



**Remarks on the Draft PPP and  
Megaprojects Law**  
to the  
**Private Sector Working Group (PSWG)**

## How do I thwart thee: let me count the ways

1. No grandfathering: the end of stability
2. Punctuated revolution: the assurance of uncertainty
3. Prevalence over all other laws: instant incoherence of the broader legal framework
4. Dual oversight: geometric growth of bureaucracy
5. Nationality requirements and the specter of enforced free carry
6. Arbitrary signing bonus requirements
7. Dangerous ambiguity + ample discretion = increased risk of rent-seeking
8. Tension with treaty obligations; hello ICSID
9. Three things to remember
10. Conclusions

# 1. No grandfathering: the end of stability

Article 54, paragraph 1 of the draft Law states that “[w]ithout prejudice to the ‘equitable economic and financial balance’ agreed in a project already authorized at the date of entry into force of this law, renegotiation of such contracts shall be permitted . . . in order to adjust the clauses [of such contracts] relating to equitable sharing of benefits and prevention of risk to the terms of [the draft] Law.”

The stability clause is usually the most closely negotiated clause in any substantial concession agreement. It is there to ensure, to the extent mutually agreeable, a stable set of rules under which investment takes place. The clear message of Article 54, paragraph 1 is that everything already agreed is up for renegotiation.

It is the end of stability.

## 2. Punctuated revolution: the assurance of uncertainty

Article 54, paragraph 2 of the draft Law states that when the “end of the ongoing period” (*prazo em curso*) arrives, all contracts that do not conform to the terms of the law shall be adjusted thereto.

Because many concessions are structured in successive stages, the implication of Article 54, paragraph 2 is that the terms of the concession are necessarily open to renegotiation at each stage.

Uncertainty is assured.

### 3. Prevalence over of all other laws: instant incoherence of the broader legal framework

Under Article 55, all undertakings covered under this draft law – which covers a big fraction of economic activity -- are governed in the first instance by this law and only complementarily by any other laws – whether sector-specific (e.g., forestry) or general (e.g., tax).

Under Article 57, everything inconsistent with this draft law is automatically repealed.

Together, these entails the instant incoherence of the broader legal framework – potentially with many unintended consequences.

## 4. Dual oversight: the geometric growth of bureaucracy

Articles 11 through 14 provide for dual oversight: that of the sector ministry and that of the Ministry of Finance. The latter, it seems, will be exercised by an überviser called the PPP and Megaprojects Unit. There is also provision for still other subordinate supervisory bodies to be created.

This will weaken the position of the sector ministry in dealing with the matters under its scope and likely generate situations of conflict between, and conflicting instructions from, the different supervisory authorities. It will also likely occasion significant delays in official decision-making.

It is a recipe for the geometric growth of bureaucracy.

## 5. Nationality requirements and the specter of enforced free carry

Article 20 imports a minimum requirement of 20% holding by Mozambican nationals. The language chosen also suggests that the 20% may be a free or subsidized carry.

Article 26 seems to require that companies covered under the law must distribute profits or dividends; in other words, it would seem, no retained earnings are allowed.

Retention of earnings that would otherwise be distributed as class dividends is a classic form by which undercapitalized nationals can (gradually) realize the purchase price of their investment.

Facing the specter of an enforced free (or subsidized) carry, foreign investors may go elsewhere.

## 6. Arbitrary signing bonus requirements

Article 21 provides for a signing bonus (*taxa ou prêmio de adjudicação*) to be paid once and in a single installment at the time of signature of the contract. It is to be determined taking into account the economic and financial “attractiveness” based on average after-tax annual profits (projected, we suppose) and the recovery period of the investment. The rate of the signing bonus will vary between 5% and 10% of that amount. No criteria for deciding on a number within this range are supplied.

The signing bonus means that there will be less money available for project investment.

The subjectivity of the criteria (e.g. what discount rate and other economic assumptions to use) make reliable financial modeling difficult, raising uncertainty and risk and further depressing investment.



## 7. Dangerous ambiguity + ample discretion = increased risk of rent-seeking

Examples of ambiguity (and incoherence) abound in the draft. Contrast the definition of “megaproject”: as defined in the glossary, it seems to exclude petroleum and mining but the description of megaprojects in Article 3, paragraph 2, clause b) seems to include petroleum and mining.

The frequently ambiguous concepts and diction of the draft Law, allied with the broad monitoring and enforcement mandate anticipated for the PPP and Megaprojects Unit, result in enormous discretion vested in a single agency.

This is a recipe for increased risk of rent-seeking.

## 8. Tension with treaty obligations; hello ICSID

States enter into bilateral investment treaties to protect the investments of their nationals in the territory of other States. The draft Law prepares the ground for actions that, at least in respect of existing concessionaires, may rise to the level of constructive expropriation and thereby violate those treaties.

