

International Comparative Legal Guides



Foreign Direct Investment Regimes 2021

A practical cross-border insight into FDI screening regimes

Second Edition

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1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

The Mozambican government has been implementing reforms in order to create a more attractive business environment for trade and investment, especially through the creation of the Mozambique Investment and Export Promotion Agency (“APIEX”) in 2016, aimed at attracting more business into the country.

Most of the business sectors are open to foreign investors, except for a few sectors relating to national security and other sectors that provide preferential treatment to national investors. The Investment Law, approved by Law no. 3/93 of 24 June 1993 (“IL”), provides the basic legal framework for foreign investment, which the Mozambican Government sees as a driver of economic growth and job creation.

1.2 Are there any particular strategic considerations that apply during foreign investment reviews?

There are several benefits and tax incentives granted by the State in certain sectors or activities, notably provided by Tax Incentives Code, approved by Law no. 4/2009, of 12 January 2009, as amended by Notice no. 21/05/2009, of 30 April 2009, for investments and projects directed at: (i) creation of basic infrastructures; (ii) trade and industry in rural areas; (iii) manufacturing and assembly industries; (iv) agriculture and fishing; (v) hotel and tourism; (vi) science and technology parks; (vii) mega projects; (viii) fast-development zones; (ix) industrial free trade zones (“IFTZs”); and (x) special economic zones (“SEZs”).

Also, the IL and the Investment Regulation, approved by Decree no. 43/2009 of 21 August 2009, amended by Decree no. 48/2013 of 13 September 2013 (“IR”), provide a specific framework applicable to investments carried out in SEZs and IFTZs, which are created by the Council of Ministers, to which a specific set of benefits will be applicable, in accordance with the State’s strategy to attract more investment to certain areas that present great potential, taking into account the location and resources, among other factors.

As such, although there is a set of incentives that are generally granted to all investors in Mozambique, there are also special tax and customs incentives both under the Tax Incentives Code/specific legislation governing an economic activity that may be available: location of the investment; and the area where investors are interested in should be considered for this purpose.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

We are not aware of any plans to amend the foreign investment review policy or any related Statutes in the near future.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Are there any notable developments in the last year?

The main pieces of legislation applicable to foreign investment are the following:

- Investment Law, approved by Law no. 3/93 of 24 June 1993;
- Investment Regulation, approved by Decree no. 43/2009 of 21 August 2009, amended by Decree no. 48/2013 of 13 September 2013;
- Decree no. 60/2016 of 12 December 2016, amended by Decree no. 48/2017 of 11 September 2017 and by Decree no. 83/2019 of 11 October 2019, which created the APIEX;
- Tax Benefits Code, approved by Law no. 4/2009 of 12 January 2009;
- Tax Benefits Code Regulation, approved by Decree no. 56/2009 of 7 October 2009; and
- Public Private Partnerships Law approved by Law no. 15/2011.

We further note that in Mozambique, national security is exercised by State entities, according to Law no. 18/2019, of 24 September 2019. We rarely see in practice issues of national security and public order being raised in the review of private investment projects. We are not aware of any other recent developments.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught?

The IL is applicable to investments made in Mozambican territory which are intended to benefit from the guarantees and incentives provided therein. No distinction is made based on the origin of the investors or the monies involved. This statute further provides the forms of investments covered thereby, which include direct and indirect investment – please see question 3.1 below. There is no specific reference to the acquisition of minority interests which means that assuming the other requirements are met, this would be deemed an investment.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

The IL provides that some projects, due to both their national significance and their magnitude, may be especially aided by the State.

The IL and IR are not applicable to investments in the areas of prospecting, research and production of oil and gas, mining or public investments financed by funds from the General State Budget or investments of an exclusively social nature.

Petroleum Law, approved by Law no. 21/2014, of 18 August 2014, provides that the State controls the prospecting, research, production, transportation, and further operations regarding oil-related products through a state-owned oil company “*Empresa Nacional de Hidrocarbonetos, E.P.*”, with whom any investor intending to undertake any activities related to oil resources must associate.

Mining Law, approved by Law no. 20/2014, of 18 August 2014, provides the legal regime applicable to the undertaking of mining operations. These may only be pursued within the framework of concession rights, licences, or other types of authorisation granted by the State.

On the other hand, the Public Private Partnerships Law, approved by the Law no. 15/2011, which governs public private partnerships, large-scale ventures, and business concessions requires that Mozambican entities participate in the share capital of all such undertakings in a percentage ranging from 5 to 20 per cent of the equity of the project company.

