

国际商务交易活动反对行贿外国公职人员公约
及相关文件

**CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS
and related Documents**

经济合作与发展组织

Organisation for Economic Co-operation and Development

金融财政与企业事务委员会

Directorate for Financial, Fiscal and Enterprise Affairs

国际投资与跨国企业委员会

Committee on International Investment and Multinational Enterprises

国际商务交易活动反行贿工作组

Working Group on Bribery in International Business Transactions

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在国际商业交易中反对行贿外国公职人员公约

在 1997 年 11 月 21 日的谈判会上通过

CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

Adopted by the Negotiating Conference on 21 November 1997

前 言

缔约各方：

鉴于行贿行为已是国际商业交易活动中，包括贸易与投资活动中，普遍存在的现象，引起了道德和政治方面的严重忧虑，破坏了良好的管理与经济的发展，扭曲了国际竞争条件；

鉴于所有国家在国际商业交易活动中都负有反行贿责任；

参照经济合作与发展组织理事会于 1997 年 5 月 23 日通过的第 C(97)123/FINAL 号关于在国际商务交易活动中反行贿的修订建议案，该建议案特别呼吁采取行之有效的措施，遏止、预防和打击国际商务交易活动中的行贿外国公职人员的行为，尤其呼吁根据该建议案中《公认通则》和各个缔约方司法管辖及其它法律准则，立即采取协调有效的方式对这种行贿行为进行定罪；

采纳了近年来取得的在打击行贿公职人员活动中新成果，包括联合国，世界银行，国际货币基金组织，世界贸易组织，美洲国家组织，欧洲理事会和欧盟等组织的反行贿活动中取得的新成果，以进一步促进国际间的了解与合作；

欢迎各公司，商业组织，工会组织以及其它非政府组织做出努力，参与打击行

PREAMBLE

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other

贿行为；

赞赏各国政府在国际商务交易活动中防止向个人和企业索贿中所发挥的作用；

承认要在这一领域取得成果，不仅需要各个国家做出努力，而且也需要多边合作，监视及后续行动；

承认使各个缔约方所采取的措施达到等效是本公约最基本的目标和宗旨，这就要求要完整无损地批准本公约，不得有影响实现这种等效的减损条款。

non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

特此各缔约方约定如下：

Have agreed as follows:

第一条：行贿外国公职人员罪

Article 1: The Offence of Bribery of Foreign Public Officials

1. 缔约方应当采取必要的措施设定：任何人，无论是直接地还是通过中间方，故意地向外国公职人员或者为外国公职人员或第三方提议给予、承诺给予或事实上给予不当的金钱或其它利益，以期该外国公职人员在履行其职责中采取行动或不行动，进而在国际商业活动中获得或保留其业务或其它不当利益的行为，依法定为犯罪。

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. 缔约方应当采取必要的措施设定：共同参与，包括煽动，协助，唆使，或授意他人行贿外国公职人员的行为是犯罪行为。企图行贿外国公职人员或共谋行贿外国公职人员与企图行贿本国公职人员或共谋行贿本国公职人员一样，同为犯罪。

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. 上述第 1 和第 2 段中所设定的罪名以下称为“行贿外国公职人员罪”。

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official”.

4. 本公约中如下术语含义为：

4. For the purpose of this Convention:

a. “foreign public official” means any person holding

<p>a. “外国公职人员”系指任何因委任或选任而在外国立法，行政或司法机构中任职的人，任何代表外国国家，包括政府机构和国营企业，行使公共职能的人或国际公共组织的任何官员或代理人。</p> <p>b. “外国国家”包括从国家到地方的各级政府机构及政府机构的各个部门。</p> <p>c. “履行公务的作为或不作为”包括公职人员任何利用其职位的行为，而无论这种行为是否在其法定的权限内。</p>	<p>a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;</p> <p>b. “foreign country” includes all levels and subdivisions of government, from national to local;</p> <p>c. “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorised competence.</p>
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<h3>第二条：法人的责任</h3> <p>缔约方均须依其法律准则采取必要的措施，确立法人行贿外国公职人员应承担的责任。</p>	<h3>Article 2: Responsibility of Legal Persons</h3> <p>Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.</p>
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<h3>第三条：制裁</h3>	<h3>Article 3: Sanctions</h3>
<p>1. 对行贿外国公职人员的行为应当适当量刑，有效地予以刑事处罚，以示劝戒。惩罚的量刑应当与行贿缔约方本国公职人员行为的量刑相当，如果行贿者为自然人，则量刑中应包括剥夺其足够的自由权以便能够行之有效采用各缔约方公认的法律援助和引渡措施。</p> <p>2. 如果在缔约方的法律制度中，刑事责任不适用于法人，则该缔约方应当确保对行贿外国公职人员的法人给予行之有效的量刑适当的非刑事制裁，以示劝戒，包括经济方面的制裁。</p> <p>3. 缔约方应当采取其认为必要的措施，规定行贿外国公职人员的贿金及行贿外国公职人员的非法所得或与该行贿非法所得价值相当的财产可以予以查封和没收充公或者规定可采用同等效力的经济制裁。</p> <p>4. 缔约方对行贿外国公职人员的行贿者除了给予上述条款中规定的刑事或经济制裁</p>	<p>1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party’s own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.</p> <p>2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.</p> <p>3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.</p> <p>4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person</p>

外，还应当考虑给予民事或行政制裁。

subject to sanctions for the bribery of a foreign public official.

第四条：司法管辖权限

1. 缔约方应当采取可能是必要的措施，设定对部分或全部在其境内发生的，行贿外国公职人员的行为的司法管辖权限。

2. 如果缔约方对其本国国民在境外犯罪有权进行法律起诉，则也应按照同样的法律准则，采取可能是必要的措施，设定起诉其本国国民在境外行贿外国公职人员的相应的司法管辖权限。

3. 如果不止一个缔约方对本公约中所述的犯罪指控事件有司法管辖权，则应由一国提出请求，当事人的各缔约方协商确定最适切的司法起诉管辖权限。

4. 缔约方应复审其现行的司法管辖依据在反对行贿外国公职人员的法律适用方面是否具有效力，否则应采取补救措施。

Article 4: Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

第五条：执行

行贿外国公职人员案件的侦查与检控应当符合各缔约方适用的法规和法理，不得受国家经济利益，可能影响与另一国关系或相关的自然人或法人的身份等因素的影响。

Article 5: Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

第六条：诉讼时效法规

适用于行贿外国公职人员罪的任何诉讼时效法规都应当酌留出足够的时间，以用于犯罪案件的侦查与检控。

Article 6: Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

第七条：洗钱

如果缔约方已经把行贿本国公职人员的行为定性为犯罪，以便适用反洗钱法律，则也应当按照同样的条件把行贿外国公职人员的行为定性为犯罪并适用反洗钱法律，而无论这种行贿行为在什么地方发生。

Article 7: Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

第八条：会计制度

1. 为了有效地打击行贿外国公职人员的犯罪行为，缔约方应当在其会计帐簿管理，财务状况披露，会计审计标准等有关法律法规框架范围内采取必要的措施禁止应当遵守这些法律法规的公司另设帐外帐户，进行帐外或性质不明的交易活动，入帐本未发生的支出，入帐去向不明的债务和使用虚假帐簿，从事行贿外国公职人员或隐瞒行贿行为。

