



Submission to the Timor-Leste Ministry of State for Coordinating Economic Issues from La'o Hamutuk on the Proposed Private Investment Law 29 March 2016

La'o Hamutuk appreciates this opportunity to share our thoughts on the proposed revision of the Private Investment Law which was discussed at this morning's workshop. We only received the draft law yesterday, and are rushing to make this submission because we understand that MECAE will finalize its proposal tomorrow. We apologize for any errors or lack of clarity, and may add more as the legislative process develops. However, we believe that there are critical deficiencies in the current draft, and hope that our comments will help remedy them at this early stage.

We are making this initial submission in English as that was the primary language used at today's socialization (which was not really a consultation -- suggestions from the audience did not appear to be seriously be considered for inclusion in the law), although we may make a revised Tetum version in a few weeks.

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Take more time and do it right.

The timetable presented this morning will send the draft law to the Council of Ministers next week and to Parliament in two weeks. Parliament will enact the law before the end of June and it will come into effect in September. We believe that such haste is inappropriate, especially since there has been a Private Investment Law in force since 2005, which was extensively revised in 2011.

This proposed law is closely related to other pending legislation – especially the land law and the tax reform law – which is more fundamental and relevant to most Timorese people's lives. It should not

be pushed to the head of the queue. Furthermore, if the Private Investment Law is not finalized until after the other laws have been adopted, it would not have to guess at their content or include the confusing transitional provisions in Article 37.1.

Furthermore, the underlying Policy Paper on Private Investment has not been finalized; we understand that no complete paper exists, but only a summary of a draft. Although we appreciate that MECAE has distributed that summary, it contains serious factual errors, misperceptions and mistaken priorities. We will write a separate comment on the draft, but does it really make sense to pass a new Investment Law when the policy it is intended to implement has not been finalized?

The undue haste surrounding this law is echoed in Article 36, which requires that implementing regulations be enacted within 60 days of the law coming into force. Although we share the concern that five years after the last revision of the Investment Law its implementing regulations have still not been written, a mandatory deadline is not the solution. It would be better to draft new regulations now, before this proposed law is approved, so that they could be part of the consultation and deliberative process. Once the new law is in force, they can be expeditiously enacted.

Remember the public interest.

Under Article 6 of the RDTL Constitution, the primary objectives of the State are to safeguard and improve the well-being of its citizens, guaranteeing fundamental rights and freedoms and democracy. Article 40, on investments, states that they must “take the national interest into consideration.”

Investment is a means to an end, not an end in itself. Private foreign and domestic investment are valuable to the extent that they help strengthen our economy and improve people’s standard of living. However, their impact on the public is paramount – if they do not make Timorese people’s lives better, they have no value and should not be promoted (or perhaps even permitted) by the State.

The General Principles in Article 4 should include other goals, such as employment, economic diversification, sustainability, reducing poverty and inequality, increasing state revenues and producing products that Timorese people need and desire. They should not be mere ideological statements about “free enterprise” or “protection guarantee,” but should advance the interests of all citizens of this Democratic Republic.

To that end, Article 4 should also refer to commitments made by RDTL. Much of this law relies on an UNCTAD document and ASEAN investment guidelines, but other instruments are legally binding – Constitutional guarantees of human rights, the International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Timor-Leste is proud to have helped write the new Sustainable Development Goals, and these (in addition to the five-year-old Strategic Development Plan and current Government Program) should inform the policy and law.

Investors should follow the same laws as everyone else.

Rule of law in Timor-Leste is a work in progress, as is public administration. Nevertheless, every investor and every citizen has the right to expect that laws will be obeyed, contracts will be honored, courts will be fair and impartial, bureaucracies will function efficiently and everybody will be treated equally under the law. Improving these systems will make everyone’s lives easier.

