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Effectiveness of Asset Recovery and Judicial Cooperation Laws Will Depend on Signing International Bilateral and Multilateral Agreements

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In Mozambique, the effectiveness of the future asset recovery (and management) law will depend to a large extent on two other important instruments: Law no. 21/2019, of 11 November - Law on Judicial Cooperation (which has already been approved) and the signing of international bilateral or multilateral agreements with countries where this may be needed. This is because Mozambique does not have the weight of a country like the United States of America (USA) or the United Kingdom (UK), whose anti-corruption laws are wide ranging, that is, they cover other jurisdictions outside those of the countries concerned. This is the case with the FCPA - Foreign Corruption Practices Act-- in the case of the USA and, in the case of England, the United Kingdom Bribery Act.

As such, States, whose anti-corruption laws have a mandatory compliance only at the domestic level, have resorted to the United Nations Convention against Corruption (UNCAC)¹ of global / international scope, which recommends signatory countries to sign bilateral or multilateral agreements to fight the (corruption) phenomenon. It should be noted that the agreements in question, since they were entered into based on the convergence of the will of the parties (States that sign and then incorporate the UNCAC into domestic law) with the aim of producing legal effects, that is, rights and obligations between themselves, which are based on the legal principle of "Pacta Sunt Servanda"² and in good faith, end up becoming mandatory compliance, which is different from what happens with the provisions of the UNCAC, which has no mandatory force for the granting / signatory States.

Following this recommendation, the Mozambican State, specifically, through the Attorney General's Office (PGR) that represents it, must endeavor to sign legal and judicial cooperation agreements on an active basis with those States where there is evidence or signs that they are used by individuals involved in corruption cases for transferring assets legally resulting from the practice of this type of crime to hide them from the authorities of the countries where they were committed. In other words, the laws that are being passed are important domestically, but they are unlikely to be effective in forcing other states to cooperate with Mozambique in the recovery of assets or in the exchange of information on criminal matters. This means that the laws produced and approved by the bodies of a specific State, in principle and almost universally, are only effective or produce legal effects within its territorial boundaries- the principle of territoriality.

Furthermore, it is necessary to refer to issues of the sovereignty of states in the defense of their interests in applying the law. In this regard, paragraph 1 of Article 2 of the Law on Judicial Cooperation establishes that: "In the process of applying this law, priority is given to the protection of sovereign interests (...) defined in the Constitution of the Republic of Mozambique". As can be seen, the primacy of the interests of the Mozambican State is emphasized, if legal and judicial cooperation in criminal matters with other States is necessary. In addition, there is a strong need for the prevalence of treaties and agreements on domestic laws in matters of an international nature. It is intended here to point out that international agreements are more effective

¹ Mozambique ratified the United Nations Convention against Corruption through Resolution No. 31/2006 of 26 December, published in Series I, No. 52.

² Latin that means that the agreements must be complied with.

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than domestic legislation in terms of cooperation between states, as established in paragraph 2 of article 4 of Law No. 21/2019: “In their absence or insufficiency, the provisions of this law are subsidiary applicable... “. In this way, the subsidiary nature of the law in question is emphasized in view of the bilateral agreements and treaties that should be given preference in the area of international legal and judicial cooperation in criminal matters.

The Law of Recovery (and Management) of Assets Will Face the Same Problems

With regard specifically to the future law on the recovery and management of assets, it must be borne in mind that this, too, will assume greater effectiveness domestically. It means that, in cases where there is the need to recover assets that have been expatriated by agents of corruption crimes, it cannot be enforced to the extent necessary. Therefore, foreign States that are used to conceal assets arising from criminal acts of corruption or related acts practiced in Mozambique, may refuse to allow the Mozambican State to access them, enforcing its legislation on recovery of assets, taking into account the primacy of their own interests and the respective legal system.

In this sense, the question of the sovereignty of States and the defense of their interests is raised in Article 4 of the UNCAC, which is a limitation of the domestic laws of the States in terms of coverage in other jurisdictions, constituting an impediment to the effectiveness of those laws and domestic rules on asset recovery. In short, this is intended to draw attention, once again, to the need to start favoring the signing of bilateral and multilateral agreements in order to give greater effectiveness both to matters of international legal cooperation in criminal matters and to the recovery of assets identified in other jurisdictions. In this regard, the convention recommends, in article 59, that States find mechanisms to unblock these limitations, and should for that purpose: “...consider entering into legal, bilateral and multilateral agreements or instruments in order to enhance the effectiveness of international cooperation ...”. Thus, the Mozambican State must follow through on this recommendation, under penalty of frustrating the huge expectations of justice and citizens regarding the recovery of assets if they have been transferred to other States and

those do not cooperate by evoking their domestic laws.

The case of the “hidden debts” can serve as an example, in the sense that those involved acquired assets outside Mozambique. For that particular case, specific legislation on asset recovery has not yet been produced, and failing that, if the Mozambican State had strived to sign bilateral agreements, even with this omission in the domestic legal framework, it could have been possible to use them to demand that the assets transferred or acquired in such countries and resulting from the said case be recovered.

