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DECREE LAW NO 43/2015 of 28 December

THE LEGAL REGIME OF THE PUBLIC PRIVATE PARTNERSHIP FOR TIBAR PORT

The Legal Regime of Public Private Partnerships, approved by Decree-Laws No 42/2012 of September 7, and 2/2014 of January 15, and regulated by Decree-Law 8/2014 of 19 March, established the legislative framework that defines the legal rules for partnerships between public and private entities. It is, however, necessary to establish a specific legal framework for the implementation of public-private partnership on the design, financing, implementation, operation and management of Tibar Port.

This decree-law thus establishes the legal framework specifically applicable to the public-private partnership agreement for Tibar Port, granting powers to the Government to negotiate and sign the contract with the private partner to develop the design, construction, financing, implementation, exploitation and management of the new deep water port in the Democratic Republic of Timor-Leste. This law aims to establish a clear, fair, predictable and stable legal framework to allow stimulating and attracting private investment and ensuring the provision of public services associated with the new deep water port, as well as empowering the Government to negotiate and contract establishing the terms and conditions of the grant, including appropriate allocation of risk between the public and private partners.

The Government decrees, under the terms of paragraphs e) and o) of Article 115.1 and of Article 116(d) of the Constitution of the Democratic Republic of Timor-Leste, to become law, the following:

Article 1

Scope and object

The Decree-Law establishes the legal framework specifically applicable to the assignment by the State to a private partner of the concession for the design, construction, financing, implementation, operation and management of Tibar Port.

Article 2

Definitions

For the purposes of this decree-law, the terms listed below have the following meanings:

- a) "APORTIL" means Port Authority of Timor-Leste, created by Decree-Law 3/2003 of March 10, 2003;
- b) "Concessionaire" means the contractor, natural or legal person who, under a contract of concession is, in whole or in part, responsible for the design, financing, implementation, operation and management of Tibar Port.
- c) "Concession Agreement" means the binding bilateral concession agreement signed between the State, the granting of quality, and the Concessionaire, including the terms and conditions for the financing, design, construction, maintenance and operation of Tibar Port;
- d) "Tibar Port" means the container terminal and cargo located in Tibar Bay as identified and described in the Concession Agreement, including the access channel and harbor bay affects the grant, quay wall and all adjacent land, infrastructure, structures, facilities and associated equipment.

Article 3
Concession contract

1. Under Decree-Laws 42/2012 of the September 7, 2012, 2/2014 of 15 January 2014, and 8/2014 of 19 March 2014 (Legal Regime of Public Private Partnerships), the Government may negotiate and sign the Concession Agreement on behalf of the State.
2. Subject to the preceding paragraph, approval of the Council of Ministers is necessary for the following acts:
 - a) Extension of the Concession Agreement;
 - b) Changes to the Concession Agreement initiated by the grantor or the Concessionaire, including changes to the design work, construction, financing, implementation, operation and management of Tibar Port and services, which entail costs for the state above \$50,000.

Article 4
Tariff regime

1. The tariff regime associated with the use of Tibar Port and associated services is established and regulated in the Concession Agreement.
2. The tariff regime may be revised only in the terms established in the Concession Agreement, and that this revision is subject to prior approval by the Council of Ministers, with the exception of automatic revision provided for in the Concession Agreement.
3. The tariff regime established in the Concession Agreement must be fair, reasonable and transparent.
4. The tariff regime is subject to the following principles:
 - a) Recovery of costs - tariffs and applied rates should reflect the true cost of the service or infrastructure referred to;
 - b) User pays - users of Tibar Port must pay for the right to access and use the services provided;
 - c) Reasonable rate of return - The Concessionaire is entitled to:
 - i. Recovery of investments in the design, construction, maintenance, operation and ancillary services of Tibar Port during the term of the Concession Agreement; and
 - ii. Receive profits proportional to the associated risks and other relevant commercial aspects.
 - d) Competitiveness - tariffs and applied rates must be internationally competitive to enable the use and availability of Tibar Port.
5. Without prejudice to paragraph 1, the tariff regime associated with the use of Tibar Port and associated services must be published in the Official Gazette.

Article 5
Relationship with Government

1. The Government members responsible for the areas of finance, public works and transport represent the state in granting quality, negotiating, signing and execution of the Concession Agreement.
2. Subject to the preceding paragraph, the Government members responsible for the areas of public works and transport may delegate their powers to another public entity, including APORTIL.
3. The rules of Decree Law No. 19/2003 of 13 November, and any other general law applicable to the tariff regime, do not apply to Tibar Port.
4. The Government members responsible for the areas of public works and transport may determine, on reasonable terms, that part of Tibar Port is defined as a secure area and submit its access and use to special regulation.

5. The following are not applicable to Tibar Port: rules concerning the technical design specifications, design documents, testing and commissioning in Decree-Law No 11/2011 of 23 March (National Development Agency), Decree-Law No. 26/2010 of 22 December (Registration of Sole Traders of the Construction Sector), Ministerial Decree No. 13/MOP/2013 of August 28, the Ministerial Decree No. 7/MF/2011 of 6 April and the Ministerial Decree No. 25/MOP/2013 of 11 December. To these ends, the rules established in the Concession Agreement will apply.
6. Notwithstanding the preceding paragraph, this Decree-Law does not cancel the requirement to obtain necessary licenses or authorizations, in accordance with applicable law.