2. 缔约方应当对公司在会计帐簿，会计记录，会计帐目和财务报表中的不作为行为和弄虚作假行为给予行之有效的量刑适度的民事，行政或刑事处罚，以示劝戒。

Article 8: Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

第九条：公认的法律援助

1. 缔约方应依照其法律，相关条约与协议尽最大可能地、及时地向另一方提供有效的法律援助，以便于其能够在本公约规定的范围内就犯罪案件对（涉嫌犯罪的）法人进行刑事侦查、刑事诉讼以及在本公约规定的范围内对（涉嫌犯罪的）法人进行非刑事诉讼。被请求方应当毫不迟延地把有助于办理请示援助之事务的任何辅助信息或文件资料通报给请求方，如果有要求的话，还应当把请求援助之事务的情形及后果也一并通报。

Article 9: Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

2. 假若缔约一方以构成双重犯罪作为提供法律互助的先决条件，如果涉及寻求法律援助的犯罪案件属于本公约适用范围内，则应当视为构成了双重犯罪。

3. 任何缔约方不得以银行保密为由拒绝对本公约适应范围内所涉及的犯罪事件提供司法互助。

2.

Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

3.

A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

第十条：引渡

1. 行贿外国公职人员应当作为足以使犯者被引渡的罪行，并纳入到缔约各方的法律及缔约各方间达成的引渡条约之中。

2. 假若缔约一方以是否缔结了引渡条约作为引渡罪犯的先决条件，在收到与其未缔约引渡条约其它缔约方的引渡请求时，则可以考虑将本公约作为涉及行贿外国公职人员犯罪案件的罪犯引渡的法律依据。

3. 任一缔约方都必须采取一切必要的措施以确保为审理行贿外国公职人员的犯罪案件而能够引渡其公民或起诉其公民。如果缔约方仅仅因为行贿外国公职人员的嫌犯是其公民而拒绝将其引渡的请求，则也应当将此案提交其本国的主管机关起诉办理。

4. 对于行贿外国公职人员案件中的引渡行为要以各缔约方本国法律，适用条约和协议中设定的条件为准据。假若一缔约方以是否构成双重犯罪作为引渡罪犯的先决条件，如果涉及寻求引渡罪犯的犯罪案件属于本公约第一条适用范围内，则应当视为此先决条件满足。

Article 10: Extradition

1.

Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.

2.

If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.

3.

Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4.

Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

第十一条：负责机关

为了处理本公约第四条第三段中关于司法管辖协商事宜，第九条中关于法律互助事宜和第十条关于引渡罪犯事宜，每一缔约方都必须将其负责提出和应答请求的机关通报经济合作与发展组织总干事，在不影响缔约方间的其它协议的情况下，该负责机关应当行使该缔约方处理相关事宜的联络途径的功能。

Article 11: Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

第十二条：监视与后续行动

缔约各方在实施有计划进行的后续行动规划中应当相互合作，以便于监视和促进本公约的全面实施。除非缔约各方一致同意另有决定外，实施这种后续行动规划应当在经济合作与发展组织国际商务交易活动反行贿工作组的框架范围内，并且根据其职权范围，或者这些职责的任何接任组织的框架范围或职权范围内进行。缔约方按照适应于其所属机构的规则承担实施这种后续行动规划的费用开支。

Article 12: Monitoring and Follow-up

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

第十三条：签字与加盟

1. 本公约生效以前将面向经济合作与发展组织成员国及受邀成为该组织国际商务交易活动反行贿工作组全额参与人的非成员国开放，供其签字加入。

2. 本公约生效后，凡经济合作与发展组织中未签署本公约的成员国，已成为该组织国际商务交易活动反行贿工作组全额参与人而未签署本公约的非成员国及其职责的接任国均可加入本公约。对于这类非签署国，本公约在其各自交存加盟文件后第六十天开始生效。

Article 13: Signature and Accession

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.

2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

<p style="text-align: center;">第十四条：批准与保管机关</p> <p>1. 本公约需经各签署方依据其各自的法律接受，认可或批准后方可有效。</p> <p>2. 接受，认可，批准或加盟文件须交存于经济合作与发展组织总干事，其行使本公约的保管机关的职能。</p>	<p style="text-align: center;">Article 14: Ratification and Depositary</p> <p>1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.</p> <p>2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.</p>
<p style="text-align: center;">第十五条：生效</p> <p>1. 如果 DAFFE/IME/BR(97)18/FINAL 文件（见附件）中列出的出口份额前十名的国家中有五个国家已经交存了其接受，认可或批准文件，而且这五个国家合并出口额不少于前十个出口国出口总额的百分之六十，则在这五个国家批准文件交存后第六十天，本公约开始生效；对于在此公约生效以后交存批准文件的每个签字国，本公约将在其交存了批准文件后第六十日开始对其生效。</p> <p>2. 如果 1998 年 12 月 31 日过后，本公约因未能满足上述第一段之规定而开始生效，则任何已经交存了接受，认可或批准文件的签字国均可以以书面形式向保管机关声明其同意本公约按照本第二段的规定开始生效，在至少两个签字国已经交存了此项声明书后第六十天，本公约开始对此签字国生效。对于在此公约生效以后交存声明书的每个签字国，本公约将在其交存了声明书后第六十日开始对其生效。</p>	<p style="text-align: center;">Article 15: Entry into Force</p> <p>1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in DAFFE/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.</p> <p>2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.</p>

第十六条：修改

任何缔约方均可以提议修改本公约。修改建议应当提交给保管机关，由其至少提前60天传达给其它的缔约各方，然后再召集缔约各方开会考虑该修改建议。经所有缔约方一致同意而采纳的或者经所有缔约方一致同意可能选定的其它方式而采纳的修改应当在经所有缔约方签署的接受，认可或批准文件交存后六十天开始生效，或者按照所有缔约方在采纳该修改意见时可能规定的其它条件生效。

Article 16: Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

第十七条：退出公约

任一缔约方均可书面通知保管机关退出本公约。在收到该通知一年后，退出本公约才开始有效。退出本公约后，退出公约方就其退出公约发生效力之日以前发生的而此生效日过后仍未完结的所有援助或引渡请求仍应当与其它缔约各方继续合作。

Article 17: Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

附件

经济合作与发展组织出口统计

经合组织出口统计			
	1990-1996	1990-1996	1990-1996
	百万美元	%	%
		经合组织出口总额	前十国出口额
美国	287 118	15,9%	19,7%
德国	254 746	14,1%	17,5%
日本	212 665	11,8%	14,6%
法国	138 471	7,7%	9,5%
英国	121 258	6,7%	8,3%
意大利	112 449	6,2%	7,7%
加拿大	91 215	5,1%	6,3%
韩国 (1)	81 364	4,5%	5,6%
荷兰	81 264	4,5%	5,6%
比利时卢森堡	78 598	4,4%	5,4%
前十国总额	1 459 148	81,0%	100%
西班牙	42 469	2,4%	
瑞士	40 395	2,2%	
瑞典	36 710	2,0%	
墨西哥 (1)	34 233	1,9%	
澳大利亚	27 194	1,5%	
丹麦	24 145	1,3%	
奥地利*	22 432	1,2%	
挪威	21 666	1,2%	
爱尔兰	19 217	1,1%	
芬兰	17 296	1,0%	
波兰 (1)**	12 652	0,7%	
葡萄牙	10 801	0,6%	
土耳其*	8 027	0,4%	
匈牙利**	6 795	0,4%	
新西兰	6 663	0,4%	
捷克***	6 263	0,3%	
希腊*	4 606	0,3%	
冰岛	949	0,1%	
经合组织总额	1 801 661	100%	

