Assessment of the Legal and Regulatory Framework for Foreign Direct Investment
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1. INTRODUCTION

Mozambique is a low-income country of 29.6 million people located in Southeastern Africa. Mozambique has a gross domestic product (GDP) of approximately $12 billion and a GDP per capita of $417, which is among the lowest in the world. Poverty is high at 48.4 percent in 2015, albeit lower than the 58.7 percent rate in 2009 (World Bank 2018b). Even under declining poverty rates, the total number of people living in poverty has grown as population growth outpaced GDP growth. Mozambique has one of the highest total fertility rates in Sub-Saharan Africa, and the population is expected to grow to 50 million people by 2050. Given this scenario, the country needs rapid solutions for more and better jobs.

Historically, growth has depended on megaprojects in extractives, but this model has not delivered the required number of productive jobs to meet the needs of a growing population. Despite the large investment flows into the country in megaprojects over the past 20 years, other sectors remain largely underdeveloped. The economy is dominated by the agricultural sector, which employs over 70 percent of the labor force but accounts for only 25 percent of Mozambique’s GDP. Services had a marked growth over this period, representing approximately 55 percent of GDP. Manufacturing and extractives split equally the remaining 20 percent. The gains from the country’s natural resources have not generated sufficient investment into human and physical capital needed for long-term productivity growth.

In more recent years, new investments reinforced the megaproject growth model. The significant investments of Vale (over $3 billion) in 2009–11, Sasol ($2 billion), Rio Tinto,^1^ CNPC, ENI, Exxon, Anadarko/Total, and other multinationals attracted by the important discoveries in the extractive sector over the decade 2003–13 offered an initial glimpse of the opportunities that could have further transformed the economy. However, the absence of transformation leaves the country vulnerable to commodity price shocks as happened in 2014, which had significant economic impact and was a critical factor behind the slowdown of foreign direct investment (FDI) flows and the postponement of the final investment decision (FID) by extractive multinationals.

At present, it is envisaged that the country will experience unprecedented investments in the next 30 years. The liquefied natural gas (LNG) projects are expected to reach over $60 billion in investment and have the capacity to generate revenues of approximately $300 billion for the accumulated duration of the projects until 2050. While the large oil and gas investments can create opportunities for links to the local economy and have a remarkable development impact in the country, these investments are not expected to generate enough direct employment opportunities. Thus, effectively using the resources generated by the gas investments and providing further links upstream, downstream, and through consumption will be critical.

Realizing the full potential of these large oil and gas investments will require a shift in Mozambique’s development strategy to date. The likely windfall from natural gas and mineral resources presents both an opportunity and a challenge. Although expectations are high, there is fear of replicating a noninclusive model of economic growth that provides enclave development of industrial investments while the rest of the economy remains underdeveloped. Economic and social unrest are evident in some parts of the country and without a concerted effort to create jobs and develop the economy as a whole, the unrest has a high potential for escalation.

The country’s pace of GDP growth has been falling. The average economic growth was 3.3 percent between 2016 and 2019, down from an average of 7.9 percent over the preceding 15 years and reflecting the impact of lower commodity

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^1^ Rio Tinto is an Australian multinational mining company.
prices in the decline in FDI (figure 1.1a and 1.1b). Moreover, donor support contracted following the discovery of $1.4 billion in previously undisclosed public debt, which had dramatic consequences on the macroeconomic and fiscal outlook.

FDI is a critical source of finance in Mozambique, supporting the country’s growth through the development of megaprojects in extractives and infrastructure. It remains the largest source of external finance (figure 1.2) and investment activity (figure 1.3). The fact that in percent of GDP, FDI is much higher in Mozambique than in any of its comparators (Ethiopia, Ghana, Kenya, Tanzania, and Zimbabwe) (figure 1.1b) further reconfirms the central role it plays in the economy and highlights this concentration. From 2010 onward, FDI inflows into Mozambique represented over 15 percent of all Sub-Saharan African FDI.

Sectoral disaggregation of FDI underscores the need to diversify to expand the set of opportunities it creates for the domestic private sector and workforce. Over 70 percent of FDI between 2009 and 2019 was linked to megaprojects, going into the extractive sector (25 percent), utilities (16 percent), construction (15 percent), transport and logistics (11 percent), and manufacturing of fuels and chemicals (8 percent) (figure 1.4). Such concentration on the extraction of finite resources and related large-scale infrastructure projects is neither sustainable nor likely to facilitate the number of links and spillovers needed to create business opportunities and jobs for an inclusive and competitive economy. Since 2000, Mozambique’s Economic Fitness rather declined in complex sectors in favor of less complex industries. Mozambique’s economic fitness in 2015 is equivalent to that of Zambia in 1995 and Cambodia in 1998.

The strong focus on financing FDI through debt instruments likely reflects the specificities of megaprojects and the little confidence investors have in the country’s investment climate. Over the past decade, FDI was dominated by intra-company loans, with the equity portion of FDI not increasing much and a negligible amount of reinvestment (figure 1.5). There is a set of reasons that typically explains this picture and that comes into play at different degrees. First, it indicates that new investments are low (that is, new greenfield projects or mergers and acquisitions that result in new direct investment relationships). Second, it may reflect that the level of equity disinvestment, typically from high dividends paid to parent companies, is significant, which tends to be the case in countries with high political risk where parents decide to bank their earnings in countries

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**Figure 1.1a. Total Inward FDI versus Comparators, Current US$, millions**

![Graph showing total inward FDI versus comparators, current US$, millions.](image)

**Figure 1.1b. Total Inward FDI versus Comparators, % of GDP**

![Graph showing total inward FDI versus comparators, % of GDP.](image)


Note: ETH = Ethiopia; GHA = Ghana; FDI = foreign direct investment; KEN = Kenya; MOZ = Mozambique; TZA = Tanzania; ZWE = Zimbabwe.
with more certainty. The limits on foreign transfers in Mozambique likely add to this behavior. Third, earnings at affiliate companies are low, and there is not much to be reinvested, which is frequently so for extractive companies while setting up projects. Although the academic body is small, some research also indicates that the choice between instruments (debts versus equity) is often driven by the tax differentials between host and source country. Thus, existing FDI firms may choose to further invest via debt for tax reasons. To what level this argument is valid for Mozambique, needs further investigation.

**Figure 1.2. FDI versus Other Sources of External Finance, US$, billions**

- FDI inflows
- Remittances
- ODA received

Source: World Development Indicators. Note: FDI = foreign direct investment; ODA = official development assistance.

**Figure 1.3. Mozambique’s Foreign versus Domestic Investment, % of GDP**

- FDI
- Domestic investment
- Total investment

Source: World Development Indicators. Note: FDI = foreign direct investment; GDP = gross domestic product.

**Figure 1.4. Mozambique’s Greenfield FDI per Sector, 2009–19**

- Extractives 25%
- Logistics 11%
- Construction 15%
- Agriculture 8%
- Other manufacturing 6%
- Mfg - Fuels 4%
- Mfg - Chemicals 4%
- Finance & Real Estate 5%
- Other 6%
- Mfg - Chemicals 4%
- Mfg - Fuels 4%
- Agriculture 8%
- Logistics 11%
- Construction 15%
- Extractives 25%

Source: Financial Times, fDi Markets. Note: Data is based on the sum of announced Greenfield Capex over the time period.

**Figure 1.5. Mozambique’s Composition of Inward FDI, US$, millions**

- Intracompany loans
- Equity other than reinvested earnings
- Reinvested earnings
- Total

Source: IMF, Balance of Payments. Note: FDI = foreign direct investment.
The shocks related to COVID-19 spilled into the economy through external and internal channels. Externally, the most important transmission channels are (a) disruption in value chains and trade; (b) falling global prices of commodities such as coal and aluminum; (c) disruption of the trade of industrial inputs; and (d) reduced FDI. Domestically, the crisis is affecting the economy through two main channels: economic disruptions caused by the containment measures and direct health impacts from a wider spread of COVID-19 (World Bank 2020a).

The deferment of the FID of Area 4’s gas investment is a concrete example of FDI establishment postponed. The highly anticipated decision for the gas investment led by ExxonMobil was delayed for at least one year. The other major gas investment in Cabo Delgado, led by TOTAL in Area 1, was forced to suspend operations for seven weeks because of COVID-19 cases found at its construction sites. The disruption in global value chains has adversely affected commodity markets, with prices declining sharply given the excess supply, and discourages new investment in the sector. In addition to reduced foreign financing flows, the sudden stop in travel hurts the tourism sector, which is highly dependent on foreign visitors from South Africa, Europe, and the United States. This resulted in a significant loss of income for workers and businesses in affected industries as well as loss of revenue for the state.

Given the impact the COVID-19 crisis has had on FDI in Mozambique, the government should focus on putting the foundations for investment competitiveness in place to support a resilient recovery. From an investment climate perspective, governments should review their FDI policy and promotion strategies, strengthen their countries’ overall business environment, and promote robust competition to reallocate resources toward sectors and firms that will drive long-term employment and economic transformation (World Bank 2020b). As this report lays out, one such foundational reform is to modernize the current investment law and align it with international commitments to improve transparency and reduce risks for investors and the government alike (for example, litigation). Furthermore, mechanisms that help investors navigate regulations and procedures would be helpful in the current context, especially those to detect investor grievances at an early stage, such as an ombudsman. In times of crisis, the investment promotion agency of Mozambique (APIEX) is well-advised to boost aftercare services to established investors to make sure they are retained in the country despite the economic shake-up. This effort requires learning about the most pressing issues they face and prioritizing those that affect employment, supply chains, and enabling services.

FDI-related recovery support also includes the promotion of links with megaprojects. Leveraging new markets, including linkages to extractive large-scale investments, is an opportunity for the recovery phase but requires upscaling quality and processes. Two types of linkages are more promising: upstream linkages for national-level recovery and consumption linkages for regional development (IFC 2021). Programs that promote supplier development by coupling skills, quality standards, and access to finance for investing in new systems and technology should be pursued. In the process, firms can upgrade and serve new international customers and markets. Providing broader private sector development support to firms in those regions affected by megaprojects can promote productivity and strengthen the recovery of the economy.