Annual Information- 2020 from the Attorney General of the Republic Shows Little Comprehensiveness Regarding the Use of International Bilateral and Multilateral Agreements in Matters of Cooperation- the example of the “Odebrecht case”

Recently, in her visit to the Assembly of the Republic to present the Annual Information on the state of justice in 2019, the Attorney General of the Republic of Mozambique, Beatriz Buchili, complained about the lack of cooperation from the American justice system in sharing information regarding the case of the “hidden debts”, arguing that the United States: “... despite countless insistences, the last of which after the trial of Jean Boustani, one of those involved in the process (...) still does not respond to our requests, thus harming the investigations and the diligence required, against all the principles of collaboration established by international conventions”³. The problem that arises is that, if there is no trust between the States members of the said international conventions, and without the conclusion of bilateral agreements (of mandatory compliance), resorting to the referred international legal diplomas will not have the desired effects, in specific cases.

An example of the proactivity of States in signing bilateral and multilateral agreements and their usefulness was the “Odebrecht” case that had repercussions in Mozambique with suspicions that high-ranking Mozambican officials had been bribed. At the time, the Center for Public Integrity (CIP) referred to the agreement signed by 11 Latin American countries for the exchange of information⁴. In one of the points of the aforementioned agreement⁵, it was stated that it was aimed at “...strengthening international legal

3 Annual Information from the Attorney General, AR - IX/Infor. /42/13.04. 2020 - Sent by the Attorney General's Office to the Assembly of the Republic on 30 March 2020 and received by this body on the same date of transmittal, page 67.

4 https://cipmoz.org/wp-content/uploads/2018/08/Caso_Odebrecht_Mocambique.pdf.

5 Multilateral Agreement on International Legal Cooperation against Corruption, signed in Brasilia,-Brazil on 16 February 2017, with Brazil, Argentina, Chile, Colombia, Ecuador, Mexico, Panama, Peru, Portugal, the Dominican Republic and Venezuela as State-Parties.

cooperation and assisting the various countries concerned to obtain evidence in order to proceed with investigations and prosecutions in their respective jurisdictions, taking into account the principles of current international law and the laws of each country...⁶.

In the case of Brazil, which was asked to share information with countries interested in obtaining it, for example, the agreement established that "...Brazil has received several requests for international legal cooperation related to the Odebrecht case, but is obliged to comply with its domestic laws and respect the set deadline, without prejudice to the countries continuing the investigations that have already started"⁷. Therefore, it must be reiterated that the Mozambican State must, increasingly, sign these agreements and not rely on domestic laws and the existence of international anti-corruption conventions, given that in some cases, these prove to be ineffective.

Information from the Attorney General of the Republic- 2019 on International Legal Cooperation shows that this is limited to countries in a specific geographical area, which Reduces the Effectiveness of Agreements

What is observed in the case of Mozambique is that the signing of bilateral agreements in criminal matters with certain States, as an example, with those that are part of international conventions, such as the UNCAC⁸, is still not given preference. Therefore, the Information presented by the Attorney General refers to the need to strive for the signing of the agreements, emphasizing that these must, mainly, take place with the countries of SADC and CPLP⁹. It is also necessary to emphasize the need to expand the number of countries with which Mozambique must enter into these agreements, taking into account the trend that may exist for the criminals to use them to hinder the investigative action of the judicial authorities.

The systematic failure to use these agreements was mentioned by the Attorney General in the Annual Information for 2020 to the Assembly of the Republic. In the case of Mozambique, the trend shows that requests for international cooperation are not based on bilateral agreements with the recipient States, but on the sending of rogatory letters¹⁰,

6 Idem.

7 Idem.

8 The Information from the Attorney General does not refer to agreements already signed/entered into.

9 Annual Information from the Attorney General, AR - IX/Infor. /42/13.04. 2020, page 78.

10 It is an instrument of legal cooperation between two states or countries and is therefore international in nature, with the aim of requesting a third state to carry out procedural acts and steps, but has no enforceable purpose. Letters rogatory are therefore different from letters of request, in which the request for proceedings takes place within the same country but in another part of its territory.

11 Information from the Attorney General – 30/03/2020, page 77.

an expedient that, in itself, is ineffective, and cooperation may be refused through these mechanisms. According to the figures presented, the Attorney General's Office sent 24 rogatory letters requesting mutual legal assistance in criminal matters, but received only 6 responses¹¹, less than half, which weakens its process of the criminal investigation domestically.

This is a weakness that exists, and it can be used by individuals involved in cases of corruption or other related or economic crimes to take advantage of hiding the proceeds of crime in different jurisdictions where the Mozambican state will have difficulties in repatriating them, given the lack of bilateral or multilateral agreements for this purpose.

Conclusion

It is important to mention that the domestic laws on asset recovery and management and international judicial cooperation in criminal matters will not assist the Mozambican State to the extent that it is wanted, if it does not strive to sign bilateral and multilateral international cooperation agreements.

In article 59 of the UNCAC, it is clear that the effectiveness of legal and judicial cooperation in criminal matters between member States and, in particular, in cases of corruption of a transnational nature, must depend on the signing of these agreements and not only on international conventions or domestic laws. Therefore, the existence of international legal instruments / diplomas or the domestic laws of the member States should not be considered enough in terms of effectiveness. If Mozambique intends to achieve success in fighting corruption when other jurisdictions are involved, it will have to follow what is recommended in the UNCAC.



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