注：* 1990-1995；** 1991-1996；*** 1993-1996

数据来源：经济合作与发展组织，(1) 国际货币基金组织

关于比利时和卢森堡：比利时和卢森堡贸易统计数据只有两个国家的合并数据。就本公约第十五条第一段而言，如果比利时或卢森堡两国中任一国交存了其接受，认可或批准文件，或者如果比利时和卢森堡两国都交存了其接受，认可或批准文件，就应当认为出口份额前十位的国家中，有一国已经交存了批准文件，并且两国合并出口额将算在前十个出口国出口总额的百分之六十之内，以期满足本条规定的本公约生效之要求。

ANNEX
STATISTICS ON OECD EXPORTS

OECD EXPORTS			
	1990-1996	1990-1996	1990-1996
	US\$ million	%	%
		of Total OECD	of 10 largest
United States	287 118	15,9%	19,7%
Germany	254 746	14,1%	17,5%
Japan	212 665	11,8%	14,6%
France	138 471	7,7%	9,5%
United Kingdom	121 258	6,7%	8,3%
Italy	112 449	6,2%	7,7%
Canada	91 215	5,1%	6,3%
Korea (1)	81 364	4,5%	5,6%
Netherlands	81 264	4,5%	5,6%
Belgium-Luxembourg	78 598	4,4%	5,4%
Total 10 largest	1 459 148	81,0%	100%
Spain	42 469	2,4%	
Switzerland	40 395	2,2%	
Sweden	36 710	2,0%	
Mexico (1)	34 233	1,9%	
Australia	27 194	1,5%	
Denmark	24 145	1,3%	
Austria*	22 432	1,2%	
Norway	21 666	1,2%	
Ireland	19 217	1,1%	
Finland	17 296	1,0%	
Poland (1) **	12 652	0,7%	
Portugal	10 801	0,6%	
Turkey *	8 027	0,4%	
Hungary **	6 795	0,4%	
New Zealand	6 663	0,4%	
Czech Republic ***	6 263	0,3%	
Greece *	4 606	0,3%	
Iceland	949	0,1%	
Total OECD	1 801 661	100%	

Notes: * 1990-1995; ** 1991-1996; *** 1993-1996

Source: OECD, (1) IMF

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a

combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 percent of combined total exports of those ten countries, which is required for entry into force under this provision.

关于《国际商务交易活动中反对行贿赂外国公职人员公约》的注释

在 1997 年 11 月 21 日的谈判会上通过

COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

Adopted by the Negotiating Conference on 21 November 1997

总则

1. 本公约处理某些国家法律称之为“主动腐败”或“主动行贿”的问题，意指承诺给予或事实上给予贿赂的人所犯的罪行，与“消极受贿”形成对比，以区别接受贿赂的官员所犯的罪行。本公约并不简单化地使用“主动行贿”这一术语，以免非专业读者误解，认为行贿行为是主动行为而受贿者仅仅是被动无辜的受害者。而实际上，多数情况下，受贿者已经先有意地诱导甚或强迫行贿者向其行贿，从这个角度来看，受贿者的腐败行为要比行贿者更具有主动性。
2. 本公约力求确保缔约各方在制裁行贿外国公职人员的措施方面取得同等的效力，而并不要求所采取的措施完全相同或者缔约方改变其法律体系的基本原则。

General:

1. This Convention deals with what, in the law of some countries, is called “active corruption” or “active bribery”, meaning the offence committed by the person who promises or gives the bribe, as contrasted with “passive bribery”, the offence committed by the official who receives the bribe. The Convention does not utilise the term “active bribery” simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.
2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party’s legal system.

第一条：行贿外国公职人员罪

关于第一段：

3. 第一条确立了缔约各方应达到的标准，但并不要求缔约各方在依照其本国法律界定此种犯罪时一字不差地使用本条中所用的专业术语。如果判定某人犯罪，除了该罪是本段中列明的罪行而构成定罪的要害需要证实外，并不需要证实构成定罪的要害，任一缔约方都可以采用不同的途径来履行其职责。例如，一部旨在广泛地禁止行贿代理人的法令，即令没有专门地处理行贿外国公职人员的犯罪，和一部专门处理此种犯罪的法令，

Article 1: The Offence of Bribery of Foreign Public Officials

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments “to induce a breach of the official’s

两者可能都符合本条的标准。同样，只要人们公认每一个公职人员都有义务公正地进行判断或裁量，一部使用了“提供钱款意图诱使官员不履行职责”这样的词语来界定此种犯罪的法令，可能也满足这一标准，而且这种界定是不需要该特定官员本国法律予以证明的“自行完备式”界定。

4. 无论涉嫌的公司是否是最合格的投标公司，也就是说，即令不行贿本来也应当被授予相应的业务的公司，为了获得或保有业务或其它不当利益而行贿就是第一段所述意义范围内的犯罪行为。

5. “其它不当利益”是指涉嫌的公司显然无资格获得的利益。例如，对于一个未达到法定标准的工厂而言，（非法取得的）经营许可证就是不当利益。

6. 无论行贿的提议或承诺是否做出，也不管金钱或其它利益是否是为受贿者本人的利益或其它任何自然人或法人的利益而给予的，第一段中所述的行为均是一种犯罪行为。

7. 无论提供的贿金价值高低、后果如何、当地风俗习惯如何看待这种行为、当地政府机关如何容忍这种行为、或者诡称为了获得或保有业务或其它不当利益提供贿金多么必要，凡此等等，也都是犯罪。

8. 但是，如果外国公职人员所属国家的成文法律法规，包括判例法，允许或者要求给予这种便利，则提供这种便利不是犯罪。

9. 提供“打通关节”的少量金钱行为未形成第一段意义范围中所涵盖的“旨在获得或保有业务或其它不当利益”的提供贿金行为，因此，也就不是犯罪。这种支付“打通关节”小钱的行为在某些国家是为了促使公职官员履行其职责—如发放许可证或执照，而在别国则通常是非法行为。这些国家可能会也应该采取诸如支持良好治理行动方案之类的措

duty” could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an “autonomous” definition not requiring proof of the law of the particular official’s country.

4. It is an offence within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.

5. “Other improper advantage” refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

6. The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person’s own behalf or on behalf of any other natural person or legal entity.

7. It is also an offence irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law.

9. Small “facilitation” payments do not constitute payments made “to obtain or retain business or other improper advantage” within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a

施处理这种腐蚀性行为，但是，为这种行为定罪好象不是一种具有实际意义或行之有效的补救办法。

10.

根据某些国家的法律制度，向任何有望成为外国公职人员的人承诺给予或事实上给予便利都属于第一条第一段或第二段中所述的犯罪范畴。而许多国家的法律制度却从严格的法律实质上考虑认为这种犯罪与本公约中所述的犯罪截然不同。然而，缔约各方却有着共同的利害关系和通过进一步合作解决这个问题的一致意愿。

关于第二段：

11.