This report serves as a background paper to the Country Private Sector Diagnostic of Mozambique (IFC 2021). At the end of the paper, the report assesses the legal and regulatory framework for FDI with a view to formulate actionable recommendations for consideration by the government.
Attracting FDI, because of its recognized benefits, is a policy goal of most countries today. The benefits of FDI extend well beyond attracting needed capital. Foreign investment also confers technical know-how, managerial and organizational skills, and access to foreign markets. Furthermore, FDI has significant potential to transform economies through innovation, enhanced productivity, and the creation of better-paying and more stable jobs in host countries in sectors that attract FDI as well as in the supportive industries (Arnold, Javorcik, and Mattoo 2011; Bijsterbosch and Kolasa 2009; Echandi, Krajcovicova, and Qiang 2015; Rizvi and Nishat 2009; World Economic Forum 2013). Capturing the full, positive spillovers of FDI is a long-term process and requires regulatory certainty and predictability to enable strategic business planning and decisions.

In recent times, industrial policy has become increasingly intertwined with FDI policy. Industrial development strategies include a number of investment policy tools, most notably incentives and performance requirements, special economic zones (SEZs), investment promotion and facilitation, and investment screening mechanisms. In most countries, SEZs continue to grow and diversify. The transition from pure export processing zones to those increasingly focused on value addition and linkages with industrial clusters has supported economic development and global value chains (GVCs) integration in some countries, although the risk of enclaves remains high (UNCTAD 2018).

Improving the investment climate is a policy priority for Mozambique. Per recent action plans, the government recognizes the dampening effect that barriers to investment have had on domestic economic development. Attracting new investment, easing entry and operation, and improving transparency as a means to reduce corruption and risk, including through the strengthening of the Investment Law, are all stated policy objectives.

Political stability and a business-friendly regulatory environment are most important in investors’ decision making. Absence of political stability and security and the lack of an enabling legal and regulatory environment—whether actual or perceived—deter investors by tilting their risk-return calculations. According to a global investor survey, these two factors are the most important country characteristics affecting the investment decision and rank higher than economic indicators such as market size, skills, land, or infrastructure (World Bank 2018). Country risk is difficult to manage and thus ranks consistently high on the list of concerns of foreign investors.

Governments can play a significant role in de-risking investment through transparent and predictable governance and investment protection guarantees. First and foremost, investors rate the transparency and predictability of public agency conduct and the ease of doing business as important determinants of their locational decisions. This is not surprising since inefficient bureaucracies, opaque regulations, and complex procedures result in high transaction costs that undermine an investment’s profitability. Globally, 81 percent of investors rate legal protections and 51 percent rate bilateral investment treaties (BITs) as important or critically important in their investment decisions (figure 2.1) (World Bank 2018a). Predictability and efficiency are essential ingredients of a sound and sustained interaction between foreign investors and host governments, comprising both regulations per se and their implementation. Academic evidence confirms that when investors incur fixed and irreversible setup costs, uncertainty about the local conditions—especially policy uncertainty—will have a dampening effect on new investment (Bernanke 1983, Bloom 2009, Dixit 1989). Looking specifically at developing countries, studies find that low institutional quality is a major deterrent for foreign capital flows (Alfaro, Kalemi-Ozcan, and Volosovych 2008). Similarly, components of
institutional quality, such as corruption (Wei 2000); government transparency (Gelos and Wei 2005); predictability of laws, regulations, and policies (Daude and Stein 2007); and the protection of property rights (Papaioannou 2009) have dampening effects on FDI inflows. A country’s attractiveness for FDI can suffer in the long term from a bad track record of government conduct that disincentivizes viable investments from materializing, even when investors are offered the most generous incentive packages.

Benchmarking Mozambique’s Legal and Regulatory Framework

Mozambique’s investment climate is considered risky, with low rankings in established international indexes affecting the attractiveness of Mozambique for FDI (table 2.1). In the established risk indexes (including the PSR Group’s International Country Risk Guide [ICRG] and the Economist Intelligence Unit’s [EIU] Country Risk Model), which are frequently consulted by foreign investors, Mozambique ranks among the riskiest countries in the world to do business. The World Economic Forum’s Global Competitiveness Ranking in 2019 ranks Mozambique 137th out of 141 countries (World Economic Forum 2019), and the country is ranked 138 out of 190 economies on the World Bank’s 2020 Doing Business (World Bank 2020c). The fact that the performance of Mozambique on many of the key global indicators is worsening compared to previous years reflects that it is losing ground against its competitors in the region. This situation underscores a general perception of a business environment that is complex, inconsistent, and rigid. The lack of clarity and transparency as well as the unpredictability and discretionary conduct of the public sector creates confusion for investors and hurts the competitiveness of the Mozambican market. Indeed, only Zimbabwe, which is among the peer group used throughout this report, falls into the same category. Host country risk discourages not only new FDI inflows but also the amount of reinvested earnings (World Bank 2019c, 15–16).

Protection of direct investment in Mozambique is below average. Political risks are wide ranging, but those most frequently reported to affect FDI are (a) unpredictable and arbitrary actions, (b) the absence of regulatory transparency, (c) delays in obtaining necessary permits and approvals to start or operate a business, (d) transfer and convertibility restrictions, (e) breach of contracts, and (f) expropriation (World Bank 2018a). At 176th of 190, Mozambique is the lowest-ranking country among all peer countries on the “Starting a Business” indicator in the World Bank’s Doing Business ranking (World Bank 2020). This indicator measures the number of procedures, time, cost, and paid-in minimum capital requirement needed for a limited liability company to start and
formally operate. Contract enforcement provides a similar picture. Mozambique ranks 168th, one rank above Zimbabwe, but with a considerable gap with all other peer countries.

**International stakeholders lack trust in the transparency and quality of government conduct and the rule of law in Mozambique.** The World Bank Group Worldwide Governance Indicators (WGIs) measure the perception of the private sector on the quality of the implemented regulations and the confidence in those laws being enforced. Accordingly, the WGIs indicate how risky Mozambique is perceived within the African region (figure 2.2). The three relevant indicators are government effectiveness, regulatory quality, and rule of law. In government effectiveness, which captures the perception of the quality of public services, the quality of the civil service, and the degree of its independence from political pressures, Mozambique ranks behind all peers but Zimbabwe. In regulatory quality, which assesses the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development, Mozambique fares better and is ahead of both Ethiopia and Zimbabwe and only 5 points behind Tanzania. The rule of law, which captures the perception of the extent to which public agents have confidence in and abide by the rules of society—and in particular, the quality of contract enforcement—is the worst indicator for Mozambique; there the country ranks ahead of only Zimbabwe again.

**Strong political leadership and results-orientation are required to address the lack of transparency and to implement deep structural reforms.** The risk dimensions outlined in this section are not new. A review of previous investment climate reform plans (CTA and ACIS 2013) concludes that reforms undertaken have not resulted in substantive changes for most businesses because they consistently lack implementing legislation. Moreover, the pace of reform has increasingly stagnated, despite the efforts of stakeholders and significant investments by donors and government. Thus, the main pressure points today remain the same, including reducing the time to obtain licenses, implementing less convoluted fiscal rules, facilitating transactions, improving consultations with the private sector, and increasing the transparency of lawmaking.
An aligned, well-coordinated, and effective investment framework is key to a country’s aspirations to successfully attract investments. Achieving such an endeavor entails a clear vision, commitment, and action-oriented leadership to convert a set of government agencies into an articulate, high-performing, institutional cluster capable of designing and implementing an agenda to properly leverage international trade and FDI for economic development.

The new government of Mozambique has a great opportunity to use the impetus around the recent gas investments to pursue a serious reform agenda. Mozambique currently receives substantial attention from the international investor community because of the developments around the new gas fields in the north of the country, which are estimated to provide a direct boost to GDP growth and will also increase investment in auxiliary services, including finance, legal services, and construction (EIU 2020). The wider economic momentum and growth present a unique opportunity to implement reforms that will also help to diversify the economy in the long run and to receive investments into productive sectors other than extractives. Attracting this type of FDI is more connected with a strong investment climate because investors are more open to choosing Mozambique and more concerned about competitiveness criteria.

Overview of the Recent Evolution of the Institutional and Regulatory Framework

The regulation defining the framework for investment policy has remained largely unchanged even though the institutional framework and market conditions have not. The legislation that anchors this framework is Law 3/93 from 1993, referred to as the Investment Law. It defines and covers both domestic and foreign investors. It is under this legislation that the guarantees for all investors are implemented.
Remarkably, the framework governing investments in extractives, the economic sector that has received the largest investment inflow (figure 1.4), is largely independent from the general framework for investments. Extractives have their own sectoral laws and regulations under the auspices of the Ministry of Mineral Resources and Energy (MIREME). These leave an important gap since they do not mention guarantees or protections. Because of the BITs that Mozambique has signed, this framework does not lift protection guarantees for investors in this sector but rather increases arbitration risk for the government. This parallel investment framework also creates challenges regarding transparency and clarity as well as the coordination between government entities.

Mozambique has recently set up the Agency for Promotion of Investment and Exports (APIEX), but implementing regulations were not updated at the same time, so the institutional reform is stuck halfway. The country’s recent institutional framework can be divided into two periods. Before 2016, Mozambique had two main agencies focused on investment attraction: the Investment Promotion Center (CPI) and the Office for the Accelerated Economic Development Zones (GAZEDA). In 2016, the Council of Ministers merged these two agencies with the Export Promotion Agency (IPEX) to form one single entity under the Ministry of Industry and Commerce (MIC), APIEX. APIEX is responsible for the promotion and approval of new investment projects but also houses export promotion and the SEZ regulator and developer functions.

