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Submission to Committee D RDTL National Parliament

**From
La'ó Hamutuk**

**Regarding the
Proposed Mining Code**

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Introduction

To start with, La'ó Hamutuk would like to appreciate Committee D of National Parliament for inviting us to share our perspective on the Timor-Leste Mining Law. Since mining, as an extractive activity, often endangers people, the environment and biodiversity, we are very concerned about the economic, environmental, social, and governance effects of this new legal policy on Timor-Leste.

Therefore, we would like to take this opportunity to share some perspectives, to look into this proposed law more deeply, especially about its implications and threats to our nation, people and environment in the future, rather than only looking from a political view and thinking about revenues to the state, which often provide the opportunity for foreign companies to make profits.

We always trust that, following your Constitutional duties, we can help your Excellencies to make wise decisions with care for the good benefits for Timor-Leste's people, avoiding human rights violations against local communities and environmental destruction, or the creation of other social problems.

Our perspectives follow:

Public Consultation has been very limited.

Since 2013, Government, through the Ministry of Petroleum and Mineral Resources (MPRM), has been developing the draft mining law for Timor-Leste. Unfortunately, Government has only held very limited public consultations in a few Municipalities – not the “broad consultations” with academics, experts and stakeholders claimed in a Government press release.¹

La'ó Hamutuk participated in the public consultation that was conducted in Same in September 2013, and at that time, Government told us that they would hold another public consultation in Dili soon, but in the end that never took place. In 2014, MPRM advised us not to submit commentary on the draft law which was circulated for consultation in 2013 because it had been extensively revised. Therefore, since 2014, La'ó Hamutuk has requested a newer draft several times draft so that we could provide comment, but Government and the legal consultants who wrote this law never provided it to us.

After Government shared this draft with Parliament, we finally received this document from National Parliament Committee D at the end of December 2016, which did not allow us enough time to get expert advice about this Law.

Because of these limitations, we think that Parliament needs to hear more input from more people, allowing more time for additional experts to make this law better, including comparative analysis with other countries who have endured problems with environment, human rights and governance, before passing this law. We think there is no need for National Parliament to hastily enact this law during an election year, and we suggest that Parliament wait to debate and approve this law until late 2017 or 2018, after adequate information has been received.

Mining will create pollution and reduce people's economic production.

Although the preamble of this draft law says that Timor-Leste will receive significant economic and social benefits from the exploitation of our mineral resources, but we clearly cannot deny

¹ <http://timor-leste.gov.tl/?p=15965&lang=en> describes “public consultations in all municipalities and zones, consultations with expert international law firms, dialogue with industry groups and companies, interaction with leading academics, and advice from the World Bank.”

that mining activities nearly always have negative impacts on people, especially local communities near the affected areas.

Mining can have negative impacts from mining can occur by design or by accident. These impacts can occur during the construction phase or during normal operation, as well as after mining activities have ended. They include accidents, erosion, river and ground water contamination, fires, explosions, emissions, spills and leaks. Sometimes it takes months or years for even experts to see the consequences, such as cancer, birth defects, and damage to agricultural production and livestock.

Timor-Leste, as a small island, even though it has some mineral resources which are always exaggerate and promoted by the institutes and ministries who promote extractive industries, but this is not an appropriate nation for mining activities because they can degrade our land, taking over areas for living, agriculture, and other economic activities. Many examples from other countries already show that high mountains like Ramelau or Matebian can disappear from the map in a decade or two if Timor-Leste licenses mining companies to exploit the mineral resources inside them.

The mining industry is infamous for its impacts on the environment. Mining can destroy or damage biodiversity such as forests, pollute ground water, land and sea, killing organisms and animals which live there. These dangers arise because byproducts from and chemicals used in mining activities are discarded, and the easiest way is to pollute the sea, rivers and air. If waste materials are not managed well, chemical residues will threaten people, animals and the environment. Mercury, a chemical which is very dangerous to people's health, is always used in gold mining.