第二段中规定的犯罪按各国法律制度中的通常意义予以理解。因此，如果授意行贿、煽动行贿或列明的其它行为没有引起进一步的行动，而按照缔约方本国的法律制度这些行为本身也不该受到惩罚，则也不应当要求该缔约方使关于行贿外国公职人员的行为应受惩罚。

关于第四段：

12.

“公共职能”包括身受外国国家委派，为了公共利益而从事的任何活动，如完成一项受外国国家委托的，与公共采购相关的任务。

13. “政府机构”是指依照公法而成立的，为了公共利益从事特定任务的实体。

14.

“国营企业”是指政府可以直接或间接地对其行使统治权的企业，而不管其以什么样的法律形式出现。特别应该说明的是，如果政府拥有一个企业半数以上的实收资本金（即处于控股地位），或者控制企业半数以上的公司股票表决权，抑或能够委任企业行

practical or effective complementary action.

10.

Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11.

The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

12.

“Public function” includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13.

A “public agency” is an entity constituted under public law to carry out specific tasks in the public interest.

14.

A “public enterprise” is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or

政管理机构或监事会半数以上的成员，这种
企业正是本处所说的国营企业。 | supervisory board.

<p>15. 除非不享有优惠的补贴或其它特权，在相关市场按通常意义的商业规则运作，即按照实质上与私营企业等同的原则运作，否则，国营企业的官员行为应当视作是履行公共职能。</p> <p>16. 特殊情况下，政府机构在实际上可以由形式上未经委任为公职人员的人执掌，如在某些一党制国家中的政党官员。这种人由于事实上行使着公共职能，按照某些国家的法律原则，可以视为外国公职人员。</p> <p>17. “公共国际组织”包括由国家，政府或其它公共国际组织而形成的任何国际组织，而不管其组织形式和权限如何，包括地区经济一体化组织，例如象欧洲共同体这样的组织。</p> <p>18. “外国国家”并不仅限于指“国家”，但也包括任何有组织的外国地区或实体，比如，自治领土或独立关税地区。</p> <p>19. 第 4.C 段的定义中已经预期到的一种行贿行为就是公司主管人员向政府高级官员行贿，以期该官员利用其职位越权使其它其它官员将某合同授予该公司。</p>	<p>15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.</p> <p>16. In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their <i>de facto</i> performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.</p> <p>17. “Public international organisation” includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.</p> <p>18. “Foreign country” is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.</p> <p>19. One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office -- though acting outside his competence -- to make another official award a contract to that company.</p>
<p style="text-align: center;">第二条：法人应负的责任</p> <p>20. 根据缔约方的法律制度，如果刑事责任不适用于法人，就不应当要求该缔约方设立这项刑事责任。</p>	<p style="text-align: center;">Article 2: Responsibility of Legal Persons</p> <p>20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.</p>

<p style="text-align: center;">第三条：制裁</p> <p style="text-align: center;">关于第三段：</p> <p>21. 贿赂的“收益”是指行贿人从凭借行贿行为而获得或保有的交易活动或其它不当的便利中而取得的得益或其它利益。</p> <p>22. “没收”这个术语包括没收物（如果适用的话），含义是指根据法院或其它主管机关的命令永久地剥夺财产。本段不影响受害方的权利。</p> <p>23. 第三段不排除对经济制裁确定适量的限额。</p> <p style="text-align: center;">关于第四段：</p> <p>24. 除了处以非刑事性的罚金以外，法人因实施行贿外国公职人员的行为可以给予的民事或行政处罚还包括剥夺享受公利或援助的权利、临时或永久地取消参与公共采购或其它商业活动的资格、强制给予司法监督或下达停业清算司法令。</p>	<p style="text-align: center;">Article 3: Sanctions</p> <p style="text-align: center;">Re paragraph 3:</p> <p>21. The “proceeds” of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.</p> <p>22. The term “confiscation” includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.</p> <p>23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.</p> <p style="text-align: center;">Re paragraph 4:</p> <p>24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.</p>
<p style="text-align: center;">第四条：司法管辖权限</p> <p style="text-align: center;">关于第一段：</p> <p>25. 应当从广义的角度解释司法管辖权限的地域依据，以便在确定行贿行为的司法管辖权限时不必需要广泛的地理关联性。</p> <p style="text-align: center;">关于第二段：</p> <p>26. 应当依照每个缔约方法律制度的一般法律原则和条件确立司法的国籍管辖权限。这些通则处理诸如双重犯罪之类的事务。然而，</p>	<p style="text-align: center;">Article 4: Jurisdiction</p> <p style="text-align: center;">Re paragraph 1:</p> <p>25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.</p> <p style="text-align: center;">Re paragraph 2:</p> <p>26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the</p>

如果某种行为在其发生地属于违法行为，那么即令是以该行为发生地所适应的刑法以外的其它刑法作为准据，则这种行为构成双重犯罪的条件也应当视为已经具备了。对于司法的国籍管辖权限仅适用于某些种类的犯罪的国家，援引的“原则”包括作出这种援引时所依据的原则。

requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to “principles” includes the principles upon which such selection is based.

第五条：执行

27.

第五条承认各国法律自由酌处权制度的根本性质，但同时也承认为了保护司法的独立性，行使这种自由酌处权必须以专业动机为基础，而不应当受制于政治方面因素的不当影响。第五条的规定在 1997 年发布的字第 C(97)123/FINAL 号《经济合作与发展组织关于国际商务交易活动中打击行贿行为的修订建议案》（以下简称：《经济合作与发展组织 1997 年建议案》）附件第六段中得到了补充完善。该段特别建议主管机关应当严肃侦查行贿外国公职人员的控诉案件，各国国家政府应当安排足够的资源以便能行之有效地追究此类行贿行为。缔约各方已经接受了这个建议案，包括这个建议案的监视与后续行动计划安排。

Article 5: Enforcement

27.

Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, “1997 OECD Recommendation”), which recommends, inter alia, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

第七条：洗钱

28.

在第七条中，“行贿外国公职人员”是从广义的角度予以界定的，这样，如果缔约方已经把无论是主动地还是被动地行贿本国公职人员的行为定性为不折不扣的犯罪，则也就可以把行贿外国公职人员的行为定性为不折不扣的犯罪，以便按照同样的条件适用反洗钱法律。如果缔约方仅把被动地行贿本国公职人员定性为不折不扣的犯罪，以便适用反洗钱法律，则本条要求应对合法化贿资的洗钱行为适用反洗钱法律予以惩治。

Article 7: Money Laundering

28.

In Article 7, “bribery of its own public official” is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

第八条：会计制度

29.