An opaque regime also reflects a lack of division of labor and coordination between the different government agencies. APIEX has reporting lines to both the MIC and the Ministry of Economy and Finance (MEF). Its lead ministry, MIC, is not the primary ministry mandated to deal with investment issues and as such does not control the regulation and procedures for granting incentives to investors—one of APIEX’s main promotion tools. In fact, MEF formulates the investment policy and incentive regimes, negotiates international investment agreements (IIAs), and controls APIEX’s budget. The opacity of the system is exacerbated by the fact that there are neither regular meetings between APIEX and MIC, nor is the investment promotion agency empowered to perform effective and efficient investment facilitation across the different phases of an investment project. The existence of multiple players increases the risk of different rules being implemented and different priorities being set from one agency to another.

Combining APIEX’s mandate to promote investment with other regulatory and administrative functions may dilute its role and image. An Investment Promotion Agency’s (IPA) main function is to provide services to foreign investors, including marketing, information, assistance, and advocacy, across the investment project cycle to encourage investment in the country. Regulatory functions differ in nature from the promotional function because they require the agency to play the role of an enforcer of compliance with regulation as opposed to that of the investor’s main advocate within government. Moreover, these functions require a different set of skills and capabilities, and the administrative burden may usurp significant resources dedicated to promotion. If regulatory functions are present in an IPA’s mandate, care should be taken to ensure the autonomy and separation of these units, their staff, and activities—for instance, by being held in independent general directorates that report to the chief executive officer and the board on their respective functions. Operationally, these sub-entities should have separate budgets, authorizing environments, and staff (Heilbron and Whyte 2019).

Another area that lacks coordination is the one-stop shop (in Mozambique, the Balcão de Atendimento Único; BAU). One-stop shops (OSSs) typically aim to simplify administrative procedures for investors by providing a central point of communication for all approvals, licenses, and permissions. The effectiveness and efficiency of the OSS serve as a reference point to the investor for the quality of public services overall. The OSS network currently in place in Mozambique is not a “single window” but rather a “one-roof” solution, housing representatives from a number of public agencies. Additionally, the BAU does not house all the relevant agencies an investor needs. While
the launch of the e-BAU (an integrated platform for service delivery that aims to connect the OSS in the provinces and other institutions relevant for investors) is welcome, it is only used for certain types of business licenses, thus not reducing time, cost, and complexity of the business establishment process much (World Bank 2019a). If effectively implemented, it would be a very relevant instrument for investors. It is critical that the OSS links to ministries and agencies so that firms may apply, process, and file documents more easily and receive updates electronically. It is also recommended that the OSS remains independent from APIEX and that MIC improves the BAU and keeps close working relations with APIEX. The reason is that OSSs have operational needs that differ from promotional needs and could cause significant conflicts of interest if the two functions were combined (box 2.1) (Heilbron and Whyte 2019).

A well-functioning and empowered ombudsman is also needed to facilitate investment. Investors have raised their concerns over long time lags for procedures paired with a lack of service attitude, conditions which frequently create grievances among the investor community. To strengthen investor aftercare and avoid losing investment due to grievances, a strong ombudsman office is suggested.

While it is understood that the investment policy in Mozambique must consider the political economy in the country, the current setup falls short of best practice and needs a clear division of labor. Both the strategy for FDI promotion and the regulatory framework, which translates policy into legally binding documents, have to be placed in the current context in Mozambique. Being an economy that is highly dependent on natural resources brings additional challenges for ensuring that all members

Box 2.1. Aspects of the BAU Operational Needs

<table>
<thead>
<tr>
<th>To improve implementation, the strategy and operational model of the Balcão de Atendimento Único (BAU) needs to be clarified, such as the following aspects (World Bank 2017):</th>
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<tr>
<td>Strategy to ensure a whole-of-government approach</td>
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<tr>
<td>Clarity on required changes in the legislative and regulatory framework to make it work</td>
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<tr>
<td>Agreement on the modality of service provision (that is, will the one-stop shop simply collocate the service providers or fully integrate service provision in a single window?)</td>
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<tr>
<td>Agreement on a sustainable financial model (that is, free access versus subsidized services versus cost recovery)</td>
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<tr>
<td>Shared understanding of what routine procedures can be automated and what type of backend integration and data exchange this model requires between entities</td>
</tr>
<tr>
<td>Definition of the monitoring and evaluation framework, including key performance indicators and understanding of what success looks like and how feedback will be collected</td>
</tr>
</tbody>
</table>

Source: World Bank 2017
of society benefit from these mega projects while at the same time avoiding having the strength of one sector hampering the development of others. However, the recent changes in the institutional set-up have established mixed roles and mandates without their being fully implemented. This not only creates significant conflicts of interest but also contributes to confusion for both the investor and the bureaucracy. Furthermore, in such a setting it is more difficult to ensure that all functions are properly executed—that is, regulator and promoter of FDI, exports, and SEZs in the case of APIEX.

The following sections assess the current investment barriers and gaps in Mozambique’s protection framework. With the exceptions of performance requirements and guarantees granted through BITs, these issues predominantly apply to investors outside the extractive sector.
3. BARRIERS TO INVESTMENT ENTRY

Investment entry barriers are restrictions governing the admission and establishment of FDI that, through regulation procedures (de jure) and practices (de facto), impose additional burdens on foreign investors during the entry process (box 3.1). The impacts of de jure or de facto barriers are often intertwined.

Regardless of their nature, entry barriers may deter investment. While the costs and issues of entry restrictions will vary a lot, they tend to have the following features in common: (a) discourage FDI and reduce the volume of inflows, (b) incur costs to the potential investor (compliance costs) and the host government (through direct administrative costs and indirect costs as a result of reputational risks and FDI foregone), and (c) may constitute a form of discrimination between domestic and foreign investors. Taken together, all these costs can be significant and likely exceed the benefits that the host economy thinks it is deriving from having certain restrictions in place.

Legal and Regulatory Barriers

Lack of transparency on sectors open or closed to FDI

Mozambique has an open FDI regime, but the legislation is unclear on what sectors are restricted for foreign investment. Mozambique’s Investment Law and its regulations generally do not distinguish between investor origin nor limit foreign ownership or control of companies. The Investment Law mentions the existence of a document that will list the sectors that are closed or restricted to investment. However, the law does not list the sectors nor does the decree implementing the Investment Law. As a result, foreign investors are left wondering which sectors they may invest in. While various information from APIEX and other investment intermediaries highlight certain restrictions, they are not consistent—for example, between the information available in English and Portuguese. APIEX’s website states that FDI restrictions only apply in three areas: (a) real estate that was previously nationalized, (b) public works (construction), and (c) travel agencies. Yet its brochure introducing the legal and regulatory framework of Mozambique in Portuguese also cites private security as being closed to investors (APIEX 2017, 23).

Information on foreign ownership restrictions is mostly covered in sectoral regulations or BITs, which makes their identification difficult and cumbersome. While this report did not involve a review of sectoral legislation, it appears that a few more restrictions exist, including in media and entertainment and in game hunting concessions.

Box 3.1. Entry Barriers

- **Legal barriers** are a result of an intentional policy decision by the government and are usually prescribed in economy-wide laws, regulations, or policies and encompass a range of measures that intentionally discriminate against foreign investors, as opposed to domestic investors. Examples include restrictions on foreign investment, limits on the amount of equity an investor can hold, and so on. Legal barriers also encompass procedural barriers that come to bear as a result of red tape and additional regulation affecting a specific aspect of the establishment process. They arise as the foreign investor completes administrative requirements to apply, enter, and start operations in a country.

- **De facto barriers** are a sign of weak governance in the country. They reflect the operational barriers to entry, such as a lack of transparency and uncertainty.
Moreover, the government of Mozambique has a list of sectors that are restricted to foreign investment as an annex to certain BITs, such as the one signed with Japan in 2014 and ratified in the same year. The schedule listing restricted sectors also states the corresponding domestic regulations and includes (a) commercial maritime transport, (b) private camping sites, (c) gambling, (d) fisheries, and (e) insurance, in addition to those economic activities already mentioned.

As part of the economic priorities that Mozambique sets for its development it should define and communicate which sectors of the economy are open, restricted, or closed to FDI. For Mozambique to establish confidence in the country as an attractive investment location, inconsistencies in laws and regulations, partly a result of inadequate coordination within government, are an issue. For example, even where the Investment Law allows certain actions, other laws issued by different ministries may have countervailing restrictions. This unpredictability often leaves investors wondering if something is allowed or not. Inadequate information about laws and regulations and difficult access to them further accentuates the problem.

It is advised to develop a negative list that clearly states what sectors are fully or partially closed to foreign investment. There are two methods to develop such a list. Countries can either draft a positive list or a negative list. While the country reserves a right to have certain sectors closed to foreign investments, such restrictions should be specific and should preferably be enumerated very clearly. In a positive list, the government attempts to enumerate all the sectors or subsectors in which foreign investors may invest. This approach is less transparent and more uncertain because the status of a sector or activity not on the list remains somewhat unclear, and there is a higher risk of omitting a sector or activity, particularly emerging activities that did not exist in the past. The more advisable approach is the use of a negative list, under which the government lists all sectors or subsectors that are closed or restricted (allowing only minority foreign ownership, requiring special authorization from foreign investors, and so forth). This system is preferable because it provides maximum transparency by eliminating possibilities of exercising discretion over determining which investment projects will be prohibited or subjected to restrictions. If a sector or subsector is not on the list, it is automatically deemed open for FDI. Negative lists are attached to the law as an annex or as subsidiary legislation. The advantage of having the sectors and activities listed in a document of “inferior” legal value, such as regulations issued under the law, is to simplify the process of revising the list over time should government policy change. Since the number of restrictions also serves as a proxy for how welcoming a country is to foreign investment, the list should be as short as possible for countries actively seeking FDI.