In addition, Article 70.1 of this draft law says that all mining activities must comply with principles of environmental protection, including following international "Good Mining Industry Practices." But our domestic institutions have little capacity for managing chemical waste, which makes this pollution even more dangerous to our tourism sector, health, fisherpeople and farmers whose lives depend on water, sea and land.

Many nations fail to manage mining to improve their people's lives.

Nonrenewable mineral resources will be gone when companies have extracted them. In addition to threats to the environment, governments of mineral-producing nations face many other challenges to ensure that mineral resources benefit their people.

It's no secret that many countries suffer from mismanagement, corruption and protracted conflict over their mineral resources. Civil wars in Sierra Leone, Angola, Congo, conflict in Indonesia and mismanagement in the Philippines are examples of the consequences of mining activities on social life, democracy and governance in producing countries.

Experience around the world shows that many countries have not managed mining operations for the benefit of their people – the negative impacts are greater than the benefits to the citizens of the country. The main benefits go to large mining companies and consumers in other. Therefore, we suggest that the state's role should be to ensure benefits to citizens of Timor-Leste and to *preserve the ecological balance and prevent destruction of ecosystems* as stated in the RDTL Constitution, rather than creating a law which will damage them.

The explanatory note says that the drafters of the law studied legislation from Angola, Australia, Brazil, Gabon, Guinea-Bissau, Indonesia, Equatorial Guinea, Mozambique and South Africa. Sadly, most of these countries have histories of bad practices, such as corruption in Equatorial Guinea, violation of community and indigenous rights in West Papua, conflict in Africa, supporting apartheid in South Africa, destruction of aboriginal lands in Australia, etc.?

TL should look around the world for the best policies, which will really protect people's rights, not just look at laws which provide benefits for companies or elites with political power or

money. Timor-Leste should not just pick countries which happen to speak Portuguese or be nearby, because many of their laws are continuing oppressive practices from prior colonial regimes, or favoring miners' interests over those of their own citizens.

In West Papua, the American company Freeport continues to exploit gold. Although this produces money for the Indonesian central government, the money has failed to liberate the Papuan people from poverty and prolonged conflict. Some mountains are already gone, many rivers are contaminated, and military violence against indigenous people continues to grow. Soldiers serve as the vanguard for company interests.²

On the other side, the Governor and local government leaders are involved in corruption through granting licenses or consent for mining companies. Although Article 14 of this draft law about exploitation licenses gives responsibility to the regulatory authority (ANPM) nian, it does not close the door to involving other government officials, as happens in Indonesia.

Article 17.3 of this draft law says that the regulatory authority will approve the Pre-viability Report after being authorized by the Member of the Government who is responsible for mining (MPRM). Article 25.3 (MPRM can sign contracts after receiving a proposal from ANPM), Article 25.4 (MPRM can delegate its power to sign contracts to ANPM) and also Article 31 (ANPM issues licenses after authorization from MPRM) of this draft law open a path to potential corruption.

Based on the above experiences, La'o Hamutuk thinks that Timor-Leste needs to strength its system for environmental protection and establish good principles to prevent our people from suffering from the mining industry. One principle that Timor-Leste can adopt is "The mining industry is inappropriate for the small island of Timor-Leste."

If Parliament chooses to approve this law, we encourage you to include the principle of "prior review" by a Court and also provide a mechanism for monitoring and investigation by the Anti-Corruption Commission a license MPRM and/or ANPM comes into force.

People will be evicted for mining.

The principle social impact is when people will lose their land or be evicted by the government or mining companies when their residence or their farmland falls within the authorized area defined in Article 2(a) of this draft law.

Article 8 of this draft law does not provide for public consultation or notification before "Opening, closing and redefinition of areas". La'o Hamutuk thinks that when an area is to be opened, public consultation should be required before a decision is taken. Local community rights are often violated because legislation doesn't consider their presence or their voice.

