



GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

# Overview and Analysis of the Anti-Corruption Legislative Package of Mozambique

## Findings

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### 1. Background

At the request of the Governance Platform of the donor community in Mozambique, a team of experts – comprised of Dr. João Carlos Trindade, former Judge of the Supreme Tribunal of Mozambique (*Tribunal Supremo*) and Pedro Gomes Pereira from the International Centre for Asset Recovery of the Basel Institute on Governance – have conducted a detailed analysis of the anti-corruption legislative package that has been approved by the Council of Ministers and has been tabled in Parliament.

The assessment comprised of: (i) an offsite revision of Mozambican legislation – which was benchmarked with the pertinent international standards which Mozambique is party to – as well as other pertinent documents; and (ii) an on-site mission to Mozambique seeking to interview relevant stakeholders responsible for the drafting the bills which comprise the anti-corruption package, public officials responsible for preventing and combating corruption in Mozambique, and to interview with the donor community, including the Heads of Mission and Co-operation.

The anti-corruption package contains: (i) a revised and consolidated Criminal Code, which would replace the one currently in force; (ii) a revised Criminal Procedure Code; (iii) a Code of Ethics for Public Officials – which includes rules on conduct, conflict of interest and declaration of assets; (iv) a witness protection law; and (v) minor legislative changes on laws currently in force, e.g., the Organic Law of the Prosecution Service and the Organic Law of the Judiciary.

The experts wish to take the opportunity to congratulate the Government of Mozambique and all key stakeholders who participated in the elaboration for the accomplishment of producing such a comprehensive anti-corruption package. The experts further wish to take note that the anti-corruption package is in line with current international standards and best practices and will enable effective combating of corruption through efficient use of resources available to Government.

### 2. Findings

The findings are divided into a three-pronged approach: (i) short-term actions which can be taken to support passing the bill through the Mozambican Parliament; (ii) medium-term action planning seeking to give support in enabling Mozambique to carry out all required by the anti-corruption package; and (iii) long-term commitment, in which the goal is to ensure knowledge transfer and retention for a more effective legal response to combat corruption in the country.

It should be noted that a separate document containing a more detailed analysis of the current legislative package in light of the international standards will be submitted to the governance platform. The recommendations contained in said legal analysis and the findings thereto seek to assist in item 2 (action plan with priority list) of section 2.2 (medium-term actions) below, as well as section 2.3 (long-term actions).

#### 2.1. Short-term: supporting Parliament in passing the package

The short-term actions are those that seek to take advantage of the current legislative session of the Mozambican Parliament (*Assembleia da República*), starting from the third week of October 2011 and lasting 45 days.

## Overview and Analysis of the Anti-Corruption Legislative Package of Mozambique – Findings

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While the anti-corruption package may have some deficiencies when they are benchmarked with the international standards in combating corruption<sup>1</sup>, it should be noted that these should not be considered enough to hinder the need to approve the current legislative package as it stands. With this in mind, the most pressing issues in which short-term action is to be taken are:

1. **Approving the bills which comprise the package together.** The package currently contains several different bills. The reason why this course of action has been chosen is due to the fact that they are very specific laws, some of which will focus on an administrative, civil or criminal side of the Mozambican law.

However, even though every effort should be made for Parliament to approve the package as such, the different bills which comprise the anti-corruption package contain different periods for commencement of their effect. For this reason, this should be harmonised amongst them, so that they may enter into force on the same date.

2. **Costs of implementation.** The international expert has been told by numerous sources from government, civil society, the donor community and by the national expert that, in order for a bill to be passed, the common legislative process in Mozambique requires that a financial assessment and impact be done prior to tabling legislation in Parliament.

In this point, it was still not clear for the international expert whether: (i) only the Criminal Code had been financially assessed and tabled in Parliament; (ii) whether the entire package had been submitted to Parliament, but only the Criminal Code had been given a financial assessment; or (iii) the entire package had been tabled in Parliament, but no part was financially assessed.