**FDI screening**

All foreign investors in Mozambique must undergo a cumbersome screening procedure that is not clearly defined. Per the Investment Law, screening is for all investors that want to benefit from incentives and the guarantees offered by the law to protect an investment against political risks. As demonstrated, the protection aspect for investors is of fundamental importance. By making screening a condition for access to guarantees, this screening requirement in practice becomes obligatory to all foreign investors. Furthermore, the Investment Law states that investment will be screened by the Council of Ministers but does not go into detail about the procedure, rendering the process less transparent and deterring for investors. The decree implementing the Investment Law also provides some rules as it pertains to screening investment, but it states that APIEX serves as the single window for screening and collecting all necessary information (business plan, size of the investment, identification of investors, and so on). In fact, according to the same decree, APIEX is responsible for screening investments between $23 million and $200 million. Any investments smaller will be screened by the Municipal Council and those larger by the Council of Ministers. Additionally, the respective government bodies do not have to explain why a certain investment was approved or rejected, nor does the law provide for an independent appeal procedure, all of which increase risk. Once granted, the investment approval for this specific investment in Mozambique does not expire, and according
to APIEX, costs are around 0.1 percent of the investment value but capped at a maximum of $50,000. As the primary legal instrument regulating FDI in Mozambique, the Investment Law should be much clearer on how the process for screening will take place. Moreover, the legislations relevant to screening in Mozambique contradict each other and create a convoluted bureaucracy for the investor.

In general, comprehensive screening of investments is a considerable entry barrier, often raising costs and investors’ uncertainty. Screening means that a foreign investor or project sponsor has to submit an application comprising multiple documents (financial projects, expected inputs and outputs, employment plans, feasibility study, and so on) and the reviewing body or committee decides whether the project will be admitted or not. Uncertainty is further increased when it is difficult to access information on the requirements and procedures, when the related laws and regulations lack clarity, and when the host country has an absent or ineffective appeal mechanism. Economywide screening is a strong deterrent for FDI for two reasons.

- **Increases the time and cost it takes to enter the country.** Onerous documentary requirements coupled with a lack of objectivity in the process may further complicate this already expensive process. The documentation needed for the screening process may sometimes require investors to hire a consulting or law firm, or both, and spend additional resources to prove the adequacy of an investment project. This may be especially challenging for small- to medium-sized investors with limited resources.

- **Has little predictability for the investor.** With no objective criteria to screen investments entering the country, the process is often discretionary, bureaucratic, and unpredictable.

Therefore, international best practices in screening have several common traits: (a) they regulate business activities rather than the actor and are focused on activities that may have significant health, safety, environmental, or security implications; (b) the licensing conditions are designed to decrease the associated risks; (c) the costs of licensing are set to cover costs of administration of licensing regime; and (d) the validity of the license is unlimited. Countries are moving away from an economywide FDI screening and are having more success in attracting FDI flows.23

For Mozambique, it is advisable to move away from general toward activity-specific screening. Comprehensive screening mechanisms are a significant burden for the investor, especially in a country that does not enjoy much trust in the public service. Even if well designed and administered, it unnecessarily increases the cost for both the administration and the investor, and its initial objectives can usually also be covered through more forthcoming regulations that send a business-friendly signal to current and future investors.

**Restrictions to own land**

Many African countries do not extend land ownership to investors. For historic and political reasons, all land belongs to the state. However, countries such as Madagascar and Tanzania grant long-term leases allowing for the operation of certain economic activities in a certain location.24 The ease of obtaining the right to lease land is thus the competitive factor for investors when making investment decisions. Mozambique offers land use rights, or *Direito de Uso e Aproveitamento da Terra* (DUAT), for up to 50 years in urban areas and 99 years in rural areas. The DUAT can be renewed once by written request of the investor.25

The current regulation on the right to lease land presents legal challenges for foreign investors in Mozambique. Treatment differs between how domestic and foreign investors can access the land. Although Law 19/1997 grants foreigners the right to use land,26 it discriminates against foreign investors and imposes more conditions than it does for domestic investors. First, a foreigner, whether a physical person or company, can lease land only if they have been living in Mozambique for at least five years, which increases the barrier for FDI because many investors cannot just enter the country and apply once an opportunity arises.27 Second, the same law states that the preliminary authorization of the DUAT granted to foreign investors will be valid for up to two years compared to five years for domestic investors. This discrimination violates
the National Treatment guarantee and is thus not in compliance with Mozambique’s international commitments. Besides the legal provisions, it can take investors up to a year to get a definitive DUAT. Since the application for the use of land can only begin after an investment project has been screened and approved by the relevant authority, obtaining a DUAT is an extra step for investors when establishing a business in Mozambique.

Work permits for foreign workers

Investments that rely on efficiency and compete internationally are sensitive to difficulties in hiring foreign skilled labor. The regulation on the movement of third-country persons is an important aspect of the operation of foreign investments. While governments naturally try to increase job opportunities for nationals (especially true in a post-conflict context as in Mozambique where there is a need to avoid social unrest), a balance between enforcing strict economywide quotas and filling gaps in the supply of skilled labor must be struck. Otherwise, such quotas quickly become a deterrent for FDI as they decrease the competitiveness of the investment project. This applies even more to investment in new sectors that would be needed for the diversification of the economy but for which a trained local workforce is not yet available.

Mozambique has quotas on foreign workers across all sectors. In line with the Labor Decree (Decree 37/2016), the quota depends on the size of the business. Companies with more than 100 employees can hire 5 percent foreign personnel; for companies between 11 and 100 employees it is 8 percent, and for companies with fewer than 11 employees it is 10 percent. The issue with a strict quota is that this does not always reflect the ever-changing demands of the market. Should a company operating in Mozambique wish to expand and diversify its operation in the country, it might have to bring experts from abroad to set up new operations and train its workforce. If the quota is already reached, that same company may not be able to bring in the required experts and therefore might have to rethink its strategy of expansion.

The legislation allows a few exceptions for the quotas. In practice, business needs exceptions regularly to mobilize sufficient labor. The Labor Decree states that investment projects above $210,000 approximately and investment projects above 10,000 hectares can file for exceptions from the quotas. However, the regulation is silent on the process and extent of that exception. Consultations with the private sector confirm that many companies are requiring such exemptions and usually also have them granted, which indicates that the current quota regime is not based on economic reality or evidence. Moreover, investors request a simplification of the process to receive work permits, in particular related to documentation requirements. The problem is that the current system leaves it to the Ministry of Labor to make a determination case-by-case, which in turn increases discretionary power while raising costs and uncertainty for investors.

Consider a labor quota regime based on economic need. To address the deficiencies in the current regulation, Mozambique is advisable to introduce quotas that allow for more flexibility. This can either take the form of adapting hard caps for different sectors, including a regular review of those caps, or requiring companies filing for exceptions to prove economic need that cannot be filled in the local labor market. A more flexible regime would offer some control to the government but also facilitate the private sector’s ability to operate competitively and would increase opportunities for the domestic workforce to acquire skills over time.

Entry visas

The impact of a poor visa regime hurts the tourism sector—one of the six priority sectors for FDI promotion in Mozambique. The burden of obtaining visas has an impact beyond the inconvenience of individual travelers. It extends to the image of the destination because it is frequently the first impression that a traveler or prospective investor gains of a country. Thus, delays, high costs, and unfriendliness in the process damage their perception and reduce the likelihood that travelers return and entrepreneurs invest.

The Mozambican government offers visas for foreign nationals willing to invest. In 2017, a new regulation to obtain investment visas reduced the minimum investment amount required from $50 million to $500,000. From the moment an
investment is approved, an investor who is a representative or member of the board of a certain company can file for this visa.

**Local content policies**

While local content requirements (LCR) are usually introduced for legitimate policy objectives, they often turn out harmful. Local content is a type of performance requirement that the United Nations Conference on Trade and Development (UNCTAD) defines as “stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country” (UNCTAD 2003, 2). Local content aims to ensure a presence for local products and services, a specific level of local jobs, training programs, or obligation to form a joint venture to enter the country (Nikièma 2014, 2). Frequently influenced by experience with natural resource-seeking investment, governments imposing LCRs often envision them as a policy response to two fundamental challenges: (a) ensuring the efficient use and equitable distribution of the benefits of FDI and (b) improving the typically low technological capacity of the domestic private sector. However, LCRs not only fail to address these underlying issues but may, in fact, exacerbate the problem. Even where LCRs achieve short-term political objectives, they often undermine long-term competitiveness.32

Different approaches to designing and implementing LCRs influence their prohibitive impact on FDI. Prescriptive quotas constrain the foreign investor and raise the price of production, especially if a domestic alternative of similar quality is not available. Nevertheless, restricting quotas for only a specific sector provides more openness than an economywide option. Other LCRs urge the investor to give “priority” to local goods and services. Foreign investors might agree on certain indicative numbers on a case-by-case basis that forms part of the investment contract and often is connected to the granting of incentives. Thus, it leaves more negotiation room between the foreign investor and the host country, making it less of a deterrent to FDI attraction. Host countries may also encourage local content by promoting links to and training of the local workforce following a partnership approach between business and the public sector. The World Bank Group generally recommends making LCRs part of a broader discussion on the domestic economic development strategy to understand if and how LCRs may be a suitable instrument to increase domestic value addition and jobs.

Mozambique enforces LCRs in the extractive sectors. The country, via Decree 20/2004 (mining) and Decree 21/2004 (oil and gas), has developed local content policies that mandate the investor to enter into a joint venture with the state (where the state will own between 5 and 20 percent of shares) and to give preference for local goods services and domestic workers. Natural resource-seeking investors tend to be somewhat less sensitive to such policies, not least given the lack of alternative investment locations.

Implementing an economywide local content law may stiffen the growth of sectors relying on competitiveness and can duplicate obligations already existing in sectorial laws. In light of the recent gas discoveries and increased investor interest, the government has been developing a horizontal local content bill setting stricter targets for all economic activities. Beyond the political signal it sends, such policy is unnecessary at best or may seriously damage business at worst. It duplicates much of the sectoral regulation and the local content framework applied to large-scale investment projects as regulated by the Law on “Projectos de Grande Dimensão,” or large-scale projects.33

**De Facto Barriers**

For FDI and mid-to-large firms in Mozambique, corruption, informality, and political instability are the key barriers to doing business. The World Bank Group’s Enterprise Survey was run in Mozambique in 2018 and measures key aspects of the business environment along 10 broad areas34 When results between domestic and foreign ownership are disaggregated, the issues that rank disproportionately high for FDI are (a) the number of meetings from tax officials (80.6 percent in Mozambique compared to the 74.3 percent regional average), (b) the days to obtain a construction permit
(40 days compared to 29 for domestic investors), and (c) days to obtain an electrical connection (50 for FDI versus 8 for domestic investors). The indicator that counts the days to clear exports or imports through customs was higher than the regional average for both domestic and international investors. What this survey clearly shows is that de facto barriers exist and negatively impact investors in the country.

