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# Newsletter
## English version

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## Editor's Letter

### Dear Reader:

In this number you can read: "The Mega-Projects Law and Sector-Specific Legislation", "The Legal Framework for Confidentiality in Petroleum Contracts in Mozambique" and also Practices and Acts which are Repellant to Investment – Acquisition of Mining Licenses (I).

We wish you a Happy reading!

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Mega-projects are specific types of investment and production activities attributed with special features arising from their size or nature as a public-private partnership or natural resource based operation, factors which result in the need for a specific regulatory framework for such investments which aims to protect both public and private interests.

In Mozambique the legal framework for implementation of mega-projects is established by Law No. 15/2022 of 10 August (the Mega-Projects Law) and its regulation approved through Decree No. 16/2012 of 4 July.

This legislation establishes the guiding principles and legal framework for public procurement, implementation and monitoring of investments classified as mega -projects. Unlike many other laws that are strictly sector-specific in scope, the Mega-Projects Law applies to all qualifying projects, regardless of the sector in which they operate. In addition Article 38 recognizes that specific legislation for the sector in which the project operates also applies.

However, the Mega-Projects Law raises questions about when and on what matters the relevant sector-specific legislation is to be applied. This is because Article 38, which outlines the hierarchy of potentially applicable law, leaves room for debate.

Pursuant to paragraph 2 of Article 38, except as provided for therein, the provisions of sector-specific (and other) legislation take precedence over the Mega-Projects Law. The exceptions are "*under the contracting regime, the equitable sharing of the expected results for each investment and its supervision, monitoring and reporting, [...] as well as the prevention and mitigation of risks where other legislation referred to in the preceding paragraph does not address these matters...*"

We therefore emphasize that the Mega-Projects Law is only applicable in cases where matters are not addressed in sector-specific legislation and other applicable law. This means that on certain matters, sector-specific legislation takes precedence over the Mega-Projects Law when such matters are dealt with in sector-specific legislation. However doubts arise in situations where the same matter is regulated differently in separate pieces of legislation.

Among the various matters dealt with in the Mega-Projects Law an issue that has raised doubts relates to the prevailing contracting regime for such projects. Under this law, the general rule is that contracting should be carried out by public tender, with possible recourse to negotiation and direct award in accordance with Article 13.

However, some sector-specific legislation is silent regarding exceptions to the contracting rules set out therein. This is particularly true of Law No. 21/97 of 1 October (the Electricity Law) which envisages the tender as the only option for contracting of projects falling within the electricity sector (with one exception which is not relevant here). Therefore the question arises as to whether one can rely on the Mega-Projects Law to resolve the "omissions" in the sector-specific law. Does the Mega-Projects Law take precedence over sector-specific law in cases where it establishes a more flexible option for the Public Administration?

In this regard the general principle for the application of several laws regulating the same matter is that the subsequent law has precedence over the preceding law. In the same vein, specific law prevails over general law, subject of course to any exceptions expressly provided by the law in question. The Mega-Projects Law is a subsequent law in relation to most sector-specific legislation dealing with the general arrangements for mega-projects. But it is still a general law in respect of matters dealt with in sector-specific legislation which is of necessity, specific in relation to the matters contained therein.

When uncertainty arises, the issues must be analyzed case by case. First, it would be prudent to assess whether it is legally possible to rely on the Mega-Projects Law, assuming the requirements which it imposes are complied with.

However, one must also take into account the underlying basis for the demands and requirements established in the legislation for contracting and implementation of mega-projects, and be aware that such projects usually coincide with areas of public interest. Thus, in respect of tenders, the State intends, firstly, to ensure fair competition on equal terms for all those who meet the legal requirements, and assess their capacity and suitability. The State also seeks to safeguard the inherent principles of legality, transparency, publicity and impartiality of government action.

Nevertheless, in accordance with the Mega-Projects Law, for reasons of public interest, which is intrinsic in the "collective interest and well-being," the State may waive certain general rules, and may exceptionally opt for more flexible contracting regimes. Exceptions must be justified by the supremacy of the public interest over private interest, and by ensuring the useful effect to be derived from the implementation of the project. Above all, the relevant government authority must justify the use of the exception based on the requirement to safeguard the guiding principles of government action and the legality of the project itself.

