RESPONSES TO THE CONSULTATION PAPER ON THE REVIEW OF THE OECD ANTI-BRIBERY INSTRUMENTS

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The report is well structured and addresses various legal technicalities concerning the implementation of the 1997 OECD Convention. My overall opinion, however, is that the consultation paper focus too much on the legal aspects framing the instrument and its implementation and omits an analysis of what those provisions actually mean in practice. There are no cases testing the validity of the legal provisions. The loopholes of the instruments are discussed in abstract with no reference to contexts, actors, resources, mechanisms of transaction, and the politics involved in (not) enforcing the legal provisions.

At a certain point, the paper cites a survey commissioned by Control Risks and Simmons & Simmons (2006) showing that "the vast majority of respondents believed that corporations from their own countries either "occasionally", "regularly" or "nearly always" sought to circumvent laws on transnational bribery by using intermediaries". But what's new in this? There are plenty studies in sociology and political science that explain how today's corruption, whether practiced against public officials at home or abroad, tends to involve intermediaries (such as law/consulting firms!) and camouflage elements (placed on the payroll to create diversion tactics and attract the attention of investigative authorities and the media away from the corrupt exchange). What if the soft "intermediaries" – i.e. those who put the briber and the bribee in contact – are high state entities (for instance, foreign trade promotion agencies, embassies, ministerial missions, etc…)? What policies need to be put in place? What degree of success is expected?

As a political scientist, I am less impressed about the legal technicalities than the actual practice. Unfortunately, this is not discussed in this paper.

Of all the problems concerning the implementation of the Convention mentioned in the consultation paper, I would like to address two points in particular which come before any other legal considerations:

1. **An educational/cultural problem**: Everybody condemns corruption in abstract, including bribery of foreign officials, but this is just a symbolic condemnation. In practice, people tolerate or ignore (by sheer lack of information/Interest/understanding of international business affairs) their companies' conduct in other countries, especially in developing ones, where racist prejudice adds to this ethical relativism. There is also a problem of national pride when fingers are pointed to the behaviour of the CEOs of national companies. There seems to be a sort of tacit consensus about defending the image of the Portuguese companies (especially those who are managing to conquer a place in the international business affairs) against external threats or allegations. This seems to have happened during the *Mensalão* case of bribery of Brazilian congressmen and illicit party financing (see Documents attached), allegedly involving two Portuguese companies with investments in Brazil and senior political figures. The case was treated in the press has a problem of party financing and corruption in Brazil and it was never referred as a possible breach of the 1997 OECD Convention. The question is not whether the case constituted or not bribery in international business transactions, but the fact that neither the media nor the Portuguese political class suggested that it could be so.

2. **The lack of awareness and information about the instrument and its implementation**. If this sort of occurrences is looked with indifference by political and business elites and ignored by the majority of citizens, one cannot expect great results from a legal instrument that criminalises these practices but that remains unknown to almost everyone. In the case of Portugal, and I am almost certain that the same could be said to many other signatory parties, there have been no governmental efforts to make the OECD Convention known to magistrates, enforcement agencies, companies and private auditors. Further to some leaflets and internal ministerial orders, some convenient passages displayed in the "governance sections" of the websites of some large

private companies, I do not recall any major training session to enforcement agencies on the OECD Convention. The instrument remains unknown to the majority of actors directly responsible for implementing the Convention (including private auditors) and to the Portuguese public at large. Information about the implementation is precarious to non-existent.

Further to the lack of knowledge about the instrument, information about the implementation is precarious to non-existent. One of the simplest reforms that the OECD could ask the parties to do, is to indicate which public body is responsible for centralizing information about this type of crime and to make it available in a publicly known website (a similar practice is also expected to corruption and related crimes at the domestic level)

This deficiency is not specific to the crime of bribery in international business transactions, but to the organization and publication of official crime quantitative information in general. Some reluctance results from the fact that numbers, other than indicating the extent of a practice/conduct in a given time and space, offer an insight into the performance of repressive agencies. In the Portuguese case the disparity between the numbers of cases of corruption investigation and those that arrive to the courts is large, and the number of condemnations with a prison sentence amount to no more than 22. With regard to the complex crimes – such as traffic of influence or bribery in international business transactions – the figures are almost inexistent.

It is almost impossible for a journalist, activist, academic wishes to confront political and law authorities about the efficacy of their work and/or policy in relation to offences against the OECD Convention at any given moment, because there is no such information readily available. In the case of Portugal, the Central Department for Penal Action and Investigation is the body responsible for centralising all available information on corruption and related crimes. In practice, however, the information is dispersed in various bodies, treated in a poor manner and not easily available to the public (in a friendly and informative format).

I will not extend further. My impression is that sufficient legal talk and writing has been done about the Convention and more policy oriented analysis needs to be done. As I said, the consultation paper touches a lot of legal aspects and loopholes which reduce the quality of implementation of this instrument, but I am not certain that its effectiveness will be guaranteed if those formal adjustments are made.

Combating bribery in international business transactions requires five organizational elements that most investigative agencies are short of:

- Experience in dealing with cross-border criminality;
- Specialized knowledge to investigate corruption and related white collar crimes;
- Sufficient resources to carry out investigative work effectively and in a sustained manner;
- Proper strategic coordination and leadership;
- Internationalization and networking;

Having said this, institutional responses are insufficient if not preceded by a change in attitudes and knowledge vis-à-vis international business practices. Developing programs to help the media and business schools to gradual address ethical matters in their informative and educative functions, is as important as making adjustments to the law.