of the mechanism by which losses arise from bribery. Therefore, when integrating the total costs, the amount b, which the perpetrator seemingly gained through bribery, is first recorded as profit. Specifically, Wa is calculated using the following formula by using integration with respect to b over the interval where b ranges from zero to infinity.

$$\begin{aligned} Wa &= Wi - \int_0^{\infty} \{b-(h+b)+p(m)\theta 1+p(pp)\theta 2\}p(b)G(b-z(m, \theta 1, \theta 2, f, s))db \\ &= Wi - \int_0^{\infty} (h[41]+p(m)\theta 1+p(pp)\theta 2)p(b)G(b-z(m, \theta 1, \theta 2, f, s))db \end{aligned}$$

This equation represents social welfare (W) as a function of various factors related to bribery and its enforcement. It aims to balance the benefits obtained by offenders and the social costs incurred through enforcement efforts to deter such crimes.

[38] If *m* (representing the measures invested by the regulatory agency) is successful in investigating a suspected bribery case, the agency will be rewarded by the government. The idea of rewarding government agencies for sanctioning bribery participants (both the bribe giver and the bribe taker) is part of a broader discussion on creating incentives within anti-corruption systems. The following potential rewards are considered:

1. **Increased Funding:** Agencies that successfully investigate and sanction bribery may receive additional government funding or budget allocations, incentivizing them to intensify their efforts in combating corruption.
2. **Enhanced Status:** Successful enforcement could elevate the agency's status within the legal and political system, granting it greater influence and recognition in future operations.
3. **Broader Authority:** The agency might be granted expanded powers to investigate and sanction other corruption-related crimes, increasing its scope and operational capacity.

The role of these elements cannot be explained more in this paper.

[39] The probability of bribery being detected by a criminal court (i.e., p(CC)) is conceivable but is not considered in this paper, given the general tendencies of criminal court case handling in Japan. The situation may differ in other jurisdictions.

[40] The costs borne by the criminal court to determine that the defendant committed bribery are also considerable, but they would not be taken into account as they are relatively small compared to those incurred by the public prosecutor, especially in Japan. Again, the situation may differ in other jurisdictions.

[41] Here, the negative sign is not attached to h because it is self-evident that h represents a negative asset as damage. It is necessary to calculate the total amount of costs to be deducted from Wi by summing the absolute value of h with other costs.

The significance of the equation is explained in more detail as follows:

p(pp)$\theta 2$: The cost borne by prosecutors to indict defendants in criminal court ($\theta 2$) is adjusted by the probability of indictment, p(pp).

p(b): The probability density function (PDF) of illegal gains (b) in cases of bribery in society reflects how frequently a certain level of illegal gains occurs. As b increases, p(b) could decrease, since higher illegal gains are less common.

G(b - z(m,$\theta 1$,$\theta 2$,f,s)): This shows the cumulative distribution function (CDF) of the amount obtained by subtracting the expected sanctions, z(m,$\theta 1$,$\theta 2$,f,s), imposed on offenders from the illegal gains (b). Here, z(m,$\theta 1$,$\theta 2$,f,s) represents the sanctions imposed by regulators (f) and criminal courts (s), as well as the enforcement efforts and associated costs borne by regulators, public prosecutor and criminal courts.

The integral (from 0 to ∞ with respect to b) represents the total impact of all possible values of illegal gains (b) on social welfare (W). It calculates how the probability of illegal gains, the enforcement costs of regulatory agencies, public prosecutor and criminal courts, and the interaction of sanctions imposed by these entities affect overall social welfare.

This equation models how bribery, the actions of various authorities, and the sanctions they impose on bribers impact overall social welfare. From this equation, the following points become clear:

1. Positive Impacts on Social Welfare (W)
   - **Reduction of Illegal Gains (b):** Strong deterrence mechanisms against bribery lead to a decrease in illegal gains (**b**).
   - **Increased Detection and Prosecution Probabilities:** Higher probabilities of detecting bribery (**p(m)**) and prosecuting it (**p(pp)**) reduce the attractiveness of engaging in bribery.
   - **Appropriate Sanctions:** It is essential to set appropriate sanctions (**f** and **s**) that offset the profits (**b**) obtained through bribery.