第八条与《经济合作与发展组织 1997 年建议案》第 V 节相关。所有缔约方都将接受《经济合作与发展组织 1997 年建议案》，并且《经济合作与发展组织 1997 年建议案》须服从于经济合作与发展组织国际商务活动反行贿工作组的后续行动。本建议案第 V 段中包括了一系列有关会计标准，独立外部审计和公司内部自控等方面的建议。实施这些建议对于提高国际商务反行贿活动的综合效率具有重要的意义。但是，缔约各方实施本公约的一个直接后果就是根据本公约，尤其是本公约第三条和第八条，的规定被要求公布财务报表，披露重要的或有债务的公司就需要把假如判定公司或其代理犯有行贿罪而可能引起的全部的潜在债务以及其它损失都考虑在内。这对审计人员要履行职责，重视行贿外国公职人员的迹象也有暗示意义。此外，第八条中所指的会计犯罪一般都在公司的驻在地国境内发生，而行贿犯罪行为的本身可能在另一国家境内发生，这样本公约的适用范围就能做到行之有效，堵住了法律适用上的漏洞。

Article 8: Accounting

29.

Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

第九条：法律互助

30.

缔约各方通过随附于《经济合作与发展组织 1997 年建议案》的《公认通则》第八段已经同意要探索和采取措施，提高法律互助的功效。

关于第一段：

31.

根据本公约第九条第一段的框架规定，各缔约方一经请求应当帮助或鼓励同意协助案件侦查或参与案件诉讼的人，包括在押的被拘留人，到场出庭或可以随叫随到。缔约

Article 9: Mutual Legal Assistance

30.

Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

31.

Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily

各方应当采取相应的措施，在适当的案件中可以将此种受押人临时地移交给请求传唤此人的缔约方，并将此人在请求传唤此人的缔约方处羁押时间记入到被移交人在受请求方处的服刑期限之内。有意采用这种方法的缔约各方还应当采取相应的措施，能够以请求方的身份羁留和遣返该被移交的在押人而不必需要引渡程序。

关于第二段：

32.

第二段解决双重犯罪这一概念的相同标准的问题。缔约各方尽管有各不相同的法令，有的仅有广泛地禁止行贿代理人的法令，有的还有专门针对行贿外国公职人员的犯罪的法令，对于犯罪行为属于本公约规定的犯罪适用范围内的案件，应当能够全面地合作。

such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32.

Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

第十条：引渡

关于第二段：

33. 为处理一类或多类属于本公约适用范围内的案件，如果必须要有引渡条约，缔约方可以把本公约作为引渡的法律依据。例如，在某类案件中，引渡本国公民需要引渡条约而引渡非本国公民却不需要引渡条约，该国就可以把本公约作为引渡其公民的法律依据。

Article 10: Extradition

Re paragraph 2:

33.

A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

第十二条：监视与后续行动

34

目前，经济合作与发展组织反行贿工作组在监视和后续行动方面的职权范围在《经济合作与发展组织 1997 年建议书》第 VIII 部分中载明，做出如下规定：

- i) 接受所有参与国提交的情况通报及其它信息；
- ii) 定期评审各参与国实施上述建议书所采

Article 12: Monitoring and Follow-up

34.

The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

- i) receipt of notifications and other information submitted to it by the [participating] countries;
- ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following

取的措施，必要时给予建议，以协助参与国实施。这些评审活动以如下配套方法为基础开展：

-- 自评方法：根据调查表把各个参与国的反应作为评估建议实施情况的基础；

-- 互评方法：根据报告反行贿工作组依次评审每个参与国。这些报告客观地评估了各个参与国在实施本建议案方面的进展情况；

iii) 审查与国际商务交易活动行贿行为有关的特定问题；

...

v) 定期地向公众发布其工作、活动及建议案实施情况等信息。

35.

经济合作与发展组织成员国的监视与后续行动的成本按照经济合作与发展组织通常的预算程序处理，而对于非成员国，现行规则建立了一个成本分摊的等效体制，这种等效体制参见字第 C(96)223/FINAL 号《理事会关于经济合作与发展组织附属机构常任观察国和全额参与非成员的费用决议》。

36.

本公约中任何方面的后续行动，凡不属于在《经济合作与发展组织 1997 年建议案》或经济合作与发展组织反行贿工作组所有参与国批准的任何其它文件中规定的后续行为的，将由本公约的各缔约方实施；如果属于，则由其它对应文件的各参与方实施。

complementary systems:

-- a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

-- a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

...

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

35.

The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

36.

The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

第十三条：签字与加盟

37.

本公约将面向成为经济合作与发展组织国际商务交易活动反行贿工作组全额参与人的非成员国开放，供其签字加入。鼓励该工作组的非成员国完全参与，并按从简的程序予以安排。由于全额参与该工作组的这一要

Article 14: Signature and Accession

37.

The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery

求是从本公约与国际商务活动中其它方式反行贿斗争的相互关系中衍生而来的，因此，希望参与本公约中所述的反贿赂斗争的国家不应当将这一要求视为一个障碍。经济合作与发展组织理事会已呼吁非成员国遵守《经济合作与发展组织 1997 年建议案》，参与任何常规例行性的后续活动或实施机构，即工作组。关于非成员国全额参与该工作组的现程序可以参见字第 C(96)64/REV1/FINAL 号的《经合组织理事会关于非成员国经济体参与本组织附属机构工作的决议》。除了要接受《理事会关于打击行贿修订建议案》外，全额参与国还要接受 1996 年 4 月 11 日通过的字第 C(96)27/FINAL 号《关于行贿外国公职人员课税减扣适用性的建议》。

in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

理事会关于在国际商务交易活动中反行贿公约的修订建议案

1997年5月23日由理事会通过

REVISED RECOMMENDATION OF THE COUNCIL ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

Adopted by the Council on 23 May 1997

理事会：

参照 1960 年 12 月 14 日的《经济合作与发展组织公约》第三条和第五条第 A 款和第 B 款之规定；

鉴于行贿行为已是国际商业交易活动中，包括贸易与投资活动中，普遍存在的现象，引起了道德和政治方面的严重忧虑，破坏了良好的管理与经济的发展，扭曲了国际竞争条件；

鉴于所有国家在国际商业交易活动中都负有反行贿责任；

鉴于企业应当按照《经济合作与发展组织跨国企业指导原则》之规定避免向行贿公务员和公职人员；

鉴于下述文件的贯彻实施中所取得的成就：1994 年 5 月 27 日通过的字第 C(94)75/FINAL 号《理事会关于在国际商务交易活动中反行贿的修订建议案》，1996 年 4 月 11 日通过的字第 C(96)27/FINAL 号《关于行贿外国公职人员课税减扣适用性的建议》以及 1996 年 5 月 7 日在开发援助委员会高层会议上批准的《关于双边援助采购反腐败计划的建议》；

采纳了近年来取得的在打击行贿公职人员活动中新成果，包括联合国，欧洲理事会，欧盟和美洲国家组织等组织的反行贿活动中取得的新成果，以进一步促进国际间在商务交易活动中反行贿方面的了解与合作；

THE COUNCIL,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Considering that enterprises should refrain from bribery of public servants and holders of public office, as stated in the OECD Guidelines for Multinational Enterprises;

Considering the progress which has been made in the implementation of the initial Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994, C(94)75/FINAL and the related Recommendation on the tax deductibility of bribes of foreign public officials adopted on 11 April 1996, C(96)27/FINAL; as well as the Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement, endorsed by the High Level Meeting of the Development Assistance Committee on 7 May 1996;

Welcoming other recent developments which further advance international understanding and co-operation regarding bribery in business transactions, including actions of the United Nations, the Council of Europe, the European Union and the Organisation of American States;

参照在 1996 年 5 月召开的部长级理事会会议上所作出的承诺：高效协调地认定行贿外国公职人员为犯罪行为；

特别指出依据附件中载明的《公认通则》而制订的国际公约是迅速实现认定行贿外国公职人员为犯罪行为的适宜手段；

鉴于为贯彻执行《1994 年建议案》在拟采用的的各项措施方面所达成的共识，尤其是有关如下方面的共识：用于促进将行贿外国公职人员定性为犯罪的拟采用的形式及国际手段、行贿外国公职人员贿资课税减扣适用性、会计标准、外部审计与公司内部自控、公共采购法规与条例；

承认要在这一领域取得成果，不仅需要各个国家做出努力，而且也需要多边合作，监视及后续行动；

Having regard to the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalise the bribery of foreign public officials in an effective and co-ordinated manner;

Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalisation rapidly.