Note that exceptions to the rule cannot be understood as being synonymous with exemption from compliance with legal requirements and application of guidelines, but instead it is understood that if certain legally established requirements are fulfilled, this may permit differentiated treatment in certain circumstances.

Based on the foregoing, it is our understanding that the supremacy of the legal framework provided in the Mega-Projects Law over projects implemented under said law should be analyzed on a case by case basis, in order to assess the possibility of applying the exceptional regime to the specific situation. This being the case, we believe that there is a need for clarification in respect of the relative supremacy of either the Mega-Projects Law or relevant sector-specific legislation in order to avoid conflict and overlap. Only in this way can we ensure legal certainty for business.

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## Introduction

This article seeks to analyze Mozambique's legal framework for the compulsory publication of concession contracts for petroleum prospecting, survey and production (petroleum concession contracts).

## Confidentiality

A confidentiality agreement is an agreement that seeks to safeguard the secrecy of the information exchanged between two or more parties. Confidentiality typically seeks to protect information that the parties deem commercially sensitive or strategic. A confidentiality agreement may be unilateral or bilateral. In the case of petroleum concession contracts the agreement is bilateral, i.e., it applies to both parties to the contract, the grantor (the Government) and the concessionaire.

## The Legal Framework

The main legislation which applies specifically to the petroleum sector is Law No. 3/2001 of 21 February (Petroleum Law) and Decree No 24/2004 of 20 August (Petroleum Operations Regulation), neither of which deals with publication or confidentiality in respect of petroleum contracts. The confidentiality agreement is therefore a term of the concession contract itself. The Petroleum Law (Article 24, paragraph 3) refers only to the publication of details of income arising from petroleum operations, which is to be undertaken from time to time by the government.

The Petroleum Operations Regulation (Article 5) provides for the confidentiality of "*data acquired within the scope of concession contracts for prospecting, survey and production or for oil or gas pipelines*". Thereunder information acquired within the scope of such contracts may be made public as long as the parties have given their consent. Article 5 of the Regulation further provides that "*data acquired within the scope of prospecting concession contracts shall remain confidential until three years after the termination of the contract.*" In addition it states that "*the Government may make general statements about petroleum operations subject of the concession contract and likelihood of oil discoveries*". Therefore, it seems to us that the Government may not publish petroleum concession contracts, if contractually prevented from so doing.

Note that the draft Petroleum Law approved by the Cabinet in the first half of 2013 proposes only that (in Article 12 paragraph 2) publication will be restricted to the key terms of the contract, while preserving "*strategic and competitive business information related to petroleum operations*". This same principle is found in Law No 15/2011 of 10 August (the Mega-Projects Law) in Article 9, paragraph 2, and Articles 23 and 31.

## The Format of Petroleum Concession Contracts

In Mozambique, petroleum concession contracts agreed with the concessionaires are based on a model adopted by the government (at least since 2006) and which may be subject to certain changes based on negotiations between the government and the concessionaire prior to adjudication and signature.

The format of petroleum concession contracts used by the Mozambican government is in the public domain (www.inp.gov.mz). It includes a confidentiality clause in Article 23. Therefore, when applying to undertake petroleum exploration and production in Mozambique potential concessionaires know in advance the fundamental contractual conditions which will be applied by the government (though some alteration of certain terms is possible).

Article 23 of the sample Petroleum Concession Contract includes a term that the contract, documentation, and other records are confidential and may only be disclosed to third parties with the consent of all parties (which may not be unreasonably withheld) or if permitted by applicable law. However, as discussed above it seems that there is no specific legislation that requires the publication of such contracts.

Article 23 further provides that, exceptionally, documentation and ancillary information, excluding the contract itself may be published, in accordance with the terms provided therein, namely:

- if it concerns an area that no longer forms part of the Contract Area, or
- with the written consent of the concessionaire, if in the opinion of the government the documentation is important for assessing the potential for exploration in an adjacent area to which the government is to allocate survey rights.

Disclosure may, however, also be undertaken under the terms specified therein such as (i) necessity for the purposes of arbitration or court proceedings related to the concession agreement or petroleum operations, (ii) to third parties in relation to sale, or for the purposes of sale or potential sale of petroleum from the Contract Area, among others. Article 23 further provides that the restrictions imposed by the confidentiality agreement apply under the same terms as those applicable to concessionaires *mutatis mutandi* to contractors, consultants or affiliates.