2. Negative Impacts on Social Welfare (W)
   - **Societal Harm (h):** Bribery can cause societal harm, such as undermining bidding systems, preventing contracts based on fair competition, and potentially causing financial harm to taxpayers.
   - **High Enforcement Costs:** The costs of enforcement incurred by regulatory authorities (**$\theta 1$**) and prosecutors (**$\theta 2$**) could be significant. These costs may outweigh the benefits gained from deterring bribery, such as ensuring proper implementation of bidding systems and concluding contracts at fair market prices.

In summary, this equation could serve the following purposes:

1. **Optimization of Bribery Detection Efforts:** In making a legal framework against bribery, it is indispensable to optimize efforts (**m**) for detecting bribery by taking into account the costs and probabilities of detection (**p(m)**), the costs and probabilities of prosecution and achieving a conviction (**p(pp)**).

2. **Designing Sanctions to Balance Deterrence and Costs:** In designing administrative fines (**f**) and criminal penalties (**s**) that maximize the deterrent effect against bribery, it is indispensable to minimize the enforcement costs borne by regulatory agencies, prosecutors and courts.

3. **Evaluating Policy Impact on Social Welfare:** In order to provide a framework for evaluating the impact of anti-bribery policies on overall social welfare, it should be ensured to effectively deter bribery while enhancing societal benefit.

When this equation is applied to a case, it can be assumed that W may either be positive or negative. The circumstances under which W may be positive are as follows:

1. When the product term of $\theta 1$ or $\theta 2$ is small,[42]

2. When h is small.[43]

On the other hand, the circumstances under which W may be negative are as follows: If regulatory agencies and public prosecutors are working very hard in order to completely eliminate bribery from society, then $\theta 1$ and $\theta 2$ will become extremely high. As the level of eliminating bribery from society is getting higher, so the workload of regulatory authorities and public prosecutors would decrease more, which could raise doubts about *raison d'être* of these agencies' existence. This may lead to a reduction in the budget available for these agencies to invest in bribery deterrence. As a result, the expectation that complete deterrence will not be realized is likely to be valid.

In addition to the above, using this equation, the following points can be further noted:

1. Likelihood of Regulation by Regulatory Agencies
   Firstly, the implementation of sanctions by a regulatory agency is more likely than indictment by a public prosecutor to a criminal court because the costs are lower for the regulatory agency. The burden of proof for imposing a regulatory penalty is lower compared to securing a criminal charge and a conviction of a defendant in court. For regulatory sanctions, it is sufficient to prove by a *preponderance of the evidence* that a person violated a specific section of the law. In many cases, it is unnecessary to determine whether or not the violation occurred with the state of mind of the violator that is required for criminal culpability (i.e., *mens rea*).

2. Limitations of Regulatory Measures Alone
   Secondly, achieving complete deterrence against bribery cannot rely solely on the efforts of regulatory agencies. While it is more effective for regulatory agencies to fine offenders than for courts to impose criminal sanctions, relying exclusively on regulatory enforcement leads to suboptimal outcomes. If complete deterrence is achieved solely through administrative efforts, the agency's expected profits diminish to zero, reducing its incentive to maintain the optimal enforcement effort as explained earlier.

3. The Role of Criminal Courts
   Thirdly, the role of the criminal court must be considered as a substitute for areas of under-enforcement by regulatory agencies. In other words, achieving an *optimal balance* between regulatory agencies and criminal courts remains a significant challenge. Resolving this issue requires further research from a law-and-economics perspective. Nevertheless, the following point can be highlighted in this paper.