**The lack of transparency fosters abuses of power and corruption.** According to Transparency International’s 2019 Corruption Perception Index, Mozambique ranks 146 out of 180 countries, with only Zimbabwe ranking lower among its regional peers. It is encouraging, however, to note that Mozambique improved by 12 places over its rank in the 2018 index. Nevertheless, the World Bank Enterprise Survey confirms that corruption in Mozambique is the number one obstacle to doing business for international and domestic investors alike and is constant across all firm sizes (World Bank 2019b). Due to the opacity of the regulatory framework, fiscal authorities, for example, often charge more than they should. This creates different challenges for investors. They may need to invest in a strong compliance department to defend themselves against abusive practices. This situation might also simply render the cost of doing business too high, especially for small-size investors, which often decide to operate informally. Competition with the informal sector ranks second among medium- to large-scale investors as the biggest obstacle in Mozambique’s business environment (World Bank 2019b).

**Mozambique’s de facto barriers are a direct consequence of the lack of clarity, transparency, and enforcement of its regulatory framework.** The existence of legal and procedural barriers is exacerbated by incomplete information, complex rules and processes, and arbitrary decisions by government officials. Newly introduced laws and regulations are often written in general terms with a promise of more detailed implementing regulations and guidelines to come. However, in practice, such details are often not provided or are provided much later after the laws and regulations have come into force. Investors, and often the implementing officials themselves, are thus unclear about how to interpret the new regulations, including their compliance requirements. The unclear regulatory framework creates a large scope for discretionary interpretation by officials. Investors feel that decisions do not always follow clear criteria but are driven by subjective considerations, and they complain about unclear and unpredictable compliance standards. More often than not, they depend on their personal network to get things done with government.

**Acceding to the Hague Apostille Convention may improve trust and simplify the certification process.** A foreign business establishing an investment in Mozambique needs to present a number of documents to evidence the identity of the investor as well as the scope and purpose of the project, among other things. To be assured of the validity of those documents, the government often requires some sort of certification or legalization that is meant to confirm that a document is indeed what it declares to be. This can be a lengthy and expensive process since it requires visiting and receiving authentication from public agencies in the home and the host country. The Hague Apostille Convention of 1961 facilitates the legalization of foreign public documents between state parties where a government entity in the home country issues an “Apostille”—that is, a standardized certificate to authenticate the document. For business, key benefits of the Convention are (a) streamlined administrative procedures, (b) reduction of red tape, (c) reduced time and cost, and (d) more certainty about the process. Governments benefit from enhanced integrity and the possibility of charging a reasonable fee in exchange for authentication services, while businesses and citizens benefit by saving time and the cost of authenticating documents, having to pay only once in the process (The Hague Conference on Private International Law 2013).

**A convoluted system may also impose considerable risks for the government of Mozambique.** For the example of the obligation to obtain an environmental license, vague requirements and procedures may lead to friction between the national and subnational levels of government. According to private sector representatives in Mozambique, on a few occasions
the municipal level did not always recognize the license that was granted by the central government, creating a problem that stalled the establishment of the investment. This issue could pose a potential threat to the central government because investors in other countries have used such cases to allege a breach of their guarantees and called for an investor-state dispute settlement.37

Barriers to Facilitate Investment in Mozambique’s Special Economic Zones

Special economic zones (SEZs) are an investment policy measure aimed at providing preferential treatment to investors.38 SEZs are geographic areas where the rules of business are different. In general, the business environment in an SEZ is more liberal from a policy perspective and more effective from an administrative perspective than in the rest of the country. SEZs usually offer fiscal incentives, infrastructure and services, streamlined business registration and customs procedures, facilitated processing of labor and immigration permits, and other investment facilitation services (Farole and Akinci 2011). There are many types of SEZs, and they continue to evolve. The various forms depend on the industrial structure of a country, the institutional environment, and the broad policy goals they want to achieve (for example, job creation, exports, reform laboratories, and so on), but they all aim to attract FDI. Today, SEZs are often general-purpose zones, attracting investors in a wide range of manufacturing and services industries (UNCTAD 2018).

In Mozambique, the legal, regulatory, and institutional weaknesses of the general investment framework are duplicated when it comes to SEZs. While SEZs have shown some advantages globally, many have failed to attract significant investments. In the same way that generous incentive packages are not able to make up for a poor investment climate overall, the mere existence of SEZs, without the provision of anything truly “special” in terms of business environment and infrastructure provision, neither improves the investment climate nor attracts significant investments. The lack of transparency, detail in regulation, and information as well as gaps in institutional capacity and coordination outlined in the previous sections also apply to SEZs in Mozambique, making it harder for individual zones to stand up to the competition in the region.

There is no single and independent SEZ law with associated implementing regulations, leaving the investor with a complex and confusing set of provisions to follow. Mozambique’s SEZ regime is governed by several ad hoc decrees, statutes, and resolutions (see appendix B). These not only mix the various forms of SEZs, including export processing zones and free zones, but also include a myriad of fiscal and nonfiscal benefits without considering their value-added for attracting new investors nor their distortive effects on domestic competition. An independent SEZ law and implementing regulations should be developed to establish a streamlined business environment with clear and transparent rules and criteria (box 3.3). The law should provide the necessary level of detail on procedures, documentation required, timeframes per process step, and associated cost. Since market conditions might change over time, it is recommended not to include these specificities in the law directly, so that they can be easier adapted. This information should be made available for investors in a handbook and published as broadly as possible in foreign languages (at least in English and Chinese) in addition to Portuguese. If such basic information is not readily available, the SEZs in Mozambique simply will not end up on the long list of potential investors.
Box 3.3. Best Practices on Legal Provisions for SEZs

Best practice special enterprise zone (SEZ) regimes are typically governed by one comprehensive and independent SEZ law with implementing regulations that provides predictability, accountability, and transparency to investors. Ethiopia, Kenya, and South Africa, among others, have such laws in place. The legal provisions should be published and include the following:

- Negative list of activities not permitted with SEZs
- Clear criteria for SEZ eligibility, selection, and approvals
- Protection of private property and intellectual property rights as well as conformity to World Trade Organization membership and standards
- Ability to export without minimum thresholds and to sell into the domestic customs territory while paying taxes
- Guarantee to transfer funds (foreign exchange) freely into and out of the SEZ and country
- Dispute resolution measures in line with international practices
- Permission to sell, resell, or lease land
- Transparent rules, processes, and procedures to streamline the enabling environment
- List of legal rights and obligations of zone developers, operators, users, and residents
- Autonomous regulating agency (legal and financial autonomy) comprising public and private membership that can independently approve all types of and financial levels of investment projects
- Promotion of private sector or public-private partnership–driven opportunities for development
- Proper master planning controls in SEZs to protect investments, minimize land use conflicts, and ensure environmental safeguards
- Guaranteed quality facilities and reliable infrastructure and utilities
- One-stop shop and aftercare that eliminate jurisdictional conflicts between ministries, departments, and agencies and that fast-track business establishment
- Package of fiscal and nonfiscal incentives

Source: Background note for IFC 2021 by Deborah Porte; Farole and Akinci 2011.

International best practice recommends an autonomous regulator for SEZs. Since the Office for the Accelerated Economic Development Zones (GAZEDA) was merged in 2016, APIEX has been the guardian of the SEZ regime in Mozambique. Therefore, the functions of the regulator, developer, and promoter are all under the same roof, creating significant conflicts of interest. Moreover, it usually requires a different set of staff and tools to perform each role well. Thus, it is recommended to have an autonomous regulatory body established that is responsible for SEZs (box 3.4), reports to an independent board, has a business and service culture, and hence may also charge for services provided to be self-sufficient.
Besides the regulatory and institutional weaknesses, another key constraint to promote investment to SEZs in Mozambique is the lack of developed SEZ projects. The new SEZs planned in Nacala, Mocuba, and Manga-Mungassa have not yet been developed, meaning that there is no serviced industrial land connected to infrastructure (that is, plots with roads, reliable power, water, drainage, telecommunications, and wastewater treatment facilities) available for lease. Recalling Mozambique’s shortcomings on some Enterprise Survey indicators related to accessing infrastructure, such as getting electricity (see section 3.2. on de facto barriers), well-serviced SEZs could fill a critical gap in attracting investors to Mozambique and helping the country compete with its neighbors. However, it is important to note that SEZ development needs to be based on comprehensive feasibility studies, including future market demand assessments, since a “build-it-and-they-will-come” approach often used by governments usually does not deliver results. It is thus recommended that the SEZ agency examine ways to attract private sector zone developers to Mozambique to avoid political interest interference with SEZ development based on market demand. Furthermore, the agency should proactively investigate ways to improve the general infrastructure and utilities surrounding the SEZ areas. To do so, the agency needs to nurture close relationships with local municipalities, the Roads Commission, and power and water providers.

Modernizing the SEZ regime is key to being competitive in the region. The competition on SEZs is significant in East and Southern Africa, where most countries in the immediate neighborhood (Ethiopia, Kenya, South Africa, Tanzania, Zambia, and Zimbabwe) are proactively promoting their SEZs as an attractive investment location. These countries have prepared their institutions, including through higher capacity of staff to operate in foreign languages, to master their mandate, and help investors set up operations.
4. GAPS IN THE INVESTMENT PROTECTION FRAMEWORK

Investment protection guarantees are critical for retaining and expanding investments in the long term across all types of FDI. Over 90 percent of all investors rate various types of legal protections as important or critically important (World Bank 2018a). Those rules may be enshrined in the constitution or under a specific regulation such as an investment law and also typically form part of international investment agreements (IIAs), such as bilateral investment treaties (BITs). While the investment law provides core guarantees for investors operating in the country, the protections a country offers domestically have to be aligned with those it offers internationally. This section assesses the coherence and quality of investment protection in Mozambique compared to best international practices.