Many people in Timor-Leste have already been faced with eviction for large projects started by Government, disrupting their lives. Evictions of communities in Suai by MPRM-TimorGAP, EP, should be considered by Members when discussing this law. Dreams and beautiful, fantastic promises caused many people to lose their land and their children's future.

La'o Hamutuk appreciates the provisions of Article 58 of this draft law, which restricts areas, including inhabited areas, from mining. However, we think that a distance of at least 500 meters from restricted areas would be more credible.

We suggest to include an "impact zone" of about one kilometer from "excluded areas" including springs, and two or more kilometers from a spring. This should also include agricultural areas as part of "Restrictions on occupying land."

In addition, because Timor-Leste is a small island, we suggest to eliminate the provisions in Articles 58.2 and 58.3 of this proposed law. This will reinforce the provision in Article 58.1(j) of the draft which does not authorize mining "em, ou a menos de 250 metros do perimetro de

² <https://www.theguardian.com/commentisfree/2011/oct/12/west-papua-striking-miners-indonesia>

aldeias, vilas, municípios ou de uma cidade;" helping to avoid having to resettle communities as described in Articles 64-67 of the draft law.

This Law prolongs legal confusion.

Like the petroleum sector which is also under MPRM/ANPM regulation, the law attempts to create special rules for its particular sector in the areas of revenues, labor, environment, and community displacement. We think it would be better for Timor-Leste to focus on how to strengthen the regulations to protect our domestic economy, workers, environment and community rights, rather than creating overlapping laws and legal confusion which will be difficult to implement.

Last year, La'ó Hamutuk wrote a letter to the Provedor for Human Rights and Justice (PDHJ) about many major infrastructure projects which continue to violate Decree-Law 5/2011 on Environmental Licensing.³ These violations by companies are examples of Timor-Leste's vulnerability to threats from large projects whose owners never want to comply with our rules.

Realistically, we would like to suggest to the Members of Parliament that it would be better for Timor-Leste to implement our environmental licensing procedures effectively, with sanctions for violations, before passing new legislation for activities with potentially disastrous environmental impacts.⁴ We believe that the Ministry of Commerce, Industry and Environment (MCIA), which is responsible for environmental licensing, needs to be strengthened financially, with better human resources, and given the political independence and will to protect our environment more effectively. MCIA should not be subservient to ANPM, as the latter sees its work as promoting the petroleum and mineral sector, rather than protecting our citizens' lives.

The Mining Law must be consistent with the principles of the Basic Environmental Law.

Article 5 of the Basic Environmental Law⁵ says that the implementation of environmental policy, environmental laws, and other legislation, plans and projects must comply with certain guiding principles. Unfortunately, this draft law ignores many of these principles, especially the (c) Principle of Prevention and (d) Precautionary Principle.

Although the Basic Environmental Law is technically a Decree-Law, it should be considered as having the same force as a Parliamentary Law, as it was enacted under the authorization of Parliamentary Law No 3/2012 of 13 January, and Parliament should accept the responsibility for following it, even if in 2012 Parliament abdicated responsibility for enacting it.

La'ó Hamutuk suggests that National Parliament consider that this draft Mining Law must apply these principles to avoid or prevent disasters which could damage common people's lives, as well as our environment.

The proposed mining law refers to "Good Mining Industry Practices: the standards and practices generally accepted in the international mining industry/ *Boas Praticas da Indústria Mineira: significa as práticas e padrões geralmente aceites na indústria mineira Internacional*" 15 times. Everybody knows that mining practices around the world frequently damage the environment and local communities. La'ó Hamutuk believes that standards accepted by the mining industry⁶ are not the same as standards which are good for people's lives.

