



Legal Analysis of Memorandum of Understanding between the Government of Timor-Leste and GTLeste Biotech

Legal issues concerning land and evictions

A Memorandum of Understanding (MOU) was signed between the Ministry of Agriculture and Fisheries of the Government of Timor-Leste (GoTL) and GTLeste Biotech, a private company on 15 January 2008. The MOU provides for a lease of land to be granted over 100,000 hectare of 'unproductive land' for the purposes of sugar plantation, sugar plant and an ethanol plant. The lease is to be granted to GTLeste Biotech for 50 years, with an option to extend for another 50 years. For the first 10 years, GTLeste will get the exclusive right to plant sugar cane.

The purpose of this paper is to explore the degree to which the MOU complies with Timor-Leste's current land law. More importantly, however, it explores whether Timor-Leste's land law meets its international law obligations. The paper goes on to consider briefly what sorts of land laws Timor-Leste would need to enact to be compliant with international law.

1. International Law

The Constitution of Timor-Leste commits Timor-Leste to the implementation of international law, stating that (s 9):

- it adopts principles of international law,
- applies international conventions as domestic laws after ratification and publication in the official gazette, and
- deems laws invalid if they are inconsistent with international conventions.

Timor-Leste signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the 16 April 2003. Section 11.1 of the ICESCR provides that:

"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure

the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent’.

This provision has been explained by the Committee on Economic, Social, and Cultural Rights in General Comment 4 (CESCR 1991) and General Comment 7 (CESCR 1997). These documents make it clear that the right to housing includes the right to security of land tenure which guarantees legal protection against forced evictions (General Comment 4, para 8, CESCR 1991). Forced evictions are defined as:

‘Permanent or temporary removal against their will of individuals, families, ... from the homes and/or the land they occupy without ... access to legal appropriate forms of legal or other protection’ (General Comment 7, Para 3, CESCR 1997).

In particular, a State needs to ensure that it:

- refrains from forced evictions without adequate protection (General Comment 7, para 8, CESCR 1997)
- has a legal system, which provides the greatest possible security of tenure to occupiers of housing and land (General Comment 7, para 9 CESCR 1997).

Evictions should only occur in the most exceptional circumstances, for instance where it is absolutely necessary for the public interest. (General Comment 7, para 18 CESCR 1997). If there is an exceptional circumstance, evictions should be minimized wherever possible and all feasible alternatives to eviction must be explored with affected persons (General Comment 7, para 13, CESCR 1997).

If evictions are to occur, the GoTL needs to ensure that they occur with a fair process, including:

1. an opportunity for genuine consultation with those affected (General Comment 7, para 15, CESCR 1997);
2. adequate and reasonable notice prior to the date of eviction (General Comment 7, para 15, CESCR 1997);
3. information on the proposed evictions and the alternative process to which the land is to be used, in reasonable time (General Comment 7, para 15, CESCR 1997)
4. providing legal remedies to those affected by eviction orders, including legal aid (General Comment 7, para 13 and 15, CESCR 1997)
5. ensuring that all individuals have a right to adequate compensation for property (General Comment 7, para 13, CESCR 1997); and
6. where persons evicted cannot provide for themselves, ensuring adequate alternative housing, resettlement and access to arable land for evicted people (General Comment 7, para 16, CESCR 1997).

The Committee on Economic, Social and Cultural Rights has not yet commented on whether Timor-Leste’s land laws meet the requirements of international law, although recently the Committee on the Rights of the Child commented that:

'The Committee is concerned about the problems resulting from insufficient access to housing and the lack of appropriate regulations concerning the ownership of land' (Committee on the Rights of the Child 2008, para 60).

2. Land Laws of Timor-Leste

Timor-Leste is obligated under international law to enact laws to guarantee security of land tenure including protection against forced evictions.

Timor-Leste's relevant laws are contained within four main instruments:

- The Constitution of the Democratic Republic of East Timor 2002
- Juridical Regime of Real Estate Law Part One – Ownership of Immoveable Property 1/2003
- Juridical Regime of Real Estate Law Part Two 12/2005
- Legal Regime of Immovable Property Decree Law 19/2004

The Real Estate Law Part One divides real estate assets into private real estate, which is defined as rural and urban buildings (s 2); public real estate, which is defined as *'immoveable assets ... by nature not liable to individual appropriation'* (s 3); and real estate owned by the State, which are

- real estate assets owned by the Portuguese State as at the 7 December 1975 (s 4),
- real estate assets acquired by law or judicial process (s 4),
- unclaimed private immoveable assets without identified owners unless someone lodges a judicial appeal before 31 December 2008 (s 12), and
- real estate assets acquired by public entities between 1975 and 2002, unless they were legitimately bought by a bona fide third party (s 16).