However, this draft law attempts to circumvent some of these challenges by allowing investors (that is, people with money) to bypass normal systems or to receive favors from the State which are not

available to ordinary citizens. We believe that such favoritism seriously undermines the principles of democracy and should not be offered. Here are a few examples:

- Article 20.2 “automatically authorizes” three work visas for newly approved investment projects, bypassing criminal record checks and other provisions of the Visa Law. Rather than giving investors special treatment – especially when this could potentially expose Timor-Leste to people with criminal histories – the visa process should be made more efficient for everyone. A one-stop-shop could make a visa application simultaneous with registering an investment, but it should still be vetted by the Ministry of Justice and Department of Immigration.
- Article 34.4 allows disputes to be appealed to the RDTL court system only when both parties agree. In other words, a foreign investor can refuse to allow Timor-Leste courts to rule on a dispute, thereby assigning final decision-making power to the World Bank-run ICSID (Article 34.3). However, the ICSID mechanism has created problems around the world. Indeed, Indonesia, Brazil, South Africa and other countries are looking to reduce or eliminate its role in their own investment systems. Jurisdiction of the Timorese courts should not be optional, and the RDTL Supreme Court (or Court of Appeals for now) should have the final word.
- Article 16, which is new in this law, encourages violation of human rights of nearby communities and workers in investment projects. Timor-Leste’s penal code already contains provisions criminalizing wanton injury to persons and destruction of property, and the security forces are responsible to enforce this law. The state should never dispatch “law and order forces” to violate human rights by carrying out extra-legal “protection” of investors’ perceived interests. This article unfortunately recalls repression to defend corporate interests which was once widespread but has been eliminated in most democratic societies, and it should be removed. Furthermore, when a community or labor force is aggrieved to the extent that an investor feels threatened, the first response should be to engage discussion, mediation or dispute resolution mechanisms to explore the causes and possible solutions of the grievance.
- Article 15 protects investors against expropriation, as well as requiring fair compensation. Such protections should be in the land laws and apply equally to all landowners and leasers, including communities, individuals and companies. If these systems are dysfunctional, fix them for everyone, not only for investors.
- Article 18.3 of the 2011 investment law requires that minimum wage and collective bargaining agreements apply to foreign workers, but this has been deleted from Article 20 of this draft. The new law should be explicit that these (and other labor and environmental laws) apply both to Timorese and to foreign entities. If underpaid foreigners are brought to Timor-Leste by foreign companies, this displaces Timorese workers and invites human trafficking.
- Article 23 allows investors to lease State land, which is appropriate. But it must be assured that the land indeed belongs to the State, and not to the community of people who live on and near it. This sort of uncertainty is already creating problems in Oecusse, and underscores the importance of enacting the Land Laws before this Investment Law.
- Article 26.3 and others require that bureaucracies work in an efficient and timely manner. We agree, but this should be a goal for all public services, not only for those which deal with investors. Some (such as visas, electricity, roads, courts) will also help investors, and others (schools, health care, water supply) are the right of every citizen. These inefficiencies are a major reason that Timor-Leste scores poorly on the World Bank’s *Doing Business* reports, and they should be addressed across the public service.

The Investment Law should not provide pathways to corruption.

In particular, the Special Investment Agreement (Articles 3(d) and 27) has the potential to invite corruption, collusion and nepotism. If such a provision is warranted, it should be carefully designed to ensure that it is not open to abuse:

- Applications for SIAs should be made public, with an opportunity for public comment or consultation.
- SIAs which have been issued should be publicly disseminated, and those which have been denied should have the reasons publicly announced.
- The automatic issuance of an Investor Certificate to an SIA recipient (Article 27.2) should not bypass the normal checks and requirements to get an Investor Certificate under Article 26.

The law should incorporate other transparency provisions, including:

- Company annual reports (Article 25.2(c)) should be public.
- The Company list (Article 33) should be public.
- Disclosure (Article 38) should be to the entire public, not exclusively to potential investors.

A public blacklist should be maintained of investors and companies which are internationally blacklisted or have violated Timor-Leste law, and such companies and individuals should not be allowed to receive Investor Certificates. This process should have appropriate transparency and appeal mechanisms to protect companies' rights and avoid abuse.