4. Importance of Private Sector Cooperation
   Fourthly, it is crucial for the private sector to report signs of bribery to the regulatory agency as soon as they are discovered and to cooperate fully with the agency's investigation. By engaging in this way, the private sector can contribute to ensuring that the agency's enforcement activities will get closer to an optimal level. This, in turn, reduces the risk of being indicted and convicted for bribery-related criminal offences, as explained earlier. Therefore, the degree of deterrence against bribery targeted by the related agencies is a critical matter that cannot be decided without due consideration of the data they have gathered.

VI. FACTORS THAT PROMOTE DETECTION OF CORRUPTION AND THE ROLE EXPECTED OF PRIVATE BUSINESSES

A. Overview

From the past experiences in many jurisdictions, the following factors have been found as particularly

[42] This can be considered in a society where sanctions such as f and s are not functioning

[43] This could be in a society where the social loss due to bribery is small. In Japan, it has been explained that the situation during the Edo period when Tanuma Okitsugu held political power corresponds to this; however, there are recent strong criticisms that this does not align with historical facts at that time.

important in promoting the detection of corruption: (1) public whistle-blowing, (2) accounting audits, and (3) tax investigations. In this paper, only (1) will be discussed due to the page limit.

B. Whistle-Blower Protection System

1. Overview

Encouraging insiders within companies and other organizations, who are close to the scene of the misconduct, to report potentially corrupt actions to external authorities contributes to preventing corruption at a low cost. Collecting evidence related to corruption by police officers and prosecutors is a very costly process. Particularly in cases of bribery involving foreign public officials, investigation authorities generally do not have the authority to collect evidence abroad, making the cooperation of those close to the scene of the misconduct crucial for investigation authorities. Therefore, systems that increase the incentive for the private sector to provide criminal-related evidence to public institutions should be introduced. Indeed, from the perspective of law and economics, such systems represent one of the most cost-effective methods to achieve the greatest impact.

2. Issues with Japan's Whistle-Blower Protection System

Japan's whistle-blower protection system has been criticized for several issues regarding the reporting channel and the risk of retaliation.

(a) Reporting Channels (Current Law)

Under Japan's Whistleblower Protection Act, if an act of bribery is discovered within a company, the whistle-blower can report it to one of the following channels:

- Internal Reporting
  - Company's Internal Reporting Desk: Report to the internal reporting desk set up by the company.
  - Whistle-blowing Response Personnel: Notify the designated responsible person for whistle-blowing responses. It should be a system where all employees within the company are informed of who has been designated as personnel responsible for handling whistle-blowing reports. Also, it is requested to establish a system that allows whistle-blowing to be carried out as needed.

- External Reporting
  - Government Agencies: Report to the supervising authorities (e.g., Fair Trade Commission, police, public prosecutors offices, etc.).
  - Third-Party Agencies: They are, for example, lawyers, either anonymously or non-anonymously. Many companies designate lawyers or similar professionals as whistle-blowing channels (in addition to internal personnel). In such cases, the designated lawyers are considered part of the "internal" whistle-blowing channels. On the other hand, employees of the company can also delegate whistle-blowing to a lawyer other than the one designated by the company. This case is categorized as whistle-blowing using a third-party lawyer.
  - Media and Public Disclosure: If internal or governmental reporting is insufficient, public disclosure via media may be considered.

(b) Retaliation Under Current Law and Criticism

Although the Whistle-blower Protection Act aims to protect whistle-blowers, in practice, there are risks of retaliation. Below are examples and issues related to retaliation:

- Specific Examples of Retaliation
  - **Dismissal**: Losing one's job as a result of making a report.
  - **Demotion or Salary Reduction**: A decrease in position or salary.
  - **Forced Transfer**: Being transferred to an undesirable department to isolate the whistle-blower.
  - **Workplace Harassment**: Bullying or harassment by superiors or colleagues.
  - **Isolation**: Being cut off from communication in the workplace.