The State of Timor-Leste also has the power to temporarily administer abandoned real estate assets (s 15).

It is not known which land the MOU with GTLeste Biotech refers to, as it is identified within the document only as 'unproductive land'.

2.1. Dealing with State owned real estate

If the land referred to in the MOU is State owned real estate, then art 2 and art 3 of the Legal Regime of Immovable Property Decree Law provides that the use of it must be given by 'legal disposal' or 'as allowed by Law'.

The same law provides for leases to national and foreign investors as well as 'grants of official allocation', although the latter is only in return for a good that is provided for the 'gratuitous use of the State' (art 4).

Articles 9-12 set out the formal requirements for leasing from the State. Articles 10 and 12 require there to be an adjudication process when the lease is over 'State properties of private domain'. This adjudication process is to consist of:

- drawing up a technical chart outlining the scope of the proposed lease;
- making a public notification to a number of bodies in the area where the property is located;
- allowing 14 days for 'interested parties' to present their proposals;
- composing an adjudication committee and deciding on the successful process, and
- the Minister of Justice signing off on the lease.

The time lines in this adjudication process are quite short. It is unlikely that any other companies would be able to compose an alternative bid for 100,000 hectares within the 14 days specified.

2.2. Evicting people from State owned real estate

If the land referred to in the MOU is State owned real estate, then it is quite likely that at least some of it is occupied by people who would need to be administratively evicted before use of the land could be given to GTLeste Biotech.

The Real Estate Law Part One sets out a process for administrative eviction. However, this process does not meet the safeguards required by section 11.1 of the ICESCR and interpreted by General Comment 7 (CESCR 1997).

In particular, the process for administrative eviction:

1. does not include a process for exploring all feasible alternatives to eviction with affected person;
2. only provides 30 days notice of the eviction, which does not constitute reasonable notice;
3. does not impose a requirement on the State to advise the evictee of the purpose for which the land is to be used;
4. does not require any consultation process with affected persons;
5. provides an insufficient legal process for the evictee to object to the eviction, because it only gives 10 days for the evictee to appeal in writing against the decision, which is insufficient considering the inaccessibility of such administrative channels for many people, including rural communities, in terms of awareness of processes as well as physical proximity to relevant government offices. The process also does not require the applicant to be given reasons for the decision on their appeal;
6. does not allow for compensation to the evictee, even if they have made improvements to the property; and
7. does not require the State to ensure alternative housing and access to land for the evictee.

As well as being inconsistent with its obligations under the ICESCR, the current process for administrative eviction is inconsistent with the Constitution of East Timor, which includes the right to housing and integrates international law obligations, including the obligation to guarantee security of tenure and protections against forced evictions as discussed above.

2.3. Real estate owned by private people

If the land referred to in the MOU is privately owned real estate, then the Government of Timor-Leste would need to set about acquiring the land before it could grant the use of it to GTLeste Biotech (see section 2.4 below).

As mentioned above, a comprehensive process for registering land and granting titles to private persons in Timor-Leste has not been implemented.

The Constitution recognizes people's right to own private property (s 54). It also provides that only national citizens can own land (s 54). The Real Estate Law Part One creates a process for those who were illegally dispossessed of their real estate assets to register their interest and acquire a formal title (s 12). People were required to lodge an application declaring an interest within a year of the law being enacted, that is by 2004. People who have not registered their interest in land by 31 December 2008 risk having it classified as an 'unclaimed private immovable asset' and surrendered to the State (s 12). However as many East Timorese people were unaware of this provision its practical impact in terms of comprehensively recording claimed interests in land has been severely limited.

The preamble to the Real Estate Law Part One sets out the context for land titling in Timor-Leste. However a comprehensive law to establish the process and criteria for the first legal recognition of ownership rights has yet to be enacted. Furthermore, a universal land registration system is yet to be put into place. In the absence of a law and registration mechanism recognizing legal ownership or use of land, security of land tenure for households and communities living on land is extremely weak in the face of such grants of land by the government to foreign companies. Such grants should not be made until after land tenure for current possessors is secured.

2.4 . Evicting people from privately owned real estate

The Constitution of East Timor provides that requisitioning and appropriation of privately owned land by the State for public purposes can only occur with fair compensation and in accordance with the law (s 54). However, there is not yet a law which covers requisitioning and appropriation, which means there is no way 'according to the law' that the GoTL could compulsorily acquire privately owned real estate.

3. Compliance with national and international laws

General Comment 7 makes it clear that States are obligated to review existing laws, pass new laws, and implement those laws, to meet their international obligations under the ICESCR (para 9 CESCR 1997).