2.4 How are terms such as ‘foreign investor’ and ‘foreign investment’ specifically addressed in the law?

The IL defines a “foreign investor” as an individual or corporate entity who has brought to Mozambique from abroad their own capital and resources or at their own risk, with a view to carrying out a direct foreign investment – as subsequently defined – pursuant to a previously approved investment project.

The IL distinguishes between foreign and domestic direct investment. “Direct foreign investment” is expressly defined as any form of foreign capital contribution susceptible to monetary evaluation which constitutes foreign investor’s own equity or resources, or at the foreign investor’s risk, which are brought from outside of Mozambique and are to be used in a project aimed at carrying out an economic activity through a company registered in Mozambique and operating from Mozambican territory.

2.5 Are there specific rules for certain foreign investors such as state-owned enterprises (SOEs)?

The applicable legal framework is silent on the existence of specific rules for certain kinds of foreign investors, such as SOEs. However, IL is in theory intended to apply to private investors although it does not expressly exclude or limit investments from SOEs.

2.6 Is there a local nexus requirement for an acquisition or investment to fall under the scope of the national security review? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

No. The IL provides that the review is applicable to investments

carried out in Mozambique, regardless of the nature and nationality of the investors. Companies incorporated in Mozambique are, in principle, under the scope of the review, regardless of the nationality of its shareholders.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

For the purposes of the applicable legal framework, only the direct acquisition of shares is deemed a form of foreign investment and is therefore subject to foreign investment review. Indirect investment instead includes, for example: franchising agreements; loans; shareholder loans; and IP rights (see question 3.1 below for further information).

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary thresholds?

The IL applies to all investments of an economic nature carried out in Mozambique that intend to benefit from the guarantees and incentives established therein, regardless of the nationality and the nature of the investor. The IL also provides that all foreign investors, employees and employers shall have the same rights and duties as Mozambican nationals, as established in the national legislation.

The IL further provides that direct investment must take one of the following forms:

- freely convertible foreign currency;
- equipment and respective accessories, materials and other assets (imported or not); and/or
- granting, in specific cases and pursuant to the terms provided by the competent authorities, of the right to use patented technologies and trademarks, the remuneration of which shall be limited to sharing in the profits of the company which undertakes the activity in which such patented technology or trademark is used.

Indirect investment may take one of the following forms:

- a loan;
- a shareholder loan;
- complementary contribution of capital;
- patented technology;
- technical procedures;
- industrial secrets and models;
- franchising;
- trademarks;
- technical assistance; or
- other forms of access for the use or transfer of technology and trademarks geographically or otherwise restricted by an exclusive or licenced use.

Regarding monetary thresholds, the IR establishes a minimum threshold of MZN 2,500,000 (two million, five hundred thousand Meticaís) as well as other criteria for investment projects to be eligible to specific incentives granted thereby.

3.2 Is the filing voluntary or mandatory? Are there any filing fees?

Approval of foreign investments is not mandatory under Mozambican law. However, in order for foreign investors to benefit from the guarantees and incentives set out in the IL, notably the right to repatriate the invested capital and profits

obtained from investments, tax and customs incentives, and the State's guarantee of security and protection of the investments and private property, the foreign investment shall comply with the procedure as set out in the IR.

Specifically, for profits as well as for the investment amount to be transferred out of the country/re-exported, the threshold is MZN 2,500,000 (two million, five hundred thousand Meticaís) as indicated above. However, foreign investors that are in one of the following situations may also be granted with this right:

- have an annual turnover of no less than MZN 7,500,000 (seven million, five hundred thousand Meticaís) from the third year of activity;
- present annual exports of goods or services in the minimum amount of MZN 1,500,000 (one million, five hundred thousand Meticaís); or
- have created/maintained direct employment for at least 25 Mozambican nationals, duly registered before the national social security system from the second year of activity.

The APIEX charges a fee for each investment project, calculated on the total amount to be invested by the foreign investors, at a rate of 1/1000.

Common practice is for foreign investors to submit a foreign investment project. We note further that the transfer or repatriation of funds originating from the proceeds of investments from Mozambique to abroad by investors must be processed through a commercial bank and licensed by the Mozambican central bank – see question 3.11 below. The central bank will in principle not license payments out under these circumstances where the investment in question was not approved by APIEX.

3.3 In the case of transactions, who is responsible for obtaining the necessary approval?

The investor/sponsor or its representative is responsible for obtaining the necessary approval of the project.

The investment project will be registered in the name of the implementing company (if a company has already been incorporated in Mozambique) or under the name already reserved for the company to be incorporated (if the company is still in the process of being incorporated).