3. Efforts to Improve Japan's Whistle-Blower Protection System

In light of these issues, efforts to improve Japan's whistle-blower protection system are accelerating. The

most recent developments are as follows[44]:

- **Introduction of Criminal Sanctions**: It has been proposed to introduce criminal sanctions for businesses that engage in retaliatory actions against whistle-blowers.

- **Expansion of Whistle-Blower Protection**: Discussions are underway to extend the protection under the current system to include individuals who are less likely to be protected, such as former employees and business partners.

- **Promotion of Anonymous Reporting**: Measures have been proposed to encourage anonymous reporting, making it harder to identify whistle-blowers.

If these initiatives are implemented, it is expected that they will lower the barriers to reporting and reduce the deterrent effects on potential whistle-blowers, although it may take time to enact specific legal reforms.

C. Strengthening Deterrence through Public-Private Cooperation and Collaboration – Relationship with Criminal Sanctions

It is extremely important for the public sector to assist private businesses in eliminating barriers to public reporting, and in strengthening their active responses to accounting audits and tax inspections. Assistance, specifically, involves the establishment of systems that provide a reduction in legal sanctions for businesses that cooperate in deterring corruption by, for example, discovering instances of corruption and willingly reporting them to investigative authorities.

In making such a leniency system, presenting the elements necessary for exemption from regulatory or criminal sanctions are the most important issue. With regard to this matter, the dual penalty provisions in the Unfair Competition Prevention Act (section 18 and section 22, paragraph 1, item 1) are to be considered. According to the Act, businesses, whether corporations or individuals, are subject to criminal liability for foreign public official bribery offences. The basis for penalizing corporations lies in their failure to properly supervise employees to prevent acts that may constitute foreign bribery. In other words, discovery of the foreign bribery case would be considered as a failure to fulfil the duty of supervision over employees.

In this context, the concept of criminal *negligence* is to be referred to as the failure to take action that could have avoided harm, despite the harm being foreseeable. The concept of criminal *negligence* can be explained as the actor's awareness of the following situation:

$$C(\text{cost}) < P(\text{probability}) \times H(\text{harm})$$

In other words, this inequality represents the *perceived likelihood* of harm occurring due to the actor's actions.

This can be understood as applying the *Hand Formula* used in civil torts to the concept of criminal negligence.[45] An act that constitutes a crime is seen as an act similar to civil torts with the different degree of negligence. The characteristic of criminal negligence is found in anticipating the occurrence of future harm more clearly than in civil negligence. But the mechanism of civil negligence can also apply to criminal negligence as a basis for evaluating the costs. It must be applied to a criminal case to establish a clearer threshold over which criminal negligence can be determined more objectively.

Regarding *foreign public official bribery offences*, it can be understood as follows:

- In the country where the business operates, they should acknowledge the following:
  - The cost (C) of taking preventive measures to ensure that local employees can reject bribery demands.
  - The probability (P) for local officials to demand bribes.

[44] The following is cited from the draft report of the "Whistleblower Protection System Working Group" published on 24 December 2024.

[45] Cf. *U.S. v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947).

- The additional cost (H) incurred by providing a bribe to acquire related goods or services locally.[46]

With these factors in mind, if the actor recognizes that:

C>P×H

and they have invested sufficient cost (C) in the preventive measures, then negligence can be denied.

For businesses operating overseas, at a minimum, the following measures should be taken by the company to prevent it from being charged and convicted for the negligent crime:

1. Directors must fulfil their duty to monitor and prevent bribery by employees in their respective departments.

2. As a prerequisite, they must conduct a detailed risk-based assessment considering the level of corruption and transparency of the public services in the local area.

3. Directors must check among themselves in board meetings that each director is fulfilling their supervisory duties as outlined above.

4. The CEO must ensure that a strict anti-bribery stance is communicated throughout the company.

5. The board of directors must verify whether the CEO is fulfilling their duties regarding the above obligations.

If these measures are taken by the directors, the board of directors, and CEO, the likelihood of criminal negligence being denied increases.