Article 6

Environment

1. During the period of construction and maintenance of Tibar Port, the following constants of UNTAET Regulation 2000/19 of 30 June do not apply:
 - a) Article 3.2(a), regarding the need to avoid disturbing protected species as a result of dredging or other work;
 - b) Article 3.2(b).
 - c) Article 4(a); and
 - d) Article 5.
2. This decree-law shall not prejudice the application of Decree-Law no. 5/2011, of February 9 (Environmental Licensing) regarding the environmental license.

Article 7

Labor relations

1. The Concessionaire has the right to hire workers, pursuant to Article 77 of Law No. 4/2012 of 21 February (Labor Law).
2. For the purposes of Article 18 of Law No. 5/2012 of 29 February (Strike Law):
 - a) Tibar Port is intended to respond to essential social needs;
 - b) The Concessionaire, as a company, is intended to respond to essential social needs.

Article 8

Land required for implementation of the Concession

1. The grantor, in accordance with the law and the Concession Agreement, shall provide the land required for construction and operation of Tibar Port or, when they are not its property, assist the Concessionaire in obtaining rights to the land, including through expropriation procedures or easements.
2. Compulsory acquisition of land or rights over the land required for the construction and operation of Tibar Port are conducted in accordance with applicable law and the owners of the land or the rights to them are entitled to fair compensation, the value of which is agreed between the parties or established by law.
3. The Government members responsible for the areas of public works and transport should develop a relocation plan for the owners of land which is to be acquired or whose livelihoods are adversely affected by the construction and operation of Tibar Port.
4. The Concessionaire has the right, under the applicable law, to access, move, carry out works, install infrastructure and equipment on land whose ownership is public and that are necessary for the construction and operation of Tibar Port.
5. The Government members responsible for the areas of public works and transport may impose special restrictions on the use of soil and water, including the seabed, situated in the vicinity of

Tibar Port and which are necessary to ensure the safety and security of transactions Tibar Port and its surroundings, in particular:

- a) The use of soil and water;
 - b) The implementation of infrastructure, structures, facilities, equipment, vehicles, lighting, signs or other objects of a temporary or permanent nature;
 - c) Anything that can interfere directly or indirectly with the use of Tibar Port.
6. The Government members responsible for the areas of public works and transport should apply to the court to proceed with the impoundment of works and demolition of infrastructure and facilities that violate the restrictions imposed by this article.
 7. The owners of infrastructures, structures, facilities, works and other rights preceding the imposition of the restrictions established pursuant to this Article shall have the right fair compensation, the value of which is agreed between the parties or required by law.
 8. The state may impose deadlines for the payment of compensation under this Article.
 9. The values referred to in paragraph 2 and paragraph 7 are decided by the court if there is no agreement between the parties.

Article 9

Formalities and procedures

1. The selection of the private partner and the award of the Concession Agreement is subject to completion of a tender procedure, which complies with the following conditions:
 - a) The tender procedure should be performed according to international best practice in order to include a pre-qualification and a tender phase;
 - b) Candidate competitors will be pre-qualified based on their technical and financial qualifications;
 - c) Competitors who qualify in the pre-qualification stage are invited to submit technical and financial proposals;
 - d) After reviewing the proposals, a report is prepared based on the procedure, analysis and methodology for assessing the proposals, proposing to their coordination, and identifying the proposal they should be awarded the concession contract.
2. The concession agreement may be concluded in several languages, provided that at least one of them is an official language of the Democratic Republic of Timor-Leste.
3. Multiple copies of the Concession Agreement can be signed.

Article 10

Conflict resolution

1. Any conflicts that may arise between the parties concerning the application, interpretation or the rules of the Concession Agreement are submitted to arbitration or other alternative means of dispute resolution established pursuant to the Concession Agreement.
2. The Government undertakes to comply with the final decision or judgment and not to oppose the execution of the same on the basis of its rights and immunities or based on error, defect or omission of which the Concessionary had no prior knowledge.
3. The site of arbitration may be outside of the Democratic Republic of Timor-Leste.

Article 11 **Concession Agreement Contents**

Without prejudice to the parties agreeing to include other matters, the Concession Agreement should regulate the following matters:

- a) Ownership and control of assets belonging to the State and the Concessionaire;
- b) Transmission or transfer of the rights and property of the Concessionaire;
- c) Reference language in the event of a discrepancy in translating the Concession Agreement;
- d) Compensation paid by the parties, as its calculation and availability of appropriate remedies;
- e) Amount of taxes and fees for the use of Tibar Port and associated services and review mechanisms for them;
- f) Direct payments from the grantor to replace or supplement or in the form of compensation for the charges and fees payable for the use of Tibar Port;
- g) Securitization of rights, assets and cash flows;
- h) Renegotiation, termination, suspension, extension and amendments to the Concession Agreement.

Article 12 **Subsidiary law**

1. Everything that is not specifically provided for in this Decree-Law is covered either by the Legal Regime of Public Private Partnerships, the Legal Regime of the Public Procurement and the general principles of administrative law.
2. This Decree-Law may be regulated by ministerial decree of the Government members responsible for finance, public works and transport.

Article 13 **Application of the Law in time**

The provisions of Article 3.1 and Article 9.1 of this Decree-Law apply retroactively as of August 2, 2013.

Article 14 **Implementation**

This Decree-Law shall enter into force on the day following its publication.

Approved by the Council of Ministers on 24 November 2015.

The Prime Minister,

Dr. Rui Maria de Araujo

The Minister of Finance,

Santina José Rodrigues Ferreira Viegas Cardoso

The Minister of Public Works, Transport and Communications,

Gastão Francisco de Sousa

Promulgated on December 23, 2015

To be published.

The President of the Republic,

Taur Matan Ruak