Nevertheless, the Mozambican authorities will require urgent and specialised knowledge in several different areas to assist them in preparing the financial impact (both the initial cost and costs for maintenance). This areas include, most notably:

- a. **The Witness Protection bill.** Assistance will be needed not only to assess the costs for establishing a witness protection programme and witness protection agency, but also to assess all the logistical requirements (e.g., staffing, initial training, physical place to work, etc.), as well as the operational costs pertaining to the core area of work (e.g., costs for providing different levels of protection, including the relocation out of the country). It is suggested that donor countries with extensive experience in the area assist the Mozambican authorities by providing an expert which can assist them in assessing the real costs of implementation and operationalization of the witness protection programme.

3. **Assessment of the opportunities for corruption created by the new anti-corruption package.** The new threshold in which the current legislative package puts Mozambique will require it to re-assess the opportunities in which the current package may create, be it with the current practices or the conflicting information it may give when interpreting the package with existent legislation.

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<sup>1</sup> For the purposes for this study the international standards include, but are not limited to, the conventions dealing with combating corruption which have been ratified by Mozambique: the United Nations Convention Against Corruption, the African Union Convention against Corruption, and the SADC Protocol against Corruption.

### 2.2. Medium-term: action planning

The medium-term actions are actions to be taken upon passing of the legislative package through Parliament. These comprise actions seeking to support the Mozambican government and its agencies in creating the necessary legal and logistical framework to efficiently operationalize the new responsibilities contained in the anti-corruption package.

The medium-term actions include, but are not limited to:

1. **Gap analysis of the anti-corruption system in Mozambique.** Differently from point 3 in the previous section, the goal is to do a full, comprehensive and participatory gap analysis of the entire anti-corruption system in Mozambique. The applicable laws (Criminal Code, Criminal Procedure Code, anti-money laundering legislation, laws on procurement, etc.) are to be reviewed and benchmarked with the applicable international standards, especially the UNCAC. The aim is to assess not only (i) if the applicable legislation is in conformity with the international standards, but also (ii) to identify gaps in which further legislation is needed, as well as (iii) the consistency of the anti-corruption system in Mozambique.

It should be underscored that, due to the fact that Mozambique will be peer reviewed for the UNCAC peer review mechanism in 2012 (with regards to chapters III and IV of the UNCAC), conducting a gap analysis of this nature will greatly assist the country, avoid duplication of work, and ensure that the exercise is seen as a nationally driven process.

2. **Creation of action plan with prioritisation.** Although the current anti-corruption package is mostly consistent with the international standards, it should be noted that there are elements which will need to be included to ensure full conformity (e.g., criminalising the active and passive bribery of foreign public officials, and officials from international organisations). Once the anti-corruption package has been passed, there should be an effort to identify these elements and prepare the legislative drafting for the amendment.

Moreover, the anti-corruption package itself will require regulation in many, if not most, of the elements contained in package. Thus, extensive revision of current regulation and harmonisation of new regulation will be needed, in order to have them approved by the Council of Ministers.

Furthermore, several institutions (e.g., the Witness Protection Programme Agency) will have to be created. Existing institutions will need to have their competencies reviewed, as well as their workflow with regards to inter- and intra-institutional co-operation.

### 2.3. Long-term: knowledge transfer and retention

The long-term actions seek to plan long-term engagement with Mozambican authorities seeking to ensure both the knowledge transfer of elements necessary for the prevention and criminalisation of corruption, while ensuring that such knowledge transfer is retained at the government level.

1. **Capacity building.** The asset recovery process is resource intensive. It requires a specific set of skills which enable law enforcement and the judiciary (whether prosecution, investigating magistrates or trial judges) to seek a proper conviction of the corrupt officials and the bribe givers, while also ensuring that the proceeds and instrumentalities of crime are seized, managed, confiscated and repatriated to the State.

As such, specific training will be needed to ensure that Mozambican authorities and the private sector are familiar with specific financial investigative techniques (e.g. source and application), data gathering for financial and anti-corruption intelligence purposes (e.g., enhanced due diligence, know-your-customer requirements), case management, international co-operation (e.g., extradition, mutual legal assistance, joint investigative techniques, etc.), and special investigative techniques (e.g., wire tapping, infiltration, etc.), among others.

2. **Institution building and strengthening.** Mozambique has already set up the core institutions which are necessary for effective combating of corruption (the GCCC and GPCC – *Gabinetes Central e Provinciais de Combate à Corrupção*) and money laundering (the GIFIN – *Gabinete de Inteligência Financeira*). These are either linked directly to the prosecution, as is the case of the GCCC, or are to interact with it.