Mozambique grants variations of all five fundamental guarantees for foreign investors. These are grouped into three categories:

- The guarantees for nondiscrimination and fair and equitable treatment both refer to the treatment of the investor.
- The protection against unlawful expropriation and guarantee for the free transfer of funds and profits relate to the protection of the established investment.
- Access to investor-state dispute settlements provides mechanisms to settle grievances in the process.

**Investment is a long-term relationship, not a one-time transaction.** The level of reinvested earnings as a share of FDI inflow is a good indication of how foreign investors perceive the project’s risk and quality of protection. Globally, roughly 25 percent of FDI inflow on average are reinvestments from investors already present in the country per year (World Bank 2018a). As of 2016, Mozambique had not received any reinvestments since 2011. Among the peer group, performance is mixed. Ethiopia, Ghana, and Zimbabwe also have not had reinvestments recently, while countries such as Kenya and Tanzania have.

**Treatment of the Investor**

**Protection against nondiscrimination via the national treatment principle**

As a World Trade Organization member, Mozambique needs to uphold the national treatment principle. This guarantee is defined by a host country’s offering treatment as favorable to foreign investors as it does to a domestic investor in like circumstances. As such, this guarantee has a relative standard since it observes the treatment that two types of investors receive when faced with the same situation to determine if there is a violation or not.

Mozambique guarantees this principle both at the domestic and international level, but the domestic quality of the protection is not aligned with best practices. Article 4 in the Investment Law states that domestic investors and foreign investors will have the same rights and obligations. However, it leaves gaps in the quality and scope of the guarantee. First, article 4 should also mention that it treats investors equally “in like circumstances.” That is, to establish if discrimination occurred, one has to observe if the situation in which a domestic investor was favored is indeed the same situation that a foreign investor is in. Adding this qualifier would better protect the government of Mozambique from frivolous claims and potential arbitration proceedings. The BITs with the Economic Union of Belgium and Luxembourg, India, and Japan already include this clause. Thus, it is simply a question of modernizing the language under Mozambique’s Investment Law. Second, the scope of the guarantee as currently phrased is unclear and creates a gap regarding international commitments. This guarantee can extend only to the post-establishment phase (that is, once the investor has started operation) or also include the
establishment phase. In its BITs with Japan and the United States, investor activities are defined as covering both phases, therefore extending the guarantee further than its definition in the Investment Law. Therefore, it is important to raise the attention of the government of Mozambique to this discrepancy since investors from Japan and the United States are entitled to start an arbitration procedure against Mozambique even before they have started operation in the country.

**Fair and equitable treatment: an absolute standard of protection**

This guarantee has become the most important standard in investment disputes but is not defined in Mozambique’s Investment Law. The fair and equitable treatment (FET) standard is designed as a rule of international law and is not determined by the laws of the host state. Thus, unlike national treatment, the FET standard might even be violated if the foreign investor received the same treatment as a domestic investor. Thus, a clear definition of this is paramount for the government and investors alike. This provision is currently left out of Mozambique’s Investment Law. Mozambique upholds this guarantee in its BITs but, again, without providing a granular definition. This absence could allow different arbitral tribunals to give different interpretations as to what the content of such a standard may be.

There is no consensus on a FET definition encompassing all possible forms of prohibited action by the state. However, tribunals have tended to focus on the following subcategories for potential violations, which are now found in the FET definition of best international practice investment agreements. The examples listed in the subcategories (box 4.1) are not exhaustive but are used to illustrate their meaning.

Mozambique already had to defend itself at the International Centre for Settlement of Investment Dispute (ICSID) on the basis that it had violated the FET provision. Most international arbitration proceedings started by foreign investors are based on FET violations. As stated, this guarantee is on a spectrum, and when not precisely defined it gives a large amount of interpretation to the arbitrators in an investor-state dispute. Mozambique has had an arbitration procedure under the ICSID from an Italian investor for violation of the FET provision of the Mozambique-Italy BIT. The investor argued sudden and arbitrary conduct from the government when it refused to pay compensation that it had supposedly agreed to. Although the ICSID award was in favor of the state, it reflects the risk of other such cases in the future. It is therefore recommended that the country define the FET provision in the Investment Law to have more control over what may fall in the scope of this guarantee.

**Protection of Established Investments**

**Protection against unlawful expropriation**

Mozambique is regarded as having a medium risk for expropriation, but its performance is deteriorating. Per Credendo’s assessment, the risk of expropriation in Mozambique is at par with Ethiopia and Tanzania (all at 5 out of 7 = highest risk) and better than Zambia and Zimbabwe (both 6 out of 7). However, in the International Country Risk Guide’s (ICRG’s) assessment, which classifies indicators from 0 (high risk) to 4 (low risk), the risk of expropriation in the country changed from 3 in 2015 to 2 in 2019, suggesting an increase in this type of risk for investors.

It is a government’s prerogative to expropriate investors for matters of public purpose. However, this procedure needs to be done lawfully and following a transparent procedure. According to best international practice, an expropriation is seen as legal if it (a) is done to serve a public goal, (b) follows a nondiscriminatory process in which the investor has a right of appeal, (c) offers a fair market value compensation to the investor equivalent to the value of the good directly before the expropriation process, to be paid without undue delay in a freely convertible currency, and (d) allows this compensation to be transferred outside of the host country.
The domestic regulation in Mozambique does offer protection against unlawful expropriation, but key elements of the provision are not present. The Investment Law states that expropriation will only occur for public purposes and ensures the promptness of the compensation and its transferability (art. 14). However, all other conditions are either absent or could be improved on. Per the Investment Law, investors may ask the Council of Ministers to review their case, but this is not standard due process. Investors should be allowed to argue the decision by the government to expropriate in the judiciary to ensure the fairness of the review. Further, the Investment Law secures compensation for the investor, but it states that the amount will be determined by individuals selected by the state, so the compensation may not necessarily be equivalent to free-market value before the expropriation. This is typically of great concern to investors because they may not be adequately compensated. Last, but a minor detail, the Investment Law does not explicitly state that foreign investors will not be discriminated against during the process. Since Mozambique already has many BITs in force that flesh out all the recommended conditions for this provision aligned with best international practices, it could simply update the Investment Law following, for example, art. 5 of the BIT with India.

Box 4.1. Subcategories under Recent Jurisprudence of the FET Provision

- **Frustration of an investor’s legitimate expectations and failure to act in good faith:** A host government cannot break a promise made to the investor. If, for example, the state offered the investor an exoneration of tariffs for a certain time, it cannot completely change those exonerations arbitrarily thus substantively changing the situation compared to the one the investor agreed to when they entered the country.

- **Lack of a stable, consistent legal regime:** The state does have the right to adapt its regulatory regime to circumstances of public need, such as rolling back incentives granted to foreign investors when the fiscal health of the state demands it. Nevertheless, in cases like these, the jurisprudence has stated that the host country cannot just ignore its investment treaties obligations and therefore has to offer fair treatment to foreign investors in such situations, mindful not to completely change their situation in the country.

- **Arbitrary, discriminatory conduct, lack of due process, or denial of justice:** This standard dictates that investors are to be given a fair hearing and a right to appeal after a decision is taken. There are four cases where an investor can carry a denial of justice against the state: (a) if courts refuse to entertain a suit, (b) if the investor is subject to undue delay, (c) if justice was rendered in a seriously inadequate way, and (d) if malicious misapplication of the law is found. It is relevant to underline that according to international cases, an investor will only be able to claim denial of justice in an international arbitration case when all local remedies have been exhausted.

- **Failure to act transparently:** This condition means that investors must be able to know the rules applying to their business. In addition to the above examples, transparency is then the effort from the state not to change the essential features the investor relied on at the time of the investment or at least informing the investor in a timely manner that the regime will be modified.

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a. Ioan Micula and others v. Romania, ICSID Case No. ARB/05/20.  
b. ADC v. Hungary, ICSID Case No. ARB/03/16.  
c. Eiser Infrastructure Ltd. v. Spain, ICSID Case No. ARB/13/36.  
d. Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2 paragraph 126.  
e. Saipem S.p.A. v. People’s Republic of Bangl., ICSID Case No. ARB/05/07 paragraph 151.

Source: World Bank Group Investment Policy and Promotion Team research.
Mozambique needs to fill the gaps in domestic legislation related to indirect expropriation. International law distinguishes two types of expropriation: (a) direct, which means that the government takes clear action to seize the property title, and (b) indirect, which is the accumulation of actions that result in a de facto expropriation for the investor. The latter is, by far, more common. While the Investment Law does not mention this type of expropriation, Mozambique is committed to enforce it under the BITs it has signed. This constitutes an important misalignment between domestic and international commitments. Mozambique already had to defend itself at ICSID for indirect expropriation alleged by a South African investor. Although the award was rendered in favor of Mozambique, it was only done because the BIT with South Africa was not in force at the time the decision was made (October 2019). Thus, a procedural aspect protected the state. As stated earlier in this report (see 3.2 De Facto Barriers), Mozambique has weak coordination between agencies and different levels of government. This example shows that uncoordinated and unaware government actions may considerably increase the risk of arbitration based on indirect expropriation claims. According to ICSID, cases involving indirect expropriation are the second most common type of cases brought forward by investors.

Free transfer of funds

The restrictions on transferring funds out of Mozambique severely hurt its investment competitiveness. Mozambique and Zimbabwe rank as the countries with the highest risk on transfer and convertibility of currencies. Just as with the expropriation indicator, Mozambique’s performance has deteriorated from 2015 to 2019. The repatriation of profits and capital to the investor’s home country is a primary concern of foreign investors who, hence, pay close attention to this provision.

To be compliant with international commitments, Mozambique cannot restrict the amount of funds that can be transferred. Under international law, this guarantee needs to explicitly offer the foreign investor the opportunity to transfer funds in and out of the country in a freely convertible currency and without undue delay. This is how it is stated in Mozambique’s BITs with India (art. 7) and with Japan (art. 15). Most importantly, those BITs ensure that all types of profits may be repatriated out of the host country. There is one accepted exception to this international standard, which is in times of balance of payment crises. In such a case, a state may restrict the transfer of funds for a determined period of time. Nevertheless, Mozambique enforces a minimum transaction threshold set at approximately $40,000 to allow the transfer of funds out of the country. Not only does this limit affect smaller investors disproportionately, but this provision also goes against all BITs that Mozambique has in force and thus, again, exposes the country to arbitration risk.