Considering the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalisation of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

Recognising that achieving progress in this field requires not only efforts by individual countries but multilateral co-operation, monitoring and follow-up;

总则

I. 建议成员国采取有效措施遏止、预防和打击国际商务交易活动中行贿外国公职人员的行为。

II. 建议第一个成员国都对下述领域进行复查，并根据其司法原理和其它基本法律原理采取具体的有实效的措施，实现这一目标：

- i) 刑法及刑法的适用，依据本公约第 III 部分和本建议案附件进行复查；
- ii) 税收法律、法规和习惯做法，以消除间接支持行贿的因素，依据本公约第 IV 部分进行复查；
- iii) 公司与商业会计、外部审计和内部自控规定与习惯做法，依据本公约第 V 部分进行复查；

General:

I. RECOMMENDS that Member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

II. RECOMMENDS that each Member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:

- i) criminal laws and their application, in accordance with section III and the Annex to this Recommendation;
- ii) tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;
- iii) company and business accounting, external audit and internal control requirements and practices, in accordance with section V;

<p>iv) 银行业、金融及其它相关规定，以确保保存有完备的帐务记录，供审验调查；</p> <p>v) 政府补贴、许可证、政府采购合同、其它方面的公共有利条件，以保证在适用的情况下并按照本公约第 VI 部分的规定可以拒绝给予这些有利条件，作为对采购合同和援助采购活动中行贿行为的制裁；</p> <p>vi) 民事、商业和行政管理方面的法律法规，以确保此类的行贿行为不合法；</p> <p>vii) 案件侦查及其它法律程序方面的国际合作，依据本公约第 VII 部分进行复查。</p>	<p>iv) banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation;</p> <p>v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement;</p> <p>vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;</p> <p>vii) international co-operation in investigations and other legal proceedings, in accordance with section VII.</p>
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<p style="text-align: center;">行贿外国公职人员的定罪</p> <p>III.</p> <p>建议成员国根据附件中载明的《公认通则》在 1998 年 4 月 1 日以前向其立法机关</p> <p>提出建议案，并力求于 1998 年年底以前通过建议案，采用协调有效的途径将行贿外国公职人员定性为犯罪行为。</p> <p>为此特决定针对一个根据《公认通则》而制订的、将行贿行为定性为犯罪的国际性公约立即开始协商，以期 12 个月后该国际性公约开始生效。《公认通则》在 1997 年年底以前开放供签署。</p>	<p style="text-align: center;">Criminalisation of Bribery of Foreign Public Officials:</p> <p>III.</p> <p>RECOMMENDS that Member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.</p> <p>DECIDES, to this end, to open negotiations promptly on an international convention to criminalise bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter.</p>
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<p style="text-align: center;">课税减扣适用性</p> <p>IV. 敦促各成员立即贯彻执行《1996 建议案》，该建议要求：“尚未禁止行贿外国公职人员贿资课税减扣做法的成员国重审这种做法以摒弃这种课税减扣做法。把行贿外国公职人员视为非法行为这个趋势可能会对这项行动起到促进作用。”</p>	<p style="text-align: center;">Tax Deductibility:</p> <p>IV.</p> <p>URGES the prompt implementation by Member countries of the 1996 Recommendation which reads as follows: “that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal.”</p>
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会计标准、外部审计和公司内部自控

V. **建议** 成员国采取必要的措施, 确保与会计标准, 外部审计和公司内部自控有关的法律、法规和惯例符合下述原则, 并得到充分地执行, 以预防和遏止国际商务活动中行贿外国公职人员的犯罪行为。

A. 恰当的会计标准

- i) 成员国应当要求公司对公司收支的所有款项保留完备的记载, 明确产生收支的事务, 应当禁止公司从事帐外交易或者另设帐外帐;
- ii) 成员国应当要求公司在其财务报表中披露所有的重大的或有负债;
- iii) 成员国应当对会计业务中的不作为, 弄虚作假和欺诈行为予以充分地制裁。

B. 独立的外部审计

- i) 成员国应当考虑提交外部审计的现行规定是否适当;
- ii) 成员国和专业协会应当保持恰当的标准以确保外部审计员的独立性, 以便其可以对公司帐务, 财务报务和内部控制作出客观的评价;
- iii) 成员国应当要求审计员如果发现了可能存在的非法行贿行为的迹象, 应当向公司董事会汇报, 必要时向公司的监控机构汇报;
- iv) 成员国应当考虑要求发现了可能存在的非法行贿行为的迹象的审计员向国家主管机关汇报。

Accounting Requirements, External Audit and Internal Company Controls

V.

RECOMMENDS that Member countries take the steps necessary so that laws, rules and practices with respect to accounting requirements, external audit and internal company controls are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business.

A. Adequate accounting requirements

- i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.
- ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.
- iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B. Independent External Audit

- i) Member countries should consider whether requirements to submit to external audit are adequate.
- ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.
- iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.
- iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

<p>C. 公司内部自控</p> <p>i) 成员国应当鼓励采用和发展适当的公司内部自控做法, 包括行为准则;</p> <p>ii) 成员国应当鼓励公司管理层在其年度报告中对其内部自控机制做出声明, 包括那些有助于预防行贿行为的自控机制;</p> <p>iii) 成员国应当鼓励组建独立于公司管理机构的监控机构, 如董事会或监事会的审计委员会;</p> <p>iv) 成员国应当鼓励公司为面临上级指示或压力而不愿意违背专业准则或职业道德规范的人提供交流途径和保护途径。</p>	<p>C. Internal company controls</p> <p>i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.</p> <p>ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.</p> <p>iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.</p> <p>iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.</p>
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<p style="text-align: center;">公共采购</p> <p>VI. 建议:</p> <p>i) 成员国支持世界贸易组织的各项努力活动, 贯彻执行增加政府采购透明度的协议;</p> <p>ii) 成员国的法律法规应当允许相关机关能够暂停经认定已违反该成员国本国法律行贿外国公职人员的企业参加公共合同的竞争, 直至成员国可以对经认定已行贿本国公职人员的企业给予采购制裁, 这种制裁对于行贿外国公职人员的案件也应当同样适用;</p>	<p style="text-align: center;">Public Procurement</p> <p>V. RECOMMENDS:</p> <p>i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;</p> <p>ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that Member's national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such</p>
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¹ 究竟是依据刑事定罪、公诉还是行政程序对贿赂行为予以定性, 各成员国对制裁行贿本国官员的行为所采取的方法各不相同, 但任何案件都要以实据为依据。

² 本段概述了开发援助委员会的建议, 该建议仅向开发援助委员会的成员提出, 旨在针对经济合作与发展组织的所有成员国, 最后也将针对拥护该建议的非成员国。

³ Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.