Too radical a material adverse change can lead an investor frustrated in its expectations to exercise the arbitration clause in its concession contract, and sue the Government of Mozambique before the International Centre for Settlement of Investment Disputes (ICSID).

Having an ICSID case lodged against it sends the signal that a country is an unreliable destination for investment.

It can take a long time for a country to recover from the blow to its image.

## 9. Three things to remember

If you retain nothing else from these remarks, please remember these three things about the draft PPP and Megaprojects law. It will:

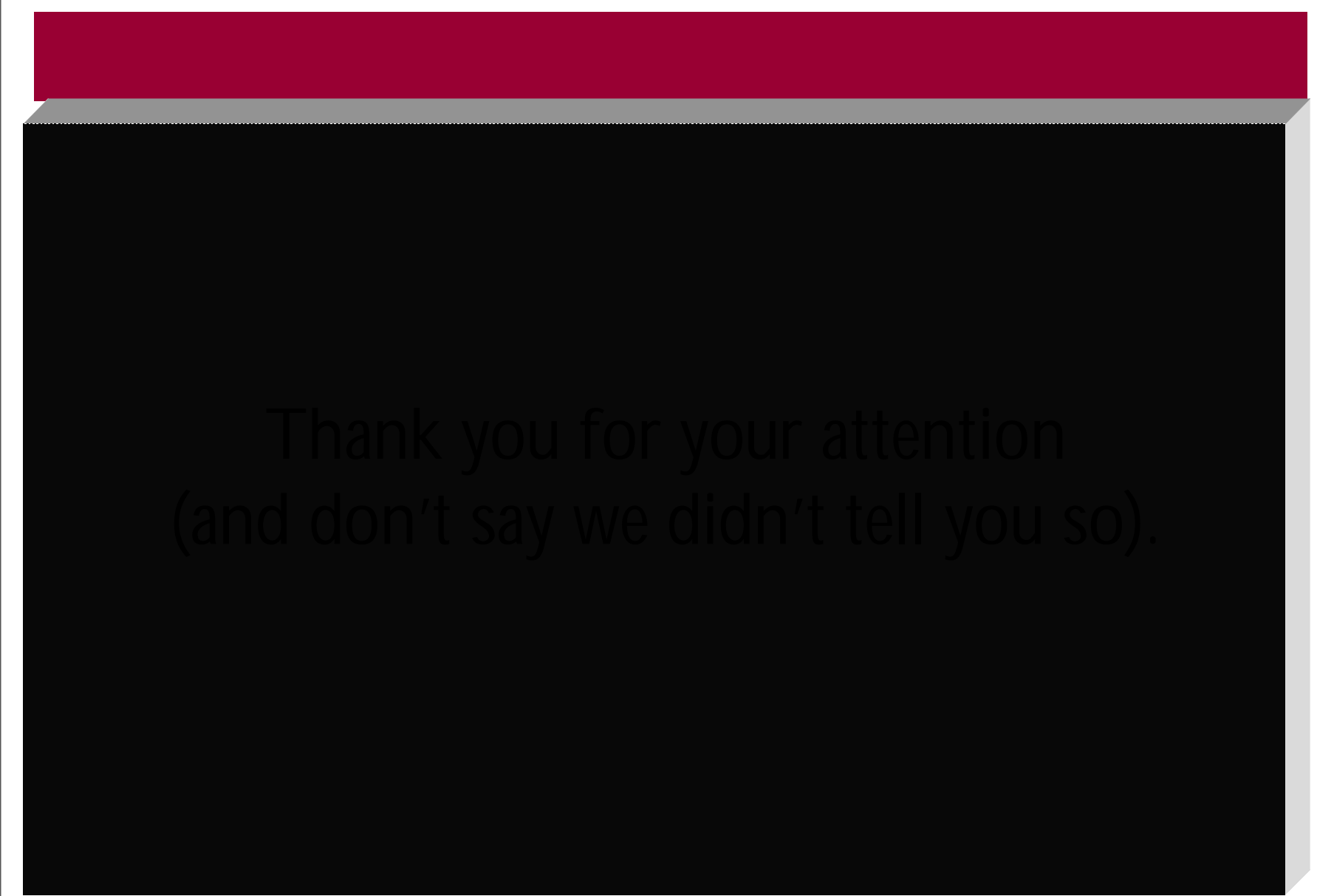
- Make legal stability history
- Overthrow the existing legal and institutional framework
- Make doing business in Mozambique far more difficult, expensive and unpredictable

## 10. Conclusions

The draft Law and related regulations are:

- wrongly conceived,
- badly executed, and
- an imminent danger to Mozambique's reputation as a stable and attractive destination for investment.

They should be withdrawn from consideration pending further analysis, consultation and reflection.



Thank you for your attention  
(and don't say we didn't tell you so).