Other concerns

La'ó Hamutuk suggests several other improvements which should be clarified in the law:

- Can a business claim its inputs as "investment" under article 3(n)(iii) to circumvent import duties or other tax obligations?
- Article 3 includes new definitions of "Special Economic Zones" and "(duty-)Free Zones." Timor-Leste slashed taxes in 2008 to promote foreign investment, but it did not work. We hope that any foregone revenues are more than balanced by other economic benefits to Timor-Leste.
- Unlike the 2011 investment law, this one will cover the oil, gas and mining sectors. However, Timor-Leste has several special laws and regimes for these sectors and is currently developing more. We wonder if their integration with this law has been well thought-out, including areas "reserved for the state" or on the list of "negative investments" in Article 8.
- The concept of "equal treatment" (Article 12) of Timorese and foreign investors may undermine the national interest. Domestic investors' investments and profits are more likely to remain in Timor-Leste, supporting the economy, job security and sustainability. Timorese investors are also likely to have a stronger commitment to the people and laws of the country than foreigners, who come to obtain profits or other material benefits.
- The state should be able to identify sectors for Special Investment Agreements according to current economic and sectoral priorities, rather than being locked into the 2011 Strategic Development Plan (Article 27.1).
- Even though Timor-Leste has decided to join ASEAN, many discussions and negotiations lie ahead, especially regarding workers, trade and investment. These may include asking for waivers and/or phased implementation of various ASEAN standards and guidelines in order to protect and nurture Timor-Leste's nascent economy. As with other countries who join ASEAN, allowances will be made for our particular situation, and Timor-Leste will not have to immediately adhere to every rule applied to larger, older, more developed countries. For

example, Timorese workers could be given preference over foreign workers, or Timorese products could be protected against cheap imports, at least for a decade or two. Although the ASEAN Comprehensive Investment Agreement (ACIA) guidelines may eventually constrain Timor-Leste's policies, implementing them now will make it much more difficult to negotiate exceptions after we join ASEAN. Our position will be stronger if we defend our national interests, rather than making concessions even before negotiations begin.

- Under Article 28, is the Minister referred to MCIA, MECAE or MPIE?

Conclusion

In closing, we note that the law has no definition for "investment" other than the circular "any direct investment..." (Article 3(n)). Our understanding is that "investment" means money or goods which are spent with the expectation of receiving a return larger than the amount originally disbursed. Although the State also considers social returns from its investments (such as in education, nutrition or preventive health care), private investors are only interested in financial returns. That is, they expect to take out more than they have put in.

Although foreign and domestic investment can be important tools to help Timor-Leste's economy develop, they do not produce anything by themselves. Investment must be combined with human and material resources, entrepreneurial creativity, hard work and competitive advantage to generate returns. Genuine investors will conduct cost-benefit-risk analysis to determine if the likely return justifies the investment. We encourage Timor-Leste authorities to undertake similar analyses – to determine whether a particular proposed investment will produce a net benefit for Timor-Leste's people – before providing incentives for a project.

A decade of "easy" oil income has infected many in this country with a rent-seeking mentality – looking for money which appears from afar without having to work or make difficult decisions. Private investment -- when combined with creative project design, diligent labor, careful management, well-functioning infrastructure and effective public services -- can help Timor-Leste emerge from poverty and dependency on oil and gas. As our oil revenues dwindle, we cannot afford to waste time, resources or opportunity cost looking for more manna from heaven.

Legitimate investors are essential and should be courted – but illegitimate ones, taking advantage of our weak regulatory system, engaging in corrupt practices, or exploiting loopholes to obtain land or launder money – can inflict lasting damage on Timor-Leste's reputation and economy.

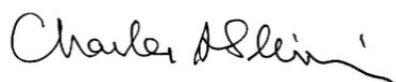
We hope that our suggestions help improve this law so that it will help Timor-Leste's economy develop. We would be happy to clarify anything we have written, and look forward to continuing the discussion.

Thank you for your attention.

Sincerely,



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