It should be noted that even if such a compliance programme is created in this manner and properly implemented, this does not guarantee the denial of corporate negligence in a particular case. Criminal negligence must be judged on a case-by-case basis, based on the evidence collected in each case. A compliance programme does not automatically exempt the company from criminal liability. This point must be carefully remembered.

On the other hand, if an effective compliance system for preventing foreign public official bribery has been established and adequately implemented company-wide, but a specific employee still violates the compliance rules and provides a bribe, the company's criminal liability will be substantially reduced. The existence of an effective compliance system itself can serve as a *mitigating factor* during a sentencing phase.[47]

Regarding regulatory sanctions, there is a system known as the *No Action Letter*, where inquiries made to regulatory authorities regarding regulatory measures can result in responses within a certain scope.[48] However, this does not apply to criminal sanctions. This is because criminal liability (or an element of *mens rea*) depends on the evaluation of evidence collected in a specific case, and there is no guarantee that performing a certain act will automatically exempt the actor from criminal responsibility.

However, again, if an appropriate compliance system is established and implemented, criminal liability (in the form of negligence of a related person including a legal one) may be denied. This provides an advantage to private businesses, allowing them to avoid creating excessive precautionary measures in their operations.

When presenting the conditions for reducing or exempting the criminal liability of businesses (including corporations) involved in foreign public official bribery offences, the FCPA (Foreign Corrupt Practices Act) provisions should be referred to once again. These provisions include the following:

[46] The amount of H is usually equal to the amount of the bribe paid.
[47] Cf. SEC vs. Garth Ronald Peterson, No,12-cv-2033(E.D.N.Y.2012).
[48] Cf. https://www.soumu.go.jp/main_sosiki/gyoukan/kanri/kakunin/02gyokan01_04000424.html

1. Voluntarily disclosing the facts of foreign public official bribery to the authorities before an investigation is initiated by law enforcement.

2. Fully cooperating with the authorities during their investigation (e.g., voluntarily disclosing internal investigation information).

3. Taking appropriate corrective actions (e.g., implementing an effective compliance system to prevent reoffending).

Conditions 1) and 2) are mainly procedural requirements for criminal proceedings, while condition 3) is a substantive requirement under criminal law. This report focuses on item 3, and the requirements of the FCPA are understood to be valid.

VII. OUTLOOK

To deter corruption, collaboration between the public and private sectors is extremely important. The following points should be borne in mind again.

1. It is often difficult for investigative agencies to collect and evaluate evidence related to corruption, such as bribery.

2. It is crucial for private entities (businesses) to report criminal facts or submit evidence, as this is vital for the recognition, prosecution, and deterrence of crimes.

3. Furthermore, to achieve optimal deterrence of corruption (especially bribery), it is necessary to actively apply the insights of law and economics. This includes considering the deterrent effects of regulatory sanctions and judicial sanctions, the costs required to achieve these deterrence effects, and an objective model.

To accelerate and strengthen public-private collaboration, the following should be done:

i) Building an effective compliance system aimed at preventing corruption.

ii) The system should be constructed based on business practices in places where bribery is expected to occur (domestically or internationally), and after evaluating the risks of bribery (Risk-based approach).

iii) When implementing the system, the damages caused by corruption to the national economy should be estimated numerically. Then, by multiplying this by the probability of corruption occurring, the risk of damages can be calculated, and the necessary precautionary costs to prevent corruption should be measured (these numbers should serve as indicative benchmarks).

iv) Businesses that recognize they have invested more in anti-corruption measures than the calculated precautionary costs could be exempt from criminal negligence.

v) Even if criminal negligence is not denied in this sense, if the compliance system is considered effective in preventing corruption, a lenient sentencing decision should be made.

vi) Based on this understanding, it is desirable that the government presents to the public a model for a compliance system (which, if implemented, could lead to the negation of criminal negligence for businesses).

It is hoped that the ideas presented in this paper will be of some reference in the fight against corruption.