⁴ This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD Members and eventually non-member countries which adhere to the Recommendation.

<p>1</p> <p>iii) 根据《发展援助委员会建议》，成员国应当要求在双边援助基金资助的采购中有反腐败规定，促进反腐败规定在国际开发机构中不折不扣地得到贯彻执行，在所有的开发合作活动中与开发合作伙伴密切合作，打击腐败。²</p>	<p>sanctions should be applied equally in case of bribery of foreign public officials.³</p> <p>iii) In accordance with the Recommendation of the Development Assistance Committee, Member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.⁴</p>
<p style="text-align: center;">国际合作</p> <p>VII.</p> <p>建议为了打击国际商务交易活动中的行贿行为，各成员国根据其司法原理和其它基本法律原理，采取如下行动：</p> <p>i) 在具体的行贿案件侦查或其它法律程序中，与其它国家的相关机关协商或采用信息共享（主动地或应他方要求地），提供证据和引渡嫌犯等手段与其它国家合作；</p> <p>ii) 充分利用现有的国际间法律互助协议或协定，必要时，缔结新的协议或协定；</p> <p>iii) 确保各国法律能够为这种合作提供足够的依据，尤其是为根据附件第八段规定而开展的合作提供足够的依据。</p>	<p style="text-align: center;">International Co-operation</p> <p>VII.</p> <p>RECOMMENDS that Member countries, in order to combat bribery in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:</p> <p>i) consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;</p> <p>ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;</p> <p>iii) ensure that their national laws afford an adequate basis for this co-operation and, in particular, in accordance with paragraph 8 of the Annex.</p>
<p style="text-align: center;">后续行动及常规性的活动方案</p> <p>VIII.</p> <p>通过其国际商务交易活动反行贿工作组责令国际投资与跨国企业委员会贯彻执行有计划进行的后续行动规划，监视和推动本建议案的全面实施，必要时与财政事务委员会，发展援助委员会及经济合作与发展组织的其它机构合作。本后续行动主要包括：</p> <p>i) 接受所有成员国提交的情况通报及其它信息；</p> <p>ii) 定期评审各成员国实施上述建议案所采</p>	<p style="text-align: center;">Follow-up and institutional arrangements</p> <p>VIII.</p> <p>INSTRUCTS the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:</p> <p>i) receipt of notifications and other information submitted to it by the Member countries;</p> <p>ii) regular reviews of steps taken by Member countries to implement the Recommendation and to make</p>

取的措施，必要时给予建议，以协助成员国实施。这些评审活动以如下配套方法为基础开展：

-- 自评方法：根据调查表把各个成员国的反应作为评估建议实施情况的基础。

-- 互评方法：根据报告反行贿工作组依次评审每个成员国。这些报告客观地评估了各个成员国在实施本建议案方面的进展情况。

iii) 审查与国际商务交易活动行贿行为有关的特定问题；

iv) 研究扩大经济合作与发展组织打击国际行贿行为的工作范围的可行性，以期将打击私营部门的贿赂行为和除了以获得或保有业务为动机的其它性质的行贿外国公职人员的行为纳入到其工作范围之内；

v) 定期地向公众发布其工作、活动及建议案实施情况等信息。

IX. 特别指出各成员国应根据经济合作与发展组织公约第三条在实施本后续行动计划中密切合作的义务。

X. 责令国际投资与跨国企业委员会审查本建议案第 III 部分的执行情况，同财政事务委员会协作，审查本建议案第 IV 部分和 1998 年春季部长报告的执行情况，第一次例行审查后以及此后各次审查（如果必要的话）后向理事会作出汇报，在本修订建议案通过后的三年内，审查本修订建议案。

proposals, as appropriate, to assist Member countries in its implementation; these reviews will be based on the following complementary systems:

-- a system of self-evaluation, where Member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

-- a system of mutual evaluation, where each Member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the Member country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

IX.

NOTES the obligation of Member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the OECD Convention.

X.

INSTRUCTS the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in co-operation with the Committee on Fiscal Affairs, Section IV of this Recommendation and report to Ministers in Spring 1998, to report to the Council after the first regular review and as appropriate there after, and to review this Revised Recommendation within three years after its adoption.

<p style="text-align: center;">与非成员国合作</p> <p>XI. 呼吁 非成员国遵守《经济合作与发展组织 1997 年建议书》，参与任何常规例行性的后续活动或实施机构。</p> <p>XII. 通过其反行贿工作组责令国际投资与跨国企业委员会设立与尚未遵守本建议案的国家进行磋商的论坛，以期扩大本建议案及其后续行动的参与度。</p>	<p style="text-align: center;">Co-operation with non members</p> <p>XI. APPEALS to non-member countries to adhere to the Recommendation and participate in any institutional follow-up or implementation mechanism.</p> <p>XII. INSTRUCTS the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.</p>
<p style="text-align: center;">与国际政府和非政府组织的关系</p> <p>XIII. 通过其反行贿工作组邀请国际投资与跨国企业委员会同积极参与打击国际商务交易中行贿犯罪活动的国际组织和国际金融机构进行协商与合作，并定期地与积极参与该领域工作的非政府组织和商界代表进行协商。</p>	<p style="text-align: center;">Relations with international governmental and non-governmental organisations</p> <p>XIII. INVITES the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and co-operate with the international organisations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the non-governmental organisations and representatives of the business community active in this field.</p>

<p style="text-align: center;">附件</p> <p style="text-align: center;">刑事立法及相关行动公认通则</p>	<p style="text-align: center;">ANNEX</p> <p style="text-align: center;">AGREED COMMON ELEMENTS OF CRIMINAL LEGISLATION AND RELATED ACTION</p>
<p>1) <i>主动行贿罪的构成要素</i></p> <p>i) <i>行贿</i> 应当这样理解：为了获得或保留其业务，无论是直接地还是通过中间方，向公职人员或者为公职人员或第三方承诺给予或事实上给予不当的金钱或其它利益，以期影响该公职人员在履行其职责中采取行动或不行动；</p> <p>ii) <i>外国公职人员</i> 系指任何因委任或选任而在外国国家立法、行政或司法机构中任职的人，国际组织的任何官员或在外国国家中行使公共职能或从事公共工作的人；</p> <p>iii) <i>行贿人</i> 是任何人的本人或代表任何其它自然人或法律实体的任何人。</p>	<p>1. <i>Elements of the offence of active bribery</i></p> <p>i) <i>Bribery</i> is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business.</p> <p>ii) <i>Foreign public official</i> means any person holding a legislative, administrative or judicial office of a foreign country or in an international organisation, whether appointed or elected or, any person exercising a public function or task in a foreign country.</p> <p>iii) <i>The offeror</i> is any person, on his own behalf or on the behalf of any other natural person or legal entity.</p>
<p>2) <i>犯罪的附属因素</i></p> <p>追诉国本国法律中的预谋未遂、共犯或/和共谋犯罪等刑法的一般概念也认为适用于行贿外国公职人员罪。</p>	<p>2) <i>Ancillary elements or offences</i></p> <p>The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official.</p>
<p>3) <i>托辞与辩解</i></p> <p>无论提供的贿金价值高低、后果如何、当地风俗习惯如何看待这种行为、当地政府机关如何容忍这种行为，为获得或保有业务而行贿外国公职人员就是犯罪。</p>	<p>3) <i>Excuses and defences</i></p> <p>Bribery of foreign public officials in order to obtain or retain business is an offence irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.</p>
<p>4) <i>司法管辖权限</i></p> <p>行贿外国公职人员的行为无论是部分地还是或全部地在追诉国境内发生的，都应当对这种犯罪设定司法管辖权限。应当从广义的角度解释司法管辖权限的地域依据，以便在确定行贿行为的司法管辖权限时不必需要广泛的地理关联性。</p>	<p>4) <i>Jurisdiction</i></p> <p>Jurisdiction over the offence of bribery of foreign public officials should in any case be established when the offence is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.</p> <p>States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principles.</p>