Access to Investor-State Dispute Settlement

Granting foreign investors access to international arbitration is a common standard of foreign investment legislation. Since the independence and quality of the judicial systems vary across the globe, and executive interference in court proceedings is likely (especially where substantial financial amounts are at stake), this is an important guarantee for foreign investors to resolve disputes with the host state. Weaknesses of the courts in Mozambique may be verified by its ranking at 168th out of 190 countries in the World Bank Doing Business indicator measuring enforcement of a contract (World Bank 2020c). It measures the time and cost of implementing a decision by a first instance court in the country. The ranking suggests that companies need to invest a significant amount of time and money to get a decision in the first instance of the courts, making them less likely to try or be willing to solve disputes that way, especially when the government is involved.

It is thus very positive that Mozambique offers access to international arbitration at both the international and domestic levels. All the BITs in force and the Investment Law (art. 25) include a provision that grants access to investor-state dispute settlement (ISDS) to foreign investors. However, if the investors may benefit from access to arbitration, it is also important for the host country to clearly define the scope of this provision. Doing so protects
the state against frivolous claims since ISDS can be very costly. Currently, the Investment Law offers only a very general provision of ISDS and investment in extractives; the majority of FDI stock in Mozambique, is not covered by the Investment Law and as such access to ISDS is unclear at the domestic level. It should be in the interest of the government of Mozambique to consider a more in-depth definition of this clause in the Investment Law and clearly identify in which circumstances a case can be brought to arbitration. Rather than allowing any dispute as receivable, the state could, for example, define that a grievance can be brought to arbitration if investors demonstrate they have incurred damage directly due to a guarantee violation. The state can also provide more details as to how the procedural aspects of ISDS should be set. This would entail fleshing out the rules to be used, implementing that the process of choosing arbitrators, their review of the evidence, and their legal reasoning be transparent (that is, the documents would be accessible to the public). Mozambique has BITs that already offer such a level of detail on the ISDS clause, and the government is advised to align its domestic legislation with those international standards.58

Given the challenges ISDS can pose to host economies, solving grievances before they escalate into a legal dispute is in the host country’s best interest. Even if awards are at the end rendered in favor of a government, having an increasing track record of ISDS cases affects the perceived political risk and attractiveness of an investment location for future investors. Defense in investor-state disputes further requires considerable public resources. Governments have therefore started to focus their attention on the beginning of the investor-state conflict continuum and have developed grievance mechanisms, such as an ombudsman office, that help them resolve problems before they escalate. Investors in Mozambique have been calling on the government to establish an ombudsman. The institutional anchor had not been finalized at the time of this study. Although APIEX would be a possible candidate, it is not fully empowered to act as a single window for investment and currently lacks the technical capacity in this area. Investors, during conversations in December 2019, reiterated that they tend to solve severe issues with the offices of the president or prime minister directly and thus do not believe placing this function in a line ministry is an effective choice. International examples that were able to fulfill this objective had two institutional features in common:

- **An empowered lead agency:** The body responsible for operating the ombudsman needs to have legal experts able to identify when an investor grievance can be received by the ombudsman and what the degree of severity of the grievance is. It is fundamental that, through law or decree, the ombudsman is conferred a clear scope of operations.

- **Buy-in from a political decision-making body:** While the ombudsman performs the technical assessment and forms the link between the investor and the government, it has to have a strong link with a political decision-making body that has the clout to indeed implement the changes needed (for example, correct policies, call out misconduct of public entities, and so on).

The lack of coordination between government agencies affects the understanding and awareness of its international commitments. Often, the distribution of competencies across government separates the body in charge of the formulation of the domestic investment policy from the body negotiating international agreements. For example, the Brazil Mozambique Cooperation for Facilitation Agreement signed in 2015 (which is not yet ratified), on the Brazilian side, was negotiated by the Ministry of Foreign Affairs. However, the government agency in Brazil developing investment policy at the time was the Ministry of Industry and Commerce. This may pose challenges absent good transparency between government agencies since once an international agreement is implemented, all levels of the government need to abide by it. In the case of Mozambique, there is also a misalignment between government agencies developing the Investment Law, which is the competence of the Ministry of Industry and Commerce (per the PANAM 2019–2021 policy) and the Ministry of Economy and Finance that negotiates the BITs according to Decree 116/2015.
Mozambique needs to align its domestic investment policy formulation with its international investment policy commitments and practice. Different countries have adopted different measures to create more alignment between their IIA commitments and their domestic legislation. In the case of Brazil, mentioned previously, the government provided a new alignment of its ministries placing now both the negotiation of IIAs and the domestic investment policy under the portfolio of the Ministry of Economy. In other countries, an institutional realignment may not be enough as the investment law and the IIAs may also be in contradiction with one another. Myanmar, for example, passed a new investment law in 2016 that is closely aligned with the obligations the country has under the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement of 2009.
5. RECOMMENDATIONS

The main weaknesses of the legal and regulatory framework for investment in Mozambique are the lack of transparency and clarity, the lack of reform implementation, and the unpredictable and discretionary conduct by public officials at all levels of government. The weaknesses not only make it more difficult and costly for an investor to enter and operate in Mozambique, but they severely affect the attractiveness of Mozambique as an investment location in the first place — especially outside the extractives sectors. These issues are not new to the country. Therefore, any serious reform agenda must be sponsored by a reform champion with enough political clout to ensure implementation finally happens.

1. Modernize the Investment Law and other related legislation and align it with international investment policy commitments:

   a. Implement a registration mechanism within the Agency for Promotion of Investment and Exports (APIEX) instead of a screening mechanism. Moving to a simple registration process in the Investment Law would considerably simplify the process of establishing a new investment in the country.

   b. Define and clearly communicate which sectors of the economy are open, restricted, or closed to foreign direct investment (FDI). Develop a negative list to increase transparency on sectors where investment is restricted.

   c. Define the fair and equal treatment (FET) guarantee and the protection against indirect expropriation as those are the most common breaches alleged by investors under investor-state dispute settlement (ISDS).

   d. To the extent fiscally possible, allow free transfer of funds in and out of Mozambique for foreign investors: As stated, the free transfer of funds is one of the core guarantees that should be offered to foreign investors in a host country.

   e. Accede to the Hague Apostille Convention to simplify the companies’ legalization process by the delivery of a standard certificate. Governments benefit from enhanced integrity and the possibility to charge a reasonable fee in exchange for authentication services, while businesses and citizens benefit by saving time and the cost of authenticating documents, having to pay only once in the process (The Hague Conference on Private International Law 2013).

   f. Review the specificity and clarity of specific provisions and procedures mandated by the Investment Law.

2. Introduce mechanisms that help investors navigate regulations and procedures, streamline the business environment, and address grievances. This could include:

   a. A functioning one-stop shop. OSSs, especially when they offer online portals to the extent possible and useful, may reduce corruption, eliminate the need for physical presence, and cut costs and time. Linking up different agencies requires a well-coordinated and politically supported approach since other parts of the bureaucracy might fear the loss of control.

   b. Establish an investment ombudsman within an agency that has political clout. It is important that the design and administration of the ombudsman functions restore trust with investors so that it can actually act on its mandate.

   c. Systematic online publishing of laws and regulations, at least those governing investment.

3. Transform the institutional framework and enable facilitation of investments by clarifying the lead ministry responsible for investment policy and empowering specialized agencies implementing it:

   a. Design an FDI strategy under the leadership of the Ministry of Industry and Commerce (MIC)
that is aligned with national development priorities, sets objectives, define right targets, and sequence of activities to support FDI inflows.

b. **Finalize the institutional reform of APIEX.** Clarify how the investment promotion agency will implement the strategic vision developed by the lead ministry. To do so, the agency’s role, priorities, reporting, monitoring and evaluation, and staffing should be developed. Therefore, it is important to divide the regulatory and promoting roles for investment and exports where, once again, the former function should be with the ministry and the latter with the agency.

c. **Strengthen capacity to proactively deliver the core services to investors**, including foreign language proficiency, a business mindset, and service mentality.

4. **Improve the legal, regulatory, and institutional framework for special economic zones (SEZs).** This reform area is intertwined with the transformation of APIEX and the modernization of the laws and regulation, but there needs to be an explicit space for SEZs that includes:

a. **Modernize current SEZ legislation** and streamline it into one independent SEZ law with corresponding implementing regulations.

b. **Clarify criteria, procedures, costs, and timeline, and compile this information in an investor handbook** that is easily accessible and widely shared.

c. **Set up an independent SEZ regulator** and improve the business mindset and capacity of staff.

d. **Promote the creation of serviced industrial land** within Mozambique’s designated SEZs as a product to offer its potential investors (roads, power, water, telecom, drainage, and so on).

5. **Reduce the prescriptive and mandatory nature of performance requirements.**

a. **Consider adapting the hard quota on foreign labor** to implement a more flexible quota based on economic needs or at least a rule adapted to sectoral needs.

b. **The government of Mozambique should reconsider its economywide local content law.** The draft bill on the table is unclear and risks duplicating already existing laws and regulations. It further is noncompliant with Mozambique’s international commitments, increasing the risk for investor-state disputes while at the same time potentially introducing new barriers for investment.
All the following BITs have a provision mentioning fair and equitable treatment, indirect expropriation, and free transfer of funds, which are some of the core guarantees that are not defined in the Investment Law and therefore create a misalignment between Mozambique domestic and international commitments for investment protection.