To be compliant with the current national laws, the GoTL would be required to:

- identify clearly which parts of the proposed lease covers privately owned assets and which covers State owned assets;
- if the proposed lease covers State owned assets, follow the process of adjudication as outlined in article 12 of the Immoveable Property Decree Law;

- if the proposed lease covers privately owned assets, create a law which governs State acquisition of privately owned land and includes sufficient safeguards;
- Negotiate with the owners of privately owned assets for acquisition and fair compensation.

To meet the requirements of international law, which are also the requirements of national law under Art 9 of the Constitution of East Timor, the GoTL would need to:

- Protect security of tenure by enacting a law to comprehensively establish the process and criteria for the legal recognition of ownership rights as well as other interests to land, and implement other mechanisms to guarantee security of land tenure, such as fair and just dispute resolution mechanisms and land registration and titling systems;
- The enactment of laws that allow evictions only in the most exceptional circumstances, and then after all feasible alternatives are explored; and
- Amend the current Real Estate Law Part One pertaining to administrative evictions so that it includes all the safeguards stipulated above, including access to information, the opportunity for consultation, access to legal remedies, and the guarantee that no one shall be left homeless following an eviction. The later safeguard can be ensured through legislation that requires:
 - The payment in advance of just and fair compensation; and/or
 - The provision of alternative adequate housing and where applicable farming land or other access to livelihood opportunities.

To follow best international practice, the GoTL would need to develop and pay for a resettlement plan that follows the guidelines on involuntary resettlement of a body like the World Bank or OECD. Such a plan points to the need to provide for social, cultural and economic assistance to relocated people, as well as compensation.

The World Bank Guidelines on Involuntary Resettlement, in particular, recommends that where involuntary resettlement has to occur, it should be preceded by a resettlement plan. The resettlement plan should be included *‘in the total costs of the project’* (para 20, World Bank 2007) and should include;

- providing compensation for loss of assets attributable to the project;
- providing allowances and practical assistance for relocation;
- moving affected people to housing sites and agricultural sites which have equivalent productive potential and locational advantages;
- providing support after displacement for a transition period; and
- providing additional development assistance such as credit facilities, training, or job opportunities.

4. The Broader Context

The objectives of the State in the Constitution of East Timor provide that it aims to provide for the harmonious development of sectors and fair distribution of

national product. Section 61 of the Constitution provides that natural resources will be preserved and rationalized and that development will be sustainable.

Local groups have raised a number of concerns that the current MOU proposal is neither sustainable nor fair. In particular it has concerns over:

- the lack of public consultation over the process;
- the failure to identify publicly the land that is proposed to be leased;
- the failure to conduct a competitive tender;
- the prospect of mass evictions, resulting in hardship and the loss of land for food production;
- the lack of an Environmental Impact Study and the prospect of land degradation from sugar cane farming;
- the terms of the MOU itself, including the low price paid by GTLeste Biotech and the lack of penalties if GTLeste Biotech fail to comply with the agreement;
- the possibility that ethanol will not be produced for a sufficiently competitive price.

In terms of the prospective income to the GoTL from the agreement, it is worth noting that the Law on External Investment 5/2005 allows for foreign companies to obtain a tax credit (s 14), customs credit (s 15) and exemption from rent on State buildings in rural areas (s 17). These concessions reduce any income the GoTL could receive from GTLeste Biotech.

5. Conclusion

The current proposal under the MOU fails to meet either Timor-Leste's domestic law or international law obligations. The GoTL needs to take a number of additional steps to make the proposed agreement compliant with its own domestic laws and Constitution as well as its international law obligations.

As such any administrative act that would bind the GoTL to an agreement granting land to GTLeste Biotech based on the MOU, and allow forced evictions to take place as a result, would arguably be challengeable in the Supreme Court of Justice pursuant to, inter alia, section 26 and section 126(1(a)) of the Constitution.

References:

CESCR- Committee on Economic, Social and Cultural Rights

CESCR 1991, *General Comment 4: The right to adequate housing (Art.11.1): 13/12/91*, Office of the High Commissioner for Human Rights, Sixth Session, 1991.

CESCR 1997, *General Comment 7: The right to adequate housing (Art.11.1): forced evictions: 20/5/97*, Office of the High Commissioner for Human Rights, Sixteenth Session 1997.

Committee on the Rights of the Child 2008, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention*, Forty-seventh session, CRC/C/TLS/CO/1, 1 February 2008, accessed at <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-TLS-CO-1.pdf> on 16 July 2008.

World Bank 2007, *Involuntary Resettlement*, Operational Policies World Bank Operational Manual, Op 4.12, December 2001 updated in March 2007, viewed at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/toc2/CA2D01A4D1BDF58085256B19008197F6?OpenDocument> on 25 July 2008.

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