There is no document which defines these "good practices," so how can anyone know how to measure whether a project follows them, or obligate companies to comply? La'ó Hamutuk

³ <http://www.laohamutuk.org/Agri/EnvLaw/2016/L.HbaPDHJAIA31May2016en.pdf>

⁴ <http://laohamutuk.blogspot.com/2014/05/environmental-licensing-who-needs-it.html>

⁵ Decree-Law N.º 26/2012 of 4 July Law de Bases do Ambiente
<http://www.laohamutuk.org/Agri/EnvLaw/11EnvBasicLaw.htm>

suggests that it would be better to replace “Good Mining Industry Practices” with a reference to a specific document, or to incorporate a list of such practices and principles into this law.

International standards for mining and similar projects are evolving toward the principle of “Free, Prior Informed Consent (FPIC).” Therefore, we think that with the principles of prevention and precaution, the law should promote people’s right to receive information which is true, easy to understand, and sufficient for them decide, with enough time for free discussion, without any intimidation or intervention. True “Boas praticas” would put the public interest first, listening to and respecting people’s right to withhold consent

Unfortunately, this draft law does not promote this sort of FPIC. Although it mentions public consultation several times, the experiences we have seen show that government and companies often do “socialization” rather than asking for and listening to people’s comments. We think that listening to people’s comments should be part of the guiding principles incorporated into this law.

The Model Contract should be part of the law.

A model mining industry contract is very important so that we know what economic benefits and profits Timor-Leste will receive, as well as the obligations that the mining company must obey.

Although Article 25.7 of this draft law opens the way for Timor-Leste to adopt a Concession contracting model. Unfortunately, the proposed Model Contract is not attached to the law.

We think that this Model Contract should be part of this public consultation. Also, the EITI principles that Timor-Leste has adopted require that all contracts be public in full, not only summaries as provided for in Article 25.9. Contract transparency should be written into the law, to advise companies of their obligation to be accountable to the people who own the resources.

Direct Award opens the way for conflicts of interest.

Another idea we have for National Parliament relates to Article 11 of this draft, about Direct Award. It’s clear that artisanal mining (“senhas mineiras”) are directly awarded, but we see this provision as weak because it doesn’t identify which specific entities are qualified to conduct artisanal mining. We think that Direct Award should only apply to community artisanal mining, which uses their traditional practices and knowledge which has little negative environmental impact – not to companies which hide as “artisanal” miners to reap benefits. We think the law should envision that awards for “artisanal” miners also need to be controlled.

In addition, Article 11.1(d) refers to Article 6 (“Strategic minerals”), particularly to Article 6.2, which weakens environmental protection. We expect that this provision can be a path toward manipulation and conflict of interest, when a government member can award a contract to a company as “strategic,” thereby circumventing the safeguards in other parts of the law.

Comments on some specific articles

Article 4.3 (Excluded areas)

This article should be improved and follow the legal principle that there should be a way for the Government to revoke existing mining licenses if they turn out to be incompatible with other needs, such as environment or land use which has more value to the nation

Article 19.2 (Relinquishment)

The law should consider that when the resource is exhausted, mining companies would prefer to abandon the area rather than take responsibility to decommission and rehabilitate the area. Therefore, La’o Hamutuk asked that this provision be strengthened, to oblige companies to

comply with these obligations from a Prospecting and Research area, and not to run away without restoring it to its prior condition.

Article 37 (Rights of the Concessionaire)

La'o Hamutuk suggests to include a definition of the "exclusive rights" to enter and occupy the concession area. Will local people and authorities such as police or community leaders be prevented from accessing this area?

La'o Hamutuk also thinks that when a license awarded to a company to explore or exploit a specific resource, the law should explain what happens when another resource is found. Does the company have the right to sell this resource, or will they need another contract?

We are also worried about the provision in Article 37(c) which says that companies can use and occupy areas outside the concession area. Companies should confine their mining operations to the defined area, and have not right to do them in other places. This provision gives a way for companies to occupy and violate community rights.

Article 45(b) (Obligations of the Mining Authorization Holder)

We suggest that this law should define what environmental, health and safety standards apply to mining operations, rather than leaving it to the concessionaires to guess.