Table A.1. Mozambique Bilateral Investment Treaties Reviewed for This Report

<table>
<thead>
<tr>
<th>Parties</th>
<th>Status</th>
<th>Entry into force</th>
</tr>
</thead>
<tbody>
<tr>
<td>Algeria</td>
<td>In Force</td>
<td>July 25, 2000</td>
</tr>
<tr>
<td>BLEU (Belgium-Luxembourg)</td>
<td>In Force</td>
<td>September 1, 2009</td>
</tr>
<tr>
<td>Brazil (Cooperation and Facilitation Investment Agreement)</td>
<td>Signed</td>
<td>March 30, 2015</td>
</tr>
<tr>
<td>Finland</td>
<td>In Force</td>
<td>September 21, 2005</td>
</tr>
<tr>
<td>France</td>
<td>In Force</td>
<td>July 6, 2006</td>
</tr>
<tr>
<td>Germany</td>
<td>In Force</td>
<td>September 15, 2007</td>
</tr>
<tr>
<td>India</td>
<td>In Force</td>
<td>September 23, 2009</td>
</tr>
<tr>
<td>Indonesia</td>
<td>In Force</td>
<td>July 25, 2000</td>
</tr>
<tr>
<td>Italy</td>
<td>In Force</td>
<td>November 17, 2003</td>
</tr>
<tr>
<td>Japan</td>
<td>In Force</td>
<td>August 29, 2014</td>
</tr>
<tr>
<td>Mauritius</td>
<td>In Force</td>
<td>May 26, 2003</td>
</tr>
<tr>
<td>Netherlands</td>
<td>In Force</td>
<td>September 1, 2004</td>
</tr>
<tr>
<td>Portugal</td>
<td>In Force</td>
<td>October 31, 1998</td>
</tr>
<tr>
<td>Sweden</td>
<td>In Force</td>
<td>November 1, 2007</td>
</tr>
<tr>
<td>Switzerland</td>
<td>In Force</td>
<td>February 17, 2004</td>
</tr>
<tr>
<td>United States</td>
<td>In Force</td>
<td>March 3, 2005</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>In Force</td>
<td>May 12, 2004</td>
</tr>
</tbody>
</table>
APPENDIX B: LIST OF LEGAL TEXTS GOVERNING SEZS

- Law No. 3/93 of July 24 (Investment Law)
- Law No. 4/2009, of January 12 (the Fiscal Benefits Code)
- Decree No. 43/2009, of August 21 (the Regulations of the Investment Law)
- Decree No.75/2007, of December 24 (creating GAZEDA)
- Decree No. 76/2007, of December 18 (establishing Nacala SEZ)
- Decree No. 22/2012, of July 6 (establishing the Manga-Mungassa SEZs)
- Decree No. 47/2013, of August 30, (establishing the Crusse and Jamal Integrated Tourism Development Zone)
- Decree No. 75/99 (approving the Regulations on foreign Labor Contracts for the Industrial Free Zones (IFZs)
- Decree No. 51/2011, of October 10 (for Minheuene Industrial Free Zone)
- Decree No.50/2011, of October 10 (for Locone Industrial Free Zone)
- Decree No. 28/2014, of June 6 (for the Mocuba Special Economic Zone)
- Decree No. 29/2014, of June 6 (for Mocuba Industrial Free Zone)
- Ministerial Diploma No. 14/2002, of January 30 (approving the Customs Regime of the Industrial Zones)
- Ministerial Diploma No. 202/2010, of November 24 (the Regulations of Fiscal Costumes For SEZs and Industrial Zones)
- Ministerial Diploma 43/2013, of September 13
- Resolution No. 15/2011, of October 15 (approving the Organic Statute of the Office For the SEZ Office)
- Internal Resolution No. 15/99, of October 12 (for Beluluane Industrial Free Zone)
1. Rio Tinto eventually abandoned its major coal project in Benga, Tete Province, losing approximately $3 billion after it was denied permission to transport coal on the Zambezi River.

2. A strong global position indicates that a country has a well-developed set of capabilities in a given sector, that is, it possesses the skills and technologies required to be a globally competitive exporter. If a product requires low capability, it is classified as less complex (generally low margin, volume product); high capability is a more complex product (generally higher margin, low competition, specialized).


7. Based on a global survey of 754 executives of multinational corporations with investments in developing countries.

8. The ICRG rating comprises 22 variables in three subcategories of risk: political, financial, and economic. The composite scores, ranging from 0 to 100, are broken down into categories from “very low risk” (80–100) to “very high risk” (0–49.9). Data from December 2019.


10. Mozambique Credendo profile: https://www.credendo.com/country-risk/mozambique. The lowest risk is a score of 1 and highest risk is the maximum score of 7. Mozambique ranks 7 on all political risk indicators (short-, medium-, and long-term).

11. Law 3/93 art. 3.2.

12. Mining Law (Law No. 20/2014) and regulations (Decree No. 31/2015); Oil and Gas Law and regulation (Decree No. 63/2011).

13. The reform was enacted by Decree 60/2016.


15. A reduction in the volume of FDI also reduces, for example, tax revenues, jobs, competition, and market access.

16. Investment Law 3/93 art. 11, “All investments are deemed open to investment except those expressly reserved for the state or only initiated by the public sector.” Article 12, “The Ministerial Council will define and indicate the sectors that are reserved for the state or the public sector.”


20. Law 3/93 art. 21.1 “For investments to benefit from the guarantees and the incentives offered by this law they will have to receive an authorization or approval from the relevant government entities.”


23. As for developing countries, reforms to remove screening have resulted in substantive growth of FDI inflows. Liberia, for example, abolished its economywide screening policy in 2010, reducing the number of sectors requiring screening, and saw an increase of $213 million FDI inflow for the following two years (OECD FDI Regulatory Restrictiveness Index).


27. Law 19/1997 art. 11.

28. Per Decree 37/2016 SEZs, the Oil and Mining sectors will have their own quotas.

29. World Bank Group interviews in December 2019 and findings of an APIEX workshop with investors supported by the Japan International Cooperation Agency conducted in April 2019.

30. The Ministry of Labor in certain instances has required documents, such as a list of employees and corresponding salary levels, prior to operationalization.

31. The reform of regime for work permits in Kosovo facilitated foreign workers to receive permits that were valid for longer than 30 days in 2013 and allowed foreigners to obtain residence permits if employed in the country in 2014. As a result, investors in Kosovo quickly reduced their cost for setting up a business within a year by about 30 percent.

32. See Hufbauer et al. 2013; Bauer et al. 2014; OECD 2016; Evenett and Fritz 2017; Moran 2006, 2007, 2014; Hoekman, Maskus and Saggi 2005. Further, McKinsey (2003) found that “import barriers and trade-related investment measures such as local content or joint venture requirements did not have clear positive impact, but did limit competition, and protect subscale operations, thereby dampening productivity performance (2). ...Local content requirements created significant costs by protecting low productivity players, but they were not necessary for the development of strong supplier industries” (25). Finally, the study found no compelling evidence in favor of joint-venture (JV) requirements. Where JVs provided benefits, they tended to emerge naturally rather than through JV requirements.

33. Law 15/2011.

34. See https://www.enterprisesurveys.org/en/data/exploreeconomies/2018/mozambique for more information on the sample and methodology.

35. The comparative ranks for the peer group are Ethiopia (96), Ghana (80), Kenya (137), South Africa (70), Tanzania (96), Zambia (113), and Zimbabwe (158). Transparency International Corruption Perception Index, 2019, https://www.transparency.org/cpi2019.


37. See example of Metalclad Corp. v. United Mexican States, ICSID Case No. ARB (AF)/97/1.

38. This section is based on findings provided by Deborah Porte, SEZ consultant, in December 2019.

39. SEZ areas are different from industrial free zones, which are developed for investors who plan to export the majority of their products. SEZs are a more flexible regime and do not have export requirements.

40. Disclaimer: For the purpose of this note, the World Bank Group has reviewed as part of the IIAs that Mozambique has in force only 17 out of the 20 BITs the country has in force, because the other legal text were not made available. As such, the level of coverage by IIAs indicated in this note is to be seen as indicative.

41. World Trade Organization agreements (art. 3 of GATT, art. 17 of GATS, and art. 3 of TRIPS).
42. Article 1 of the Mozambique-Japan BIT defines an investor as “someone that seeks to make or has made an investment” and investment activities as activities ranging from the establishment, acquisition, expansion, and operation phase. The highlighted phases under international law are understood as granting pre-establishment protection to all relevant guarantees under the agreement.

43. Article 4 of the BIT with the United States also grants this level of protection to foreign investors by saying that “this treatment extends to both the establishment and the post establishment of the investment.”

44. See, for instance, the BITs with France (art.3), Germany (art.2), Italy (art.2.3), Mauritius (art.4.1), and the United Kingdom (art.2).

45. Comprehensive Economic and Trade Agreement (CETA) art. 8.10.

46. See art. 2.3 of the Italian-Mozambique BIT.

47. Muratori Cementisti v. Mozambique, ICSID Case N. ARB/17/23 CMC.


50. All BITs reviewed provide this definition for protection against expropriation.

51. For many years, what exactly constituted an indirect expropriation was left to the interpretation of arbitrators, but the CETA between the European Union and Canada for the first time introduced a criterion to analyze what an indirect expropriation is.

A case-by-case analysis is introduced to determine whether an indirect expropriation has taken place, observing the economic impact, duration, and intent of the measure or series of measures taken by the government (CETA, art. 8.12 and annex 8-A.)

52. Besserglik v. Mozambique, ICSID case ARB (AF)/14/12, October 28, 2019.

53. Credendo ranks Mozambique and Zimbabwe at 7/7; Ethiopia, Kenya, and Zambia at 6/7; Tanzania, 5/7; and South Africa, 4/7. The ICRG indicator went down from 3 in 2015 to 2 in 2019.


55. Mozambique ranks behind neighboring countries on the enforcing contract indicator: Malawi (149/190), South Africa (102/190), Tanzania (71/190), and Zambia (130/190).


57. In 2019, two ICSID cases were decided in favor of Mozambique, but legal fees still cost the government around $3.85 million. See ICSID cases ARB (AF)/14/12 and ARB/17/23.

58. See the BITs with the United States (art. 9) and with Japan (art. 17).


60. The Hague Apostille Convention of 1961 facilitates legalization of foreign public documents between state parties where a government entity in the home country issues an Apostille—that is, a standardized certificate to authenticate the document.
REFERENCES