3.4 Can foreign investors engage in advance consultations with the authorities and ask for formal or informal guidance on the application of the approval procedure?

The Mozambican legal framework does not address the possibility of formal guidance. Informal guidance may be sought, but it does not, in principle, bind the entity providing it. Foreign investors are advised to seek a legal local counsel to assist with navigating and presenting the foreign investment project.

3.5 What type of information do investors have to provide as part of their filing?

A specific form shall be filed and submitted either in Portuguese or in English, which shall be accompanied with comprehensive information regarding the project and the following supporting documentation:

- a copy of the identification document of the proposed investor and its legal representative;
- commercial registry certificate or certificate of reservation of corporate name of the implementing company;
- topographic plan or drawing of the proposed location for the implementation of the project; and, if applicable; and

- a copy of the commercial representation licence (when the project requires the establishment of a foreign commercial representation).

Additional information and documentation may be requested throughout the assessment of the project.

The information provided by the applicant shall be true and as complete as possible. Given the uncertainty surrounding the project at the time of the application, the applicants may, when the circumstances so require, request that amendments be made to the terms and conditions initially proposed and approved. This request shall then be assessed by the competent authorities.

Please note that when presenting documents issued abroad before any public or private entity these must go through a legalisation process. Mozambique is not a Party to the Hague Convention, and as such documents usually must be notarised in the country of origin, legalised before the Ministry of Foreign Affairs or similar entity and finally stamped by the Mozambican Consulate or Embassy in the country of origin or in the country with jurisdiction over the country of origin.

3.6 Are there sanctions for not filing (fines, criminal liability, unwinding of the transaction, etc.) and what is the current practice of the authorities?

No – however, please see question 3.2 above. Since the filing is not mandatory, there is no sanction for failing to do so. The IR provides some sanctions which are only applicable if the presentation of an investment project took place according to the IL, and investors which do not comply with the legal framework are usually prevented from transferring funds abroad. Therefore, the main consequence of non-compliance with the foreign investment regime is that foreign investors will neither be allowed to repatriate profits or dividends generated by such investment nor benefit from the remainder of the benefits granted under the IL.

The IR further provides the grounds on which the competent authority may revoke the approval of an investment project, which include: the failure to comply with the applicable legal framework; and the expiry of the term established for the beginning of the implementation of the project without it having begun, among others.

3.7 What is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?

Upon the submission of an investment project, APIEX shall liaise with the Ministries that oversee the concerned sectors of activity for the project under review in order for these entities to issue an opinion. This opinion must be issued within seven business days as of submission of the application. If the competent Ministry does not reply within five days from the submission, the opinion will be deemed as favourable (although in practice investors usually await for confirmation of approval). APIEX shall notify the applicants of its decision within 48 hours following the decision to approve the project. It is common for some delays to occur, however, there has been progress in making the investment process less time-consuming.

After receiving this notification, the investor shall: (i) commence the implementation of the project within 120 days or within the specific timeline provided in the authorisation of the project, otherwise the authority that approved the project has grounds to revoke the authorisation; and (ii) register the foreign investment project at the Bank of Mozambique within 90 days.

Failure to comply with this will not affect the ability to implement the project but may result in the competent authority having grounds to not acknowledge the company's right to repatriate profits and dividends.

3.8 Does the review need to be obtained prior to or after closing? In the former case, does the review have a suspensory effect on the closing of the transaction? Are there any penalties if the parties implement the transaction before approval is obtained?

In principle, if the parties undertake the investment operation before the review takes place, that may be perceived as waiving the benefits provided by the IL, at least with regards to the part of the project already implemented. Normally the investment approval is obtained before transferring investment into the country. It is, however, possible to close international transactions and have the obtainment of regulatory approvals including for investments dealt with as a subsequent condition.

3.9 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

As mentioned in question 3.7 above, APIEX shall liaise with the Ministries that oversee the sectors of activity of the project in order to issue an opinion within seven business days as of submission of the application. If the competent Ministry does not reply in five days following the submission, the opinion will be deemed favourable.

The applicable legal framework does not specifically provide for the intervention of any other third parties, who are not granted participation rights.

3.10 What publicity is given to the process and the final decision and how is commercial information, including business secrets, protected from disclosure?

The applicable legal framework is silent in what concerns trade secrets and the protection thereof. Depending on the type of investment and on the area in which it is to be implemented, the investor is granted with a certificate which permits the private investor to prove that its investment project has undergone the approval procedure and ascertains the position of private investor for the purposes of the applicable legal framework.