However, GIFIN has, according to the interviews, been operational for the last three to four months, and most of the local authorities were not aware of either its existence or its powers. More worryingly, there seems to have been proposed a legislative amendment to the anti-money laundering legislation seeking to enhance the powers of the GIFIN, which the experts have not had the opportunity to review. Combating money laundering, having an effective Financial Intelligence Unit (FIU) – which in Mozambique is GIFIN – is essential for effective combating of corruption, as it is through the information gathered by the FIU that the GCCC will be able to more efficiently initiate their pre-investigative steps which will compose the investigation file to be submitted to the prosecutor with *locus* standing.

3. **Intercommunication of institutions.** Combating corruption requires a wide array of institutions to work together and share the information each of them possess to ensure efficient decision-making. To this end, the work undertaken by the GCCC and the GPCCs should to be clarified and better streamlined. International practice indicates that having the prosecution and law enforcement, as well as the anti-corruption authorities working together from the beginning of the case is essential. The current framework is fragmented and allows for many points in which essential information to be lost, causing the decision-making process to lose its effectiveness.

4. **Specialisation of public officials.** During the interviews, it was brought to the attention of the team of experts that there is no culture of specific job posting and careers for the functions which are to be carried out within the anti-corruption and anti-money laundering activities in Mozambique. Thus, a public official which is posted in such institutions may not have specific knowledge in the field and, due to the fact that it is not a specialised function, may not have the opportunity to gain the necessary knowledge as he or she may be placed at another institution or even to deal with different types of crimes which require other specialised knowledge.

The creation of specialised positions and careers would be greatly beneficial for institution building in Mozambique, and strengthen the retention of knowledge within them.

Notwithstanding the above, special attention should be given to the investigative police (PIC – *Polícia de Investigação Criminal*). To this end, it should be underscored that the experts did not have an opportunity to interview any members of the PIC. The PIC is responsible for, at an operational level, carrying out the investigation on behalf of the prosecution (in the Mozambican model, the prosecution is in charge of the investigation and the police is not independent, for investigation purposes, from the prosecution). However, the interviewed authorities have highlighted that, due to the fact that the PIC is part of the PRN – *Polícia da República de Moçambique* – it does not have a specialised career. The immediate result is that a police officer of the PRN which is undertaking tasks at the PIC may be required to conduct other functions (e.g., street policing) which will inevitably delay the investigation which, in turn, will lose the elements of opportunity and efficiency. In this particular case it is suggested that the Mozambican authorities ensure a greater level of independence of the investigative police to ensure that they are separate from the other forms of policing.

### 3. Conclusion

It should be underscored, as mentioned above, that the anti-corruption package, while comprising a set of different bills, should be understood as one single package. The legal interests it seeks to protect through different legal instruments are closely interconnected. As such, the full potential for effective and meaningful prevention and combating of

## Overview and Analysis of the Anti-Corruption Legislative Package of Mozambique – Findings

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corruption requires a comprehensive set of legal instruments which enable efficient use of existing and new government structures and resources.

It is for this reason that the need to approve the anti-corruption package in its entirety is paramount. If, however, the Mozambican Parliament is unable to pass the anti-corruption package in its entirety in the current legislative session (e.g., due to time constraints), the donor community in Mozambique should continue its effort to sensitize Government in pushing the agenda forward and approving the remainder of the anti-corruption package as soon as possible – both directly and by continuing its support to civil-society organisations and to the local media.

Furthermore, with a special focus on sections 2.2 (medium-term: action planning) and 2.3 (long-term: knowledge transfer and retention) above, and regardless of the fact that the anti-corruption package is approved in its entirety, or a part thereof, the donor community in Mozambique should seek to ensure that sufficient financial resources are earmarked in the annual budget of the State to allow furthering, in the medium- and long-term, the technical assistance, capacity and institution building, as well as knowledge transfer to the existing Government structures (e.g., GCCC and GPCCs, GIFIM, PGR, etc.). On the other hand, should the anti-corruption package be approved in its entirety, or a part thereof, the Government of Mozambique will be required to earmark additional funds which will allow for the setup of the additional structures (e.g. the witness protection agency and the ethics committees) envisaged, as well as the supplemental regulatory framework which will be necessary to make the anti-corruption package fully operational in Mozambique.