## Conclusion

In the absence of clear legislation which requires full publication of petroleum concession agreements, we may conclude that any publication is carried out pursuant to an agreement with the concessionaires themselves under terms included in the concession contract. In this regard, the Government of Mozambique has begun to publish some petroleum concession contracts which have already been awarded and are under implementation (these can be found at www.mirem.gov.mz).

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While there is a view which suggests that Mozambique is an attractive country in terms of its business environment, some recent studies disagree. One example is the World Bank's *2013 Doing Business* report, which indicates that Mozambique fell from 139th to 146th place among the 185 economies evaluated from the point of view of ease of doing business or business environment.

The special attention that the Mozambican government has devoted to the natural resources sector in recent times implies, among other things, the adoption or implementation of a set of efficient administrative measures or the enhancement of regulatory processes, in order to provide an environment which is increasingly favorable to the flourishing of the mineral resources industry. However, the excessive bureaucracy seen in public administration and some behavior by certain officials have been undermining these efforts by the executive and, perhaps, risk damaging the expectation of a nation that sees natural resources as a critical contributor to the economic development of Mozambique. That is to say there are practices and procedures in the public administration that are hindering investments in the natural resources sector.

This article seeks to draw attention to the negative impact that the excessive bureaucracy found in the public administration is having on attracting new investment and consolidation of existing investments, especially in the mining sector.

Government efforts in respect of the introduction of reforms to boost the mining sector and measures to promote transparency are irrefutable. Examples include the creation of an online database containing information on the Mining Registry, the publication of concession contracts, and recently (October 2012) becoming compliant with the Extractive Industries Transparency Initiative (EITI).

However, companies (applicants) that approach the Mining Registry of the National Directorate of Mines (a department of the Ministry of Mineral Resources) to submit applications for mining titles have experienced frequent disappointments regarding their applications. Among the list of concerns presented by applicants the most critical are procedures, time and cost.

In terms of procedures, we note that the National Directorate of Mines may request several times the same documents which have already been submitted. Also notifications relating to applications submitted may arrive with the applicant weeks or even months after they have been issued.

In terms of time, it should be noted that there are applicants who have submitted all the requirements in support of their application to mine a particular mineral, as mentioned above, but who have waited years without their mining titles being issued (because, for example, someone has not yet signed a particular document, or because a provincial department has not submitted its opinion on the application to the National Directorate of Mines).

In terms of costs applicants complain of wasted expenditure noting that they must cover the cost of technicians (such as geologists and lawyers) involved in the preparation of the legally required documents to accompany submission of the application (e.g. the feasibility study and mining plan in the case of applications for mining concessions) and having waited for a long time for approval they then discover that their application is considered null.

The Mining Law[1] and its Regulation[2] do not provide a deadline for issuing mining licenses. However, this silence of the Mining Law on this matter (which technically therefore is covered by the generally applicable deadline of 15 days for acts by the public administration in cases where the law does not provide for a specific time period[3]) cannot serve as justification for the excessive delay that has been recorded in the issuance of some mining titles. Indeed, there are cases where a license is issued within three months, which proves that it is possible to respond to applications within a reasonable timeframe.

Faced with this scenario, some investors have lately begun to withdraw. The dynamics of the business world do not tolerate this type of delay. We know that many applicants borrow money in order to develop mining operations and the disbursement of these funds is subject to the issuance of mining licenses, and funding is conditional on procedures being carried out within a given time frame. This means that a particular investor may have, for example, one year to acquire the license, and from there obtain funding to start the project. However, given the inordinate delay that has been observed in the issuance of mining licenses, investor expectations are not always met, and investors are left with no other alternative but to withdraw their applications and therefore cancel their projects in Mozambique.

Unfortunately, the reality is that there are investors who are removing Mozambique from their investment maps and channeling their investments into other countries in the region, where presumably the procedures for issuing mining licenses are much more efficient.

Therefore, the above scenario, which is silent but disturbing, is a black mark on Mozambique's international image as a destination for major investments. We believe that the government's legislative efforts alone are not sufficient to improve the mining sector, it is also essential that staff assume the role of contributing to the development of the sector by simplifying bureaucracy and providing their services in an efficient and speedy manner.

*[1] Law No. 14/2002, of 26 June.*
*[2] Decree No 62/2006, of 26 December.*
*[3] Article 77 of Law No. 14/2011, of 10 August.*