The certificate of approval is public and includes, among other topics, the following information:

- identification of the applicant investors;
- the designation and object of the investment;
- indication of the implementing company;
- location and scope of the investors' intervention;
- amount and method of the investment;
- incentives and warranties granted to the investment;
- number of foreign and national workers to be employed;
- a deadline and conditions for the beginning of the implementing of the project; and
- other relevant conditions related to the specific project.

3.11 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

Foreign investors shall register its direct investment with the Bank of Mozambique within 90 days of the approval. For this

purpose, foreign investors shall submit the *borderaux* issued by the national banking institutions or the documents issued by the customs authorities, depending on the specific investment.

Some investment projects may require further approvals, namely related to import and export operations and other sector-specific approvals, to be assessed on a case-by-case basis. For example, building and construction projects are subject to approval of municipality as well as district administration, according to the location of the works. These, however, are not related to the procedure of approval and registration of the investment project as such, but rather to its implementation.

In addition, the transfer abroad of the income generated by investments in Mozambique must be approved by the Bank of Mozambique. Foreign exchange operations without the authorisation of or registration with the Bank of Mozambique are punishable by fines and may result in the relevant entity not being authorised to export profits abroad or re-export the invested capital once the project is concluded.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

Until 2017, the Investment Promotion Centre ("CPI") was responsible for the approval of foreign investment projects. In 2016, the Mozambican Government created APIEX, a merger of CPI, Office for Accelerated Economic Development Zones ("GAZEDA"), and the Promotion for Exportation Agency ("IPEX"), which is responsible for the development and implementation of acts aiming at promotion and management of public and private investment process, either for domestic or foreign investment.

4.2 What is the applicable test and who bears the burden of proof?

The IL provides that the investment projects must contribute to sustainable economic and social development of the country. This statute further provides some of the goals (please see the answer to question 4.3 below). The applicant is responsible for providing the competent authorities with all the legally required information and documents.

4.3 What are the main evaluation criteria and are there any guidelines available?

IL establishes that the investments carried out in Mozambique shall pursue certain goals, namely:

- development, rehabilitation, expansion or modernisation of economic infrastructures for the operation of productive activities or for rendering services necessary for supporting productive economic activities and promoting the country's development;
- expansion and improvement of national production capacity or capacity to render services which support productive activities;
- contributions towards training, expansion and development of national entrepreneurs and Mozambican business partners;
- creation of jobs for national employees and improvement of professional qualification of the Mozambican labour force;
- promotion of technological development and the improvement of companies' productivity and efficiency;
- increase and diversification of exports;

- rendering of productive services and of those generating foreign currency;
- reduction and substitution of imports;
- contributions towards improving the supply of domestic markets and satisfaction of the priority and basic needs of the population; and
- direct or indirect contribution towards the improvement of the balance of payment and Government budget.

Foreign investors may pursue one or more of the objectives listed above.

It is important to note that receiving approval for an investment project is quite straightforward. If investors present the correct document and suggest investing in the country in line with the types of investment foreseen and established in the private investment legal framework there is no reason why their requests will be rejected. In a sense, the review prior to approval of an investment project is more objective than subjective.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

The applicable legal framework provides no clear criteria concerning this issue.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds?

The applicable legal framework does not provide specific grounds for the rejection of a transaction. It does, however, provide the goals to which an investment project must be bound and the obligations to which the investors are subject. It follows that an investment project under review shall be rejected in case it or the applicant investor do not comply with such requirements. There is no specific reference to national security or public order grounds. We rarely see in practice investment projects rejected on the grounds of national security and public order.

4.6 Can a decision be challenged or appealed, including by third parties? Is the relevant procedure administrative or judicial in character?

The investors may file complaints arising from the failure to comply with the IL, IR and further applicable legal framework on the part of a competent authority or State body to APIEX. In case no response is given by the allegedly noncompliant entity, APIEX shall refer the issue to the Minister which oversees the Planification and Development sectors.

The procedure described in the previous paragraph does not prejudice the possibility of the investors to resort to the civil and administrative courts.

4.7 Is it possible to address the authorities' objections to a transaction by providing remedies, such as undertaking or other arrangements?

In case their proposal is rejected, investors may review and reformulate their proposal and submit them to a new assessment. No further remedies are referred to in the applicable legal framework. Oftentimes in practice prior to approving/rejecting requests, authorities address applicants to, for example, provide additional documents or clarifications.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

We note that in our experience, it is not usual to see disputes with authorities regarding foreign investments in Mozambique. Also, we are not aware of any notable trends emerging in the enforcement of the FDI screening regime. We have no further considerations, save for the fact that, in our experience, there is not much litigation related to these issues.

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