

Comments on Timor-Leste draft laws for regulation of the petroleum and energy sector
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This note contains brief comments on the proposed legislation for the future regulation of the petroleum and energy sectors in the Democratic Republic of Timor-Leste. Specifically, I comment on three draft decree-laws: “Regulation of Petroleum Activity” (in unofficial English translation); “Estatutos da Petróleo, Gás e Energia de Timor-Leste—PETROFIL E.P.”; “Autoridade Reguladora Nacional do Petróleo, Gás Natural e Biocombustíveis”.

General Reflections

Choice of decree law form. These laws will define the institutional infrastructure of the petroleum sector in Timor-Leste. Not only does this sector dominate state finances in RDTL, but international experience shows that it is a sector particularly vulnerable to mismanagement, corruption, and abuse of power. It therefore seems desirable to shape the development of this sector through deliberative and inclusive political processes that can produce broad and lasting agreement on how the sector is to be regulated. A rapid passage of decree-laws is unlikely to achieve this. It may therefore be preferable to employ the full legislative process for ordinary laws in the new National Assembly. In any case, given that these laws ought to reflect a broad consensus, it is advisable to involve the opposition in the further drafting process.

Concentration of power. All three draft decree-laws envisage an extreme degree of centralization of power. The National Energy Policy Council (CNPE) and PETROFIL are fully controlled by the executive through the cabinet, and to a large degree by the Ministry of Natural Resources, Minerals and Energy Policy (MNRMEP). The National Regulatory Authority (ARNP) is fully controlled by the MNRMEP. These powers are going to create very strong political incentives for gaining control over the executive and over the MNRMEP in particular, and of using that control for private advantage. This in turn will make it very difficult for the Ministry and consequently the bodies set up by these laws to retain its current admirably high standard of professionalism and independence from political interference. This danger could be minimized if the laws built in a more even balance of power, including other branches of the government, the political opposition, or politically independent institutions.

Lack of publicity requirements. Reinforcing the previous problem is the fact that the decree-laws do not provide for general publicity of the three bodies’ activities. The CNPE’s proceedings are not required to be publicized even in part; nor are its reports. ARNP is set up to report only to the Minister of Natural Resources. For all three bodies, most of the functioning is left to “internal regulations” which therefore do not seem required to include any broad publicity. This goes against RDTL’s earlier commitment to the highest degree of transparency in its petroleum sector, and of course reinforces the dangers of abuse of power and capture by private interests.

Lack of external auditing requirements. The laws do not provide for external audits of ARNP or PETROTIL. The internal audits provided for do not seem adequate to constitute an external check and possible misbehaviour within these institutions. This may be covered by other RDTL legislation, but if so, these specific laws should clarify the role of the auditor-general or other institutions as general legislation applies it to these bodies.

Specific comments about each of the three proposed bodies

- *CNPE.* It is unclear what exactly the role of the Council is envisaged to be—in particular, the rationale for setting up a formal body when it is to have such few powers and so little independence, is somewhat mysterious. As it is designed, the majority of the Council consists of cabinet ministers, yet the main function of the Council is to present policies and strategic thinking about the sector to precisely the cabinet, through the Minister for Natural Resources. While it is certainly useful to bring in non-cabinet members, as the law does, these members are a minority and appointed at the complete discretion of the MNRMEP. Even if the chosen members do provide independent advice, there is no guarantee for that advice to reach the public or even the entire cabinet. There is therefore a real risk of the CNPE becoming an excuse for real public consultation and deliberation about policy.

If the purpose of the CNPE is just to facilitate policy formulation within the cabinet, there is no need for a formal body for this. If instead the purpose is to force future Ministers to confront alternative points of view on policy and to engage in public debates about the direction of the sector, then the envisaged structure is unlikely to succeed in that.

- *ARNP.* The proposed regulatory structure will concentrate virtually all decision-making regarding the energy sector in an agency of the MNRMEP. I have already mentioned the political risks of such an institutional infrastructure: It creates strong incentives for abuse. A further problem is that it may imperil the quality of the decision-making, even in the absence of political interference. In particular, the regulatory framework seems to envisage no role for a Ministry or Agency of Environmental Affairs to have an influence on decision-making for the sector. It is to be expected that an agency housed in the MNRMEP with main responsibility for developing RDTL's petroleum resources will have a relative bias toward development compared to an agency whose main mandate is environmental protection. It is highly advisable to institute a formal role for assessing the environmental aspects of regulation for a separate institution.

Another problem with the proposed ARNP is that it seems to be the beneficiary of revenues that should count as Petroleum Revenues and therefore be paid into the Petroleum Fund. The ARNP should be entirely funded from the regular government budget, and any fees, fines, *etc.* relating to petroleum activities should be paid directly into the Fund.

- *PETROTIL.* The draft law establishing the structure and functioning of PETROTIL seems to have no mechanism for protecting the intention of the legislation regulating Petroleum Revenue. As is often seen in other countries, national oil companies are

frequently used as tools for circumventing broader control of oil revenues, often becoming a “state within the state” beyond public control. As the decree-law is currently drafted, a large part of RDTL’s future Petroleum Revenues would first arrive in the form of PETROTIL revenue, and PETROTIL would have full discretion over whether to pay those revenues to the government as dividends, retain them for further petroleum activities, or spend them on other purposes it deems in the interest of the company. While a national oil company could ideally be a vehicle for capacity-building, the current structure too seriously jeopardizes the quality of RDTL’s existing petroleum revenue management arrangement, and this should be adequately protected in a next revision of the law.

A further problem with the proposed PETROTIL statutes is that they do little to prevent possible conflicts of interests between the company and the Timorese people and government more generally. For example, the company may find it in its interests to work for shifting the division of profits from oil and gas exploitation between the government and the company in the company’s favour, since this would give it control over larger funds to continue to expand its operations. Ultimately, of course, PETROTIL’s profits should end up in the Petroleum Fund. If PETROTIL participates in operations in joint ventures with other companies, however, its push for expansion through securing larger company shares could ultimately lead to a lower take for Timor-Leste, to the benefit of PETROTIL’s private joint venture partners.

This last problem is likely only made worse by the absence of quarantines on high-level PETROTIL personnel before they can work for other oil companies (unlike the quarantines wisely imposed on the leadership of ARNP).