<p>对于那些对在境外犯罪的公民要进行追诉的国家，则也应当按照同样的法律原则对有关行贿外国公职人员的行为进行追诉。</p> <p>对于那些依据国籍原则不进行追诉的国家，则应当愿意引渡其涉嫌行贿外国公职人员的公民。</p> <p>所有国家者应当复审其现行的司法管辖依据在反对行贿外国公职人员的法律适用方面是否具有效力，否则应采取适当的补救措施。</p>	<p>States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials.</p> <p>All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.</p>
<p>5) 制裁</p> <p>对行贿外国公职人员的犯罪应当适当量刑，有效地予以制裁或刑事处罚，以示劝戒。制裁或刑事处罚要严厉，足以达到获得有效的法律互助和引渡的程度。惩罚的量刑应当与对腐化本国公职人员案件中行贿犯的量刑相当。</p> <p>缔约方对行贿外国公职人员的行贿者除了给予上述条款中规定的刑事或经济制裁外，还应当考虑给予民事或行政制裁。对任何涉案法人进行经济惩罚或民事、行政或刑事惩罚等应当予以规定，并考虑行贿的数量及从通过行贿行为所获得的业务中取得的利益大小对惩罚力度予以量刑。</p> <p>应当制订出有关查封和没收行贿外国公职人员的行贿工具（贿金）、行贿外国公职人员的非法所得和从通过行贿行为所获得的业务中取得的利益的规定或者处以价值相当的罚金或赔偿金</p>	<p>5) <i>Sanctions</i></p> <p>The offence of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.</p> <p>Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.</p> <p>Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.</p>
<p>6) 执行</p> <p>鉴于行贿外国公职人员罪属于严重犯罪，公诉人应当以专业动机为依据独立地行使自由酌处权，而不应当受国家经济利益，促进良好的政治关系或受害方的身份等方面因素的影响。</p> <p>对受害方的申诉主管机关应当严肃地审查。</p> <p>诉讼时效法规都应当酌留出足够的时间，以</p>	<p>6) <i>Enforcement</i></p> <p>In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.</p> <p>Complaints of victims should be seriously investigated by the competent authorities.</p> <p>The statute of limitations should allow adequate time to address this complex offence.</p>

<p>便于处理这种复杂的犯罪案件。 .</p> <p>各国国家政府应当给检察机关安排足够的资源以便能行之有效地追究此类行贿外国公职人员的犯罪案件。</p>	<p>National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.</p>
<p>7) <i>相关规定（刑事的和非刑事的）</i></p> <p>-- <u>会计、帐目记录和披露要求</u></p> <p>为了有效地打击行贿外国公职人员的犯罪行为，各国还应当对会计业务中的不作为，弄虚作假和欺诈行为予以充分地制裁。</p> <p>-- <u>洗钱</u></p> <p>如果缔约方已经把行贿本国公职人员的行为定性为不折不扣的洗钱犯罪，则也应当按照同样的条件把行贿外国公职人员的行为定性为犯罪并适用反洗钱法律，而无论这种行贿行为在什么地方发生。</p>	<p>7) <i>Connected provisions (criminal and non-criminal)</i></p> <p>-- <u>Accounting, recordkeeping and disclosure requirements</u></p> <p>In order to combat bribery of foreign public officials effectively, states should also adequately sanction accounting omissions, falsifications and fraud.</p> <p>-- <u>Money laundering</u></p> <p>The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official is a money laundering predicate offence, without regard to the place where the bribery occurs.</p>
<p>8) <i>国际合作</i></p> <p>行之有效的法律互助对追诉行贿外国公职人员案件的调查取证具有决定性的作用。</p> <p>通过相关的法律，把行贿外国公职人员的行为定性为犯罪，可以铲除双重犯罪要求所带来的法律互助障碍。</p> <p>各缔约方应当专门制订法律互助方面的法律，以便能与侦查行贿外国公职人员的犯罪案件的国家合作，甚至包括与第三国（行贿人所属国或发案地国）和采用不同的定罪法律适用此类案件的国家合作。</p> <p>应当探索和采取相关措施，提高法律互助的功效。</p>	<p>8) <i>International co-operation</i></p> <p>Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.</p> <p>Adoption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.</p> <p>Countries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offeror; country where the act occurred) and countries applying different types of criminalisation legislation to reach such cases.</p> <p>Means should be explored and undertaken to improve the efficiency of mutual legal assistance.</p>

<p>理事会关于行贿外国公职人员贿 资课税减扣的建议</p> <p>1996年4月11日经理事会通过</p>	<p>RECOMMENDATION OF THE COUNCIL ON TAX DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS</p> <p>adopted by the Council on 11 April 1996</p>
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<p>理事会：</p> <p>参照 1960 年 12 月 14 日颁布的《经济合作与发展组织公约》第五章 5 b 款的规定；</p> <p>参照字第[C(94)75/FINAL]号《经济合作与发展组织理事会关于国际商务交易活动中反行贿的建议》；</p> <p>鉴于行贿行为已是国际商业交易活动中，包括贸易与投资活动中，普遍存在的现象，引起了道德和政治方面的严重忧虑，破坏了良好的管理与经济的发展，扭曲了国际竞争条件；</p> <p>鉴于《理事会反行贿的建议》呼吁成员国采取具体的有实效的措施，包括审查那些可能会间接滋长行贿行为的税收措施，打击国际商务交易活动中的行贿行为；</p> <p>响应财政事务委员会和国际投资与跨国企业委员会的动议。</p> <p>I. 建议尚未禁止行贿外国公职人员贿资课税减扣做法的成员国重审这种做法以摒弃这种课税减扣做法。把行贿外国公职人员视为非法行为这个趋势可能将会对这项行动起到促进作用；</p> <p>II. 责令财政事务委员会会同国际投资与跨国企业委员会监视本建议的执行情况，协作，审查本建议案第 IV 部分和 1998 年春季部长报告的执行情况，利用与非成员国接触的环境宣传推广本建议，必要时向理事会进行汇报。</p>	<p>THE COUNCIL,</p> <p>Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;</p> <p>Having regard to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75/FINAL];</p> <p>Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;</p> <p>Considering that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favour bribery;</p> <p>On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:</p> <p>I.</p> <p>RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal.</p> <p>II.</p> <p>INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.</p>
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