Article 61.2 (Indemnified Damages)

Article 8.3(g) of the Land Law recently approved by National Parliament considers the mining sector in the state's "public domain" and Article 8.6 says that the owner of land taken for the public domain has the right to be indemnified for losing his/her property rights.

We think that the Land Law will give too much power to the Government to take community land for mining activities by only paying compensation. Therefore, we suggest that this Mining Law should follow the U.N. Convention on Indigenous Peoples, especially the principle of Free, Prior, Informed Consent (FPIC) from a community which is being evicted or compensated for their land.

Also, this Law should give a way for affected communities to appeal to a court to ensure that their rights are respected.

Article 69 (Environmental Licensing)

La'o Hamutuk has observed that the Ministry of Commerce, Industry and Environment often fails to implement the Environmental Licensing Law, and we think that Timor-Leste should apply sanctions to agencies which don't follow the law. We also think that leaving it up to ANPM and MPRM to enforce Environmental Licensing makes it likely that they will not respect environmental regulations, because we trust that ANPM and MPRM, as agencies with political and economic interests to promote the mining industry, will not follow environmental rules.

Article 70 (Environmental management of mining activities)

La'o Hamutuk thinks that this article should be clearer about the legal responsibilities of mining companies to ensure environmental protection. In addition, we think that this article focuses too much on minor impacts like dust, rather than giving attention to much more dangerous and long-lasting effluents from mining. We ask Parliament to consider the most damaging and dangerous impacts from mining in West Papua, Congo, and other countries' experiences.

Article 88 (Health and Safety Management Plan)

La'o Hamutuk suggests that the list in Article 88.2(e) of Health and Safety Management Plan should also include dangers such as these:

- Toxic chemicals and mine by-products
- Ground water and river contamination
- Runoff and silt in rivers
- Waste storage
- Long-term impacts
- Agricultural impacts
- Air pollution

Article 96 (Special Labor Regime for Mining Activities)

We think there is no need for a different Labor Law than the national one, or the draft Labor Law for extractive industries recently presented by SEPF OPE.

Article 97.1 (Employment in Mining Activities)

La'o Hamutuk thinks that the "exclusively reserved to Timorese citizens" is better defined in the Labor Code and the Immigration Law, as to when non-citizens are allowed to work.

Article 99(b) (Procurement of Goods and Services)

The provision in this Article means that local content will not be effectively applied after Timor-Leste becomes a member of ASEAN.

Article 110 (Revocation)

La'o Hamutuk thinks that the revocation of a license could also occur when a company's activity kills one or more people. Failure to comply with health, safety and environmental standards should also be cause for revocation, in addition to fines or other sanctions.

Article 129 (Proportionality)

This article should be deleted, because inspectors and auditors must follow their rules and responsibilities, rather than being constrained by a vague proportionality rule.

Article 138.3 (Offences punishable under the Present Code)

We suggest that in addition to applying fines for very serious offences, criminal prosecution should be applicable when companies commit serious, intentional legal violations.

Article 138.6 (fine money goes to regulatory authority)

La'o Hamutuk thinks that money from fines should be deposited in the national treasury, to be spent according the normal budget process approved by Parliament.

This provision that allows regulators to use fine money is an invitation to corruption and violates the provision of separation of powers. Regulators, as state agencies, receive appropriations through the state budget and should be accountable to the Government.

This article continues to allow ANPM to receive benefits from resources which really belong to the people. ANPM was created as an odd bi-national artifact of the Timor Sea Treaty and JPDA, but it does not need extraordinary powers to regulate non-oil activities in Timor-Leste's exclusive territory.

Article 155.2(b) (Prohibition of Gifts or Benefits)

We think that this provision, allowing some gifts to remain the property of ANPM, is inappropriate. It looks bad when a company facilitates a regulator to supervise the company's activities. This could be a cover for corruption or conflict of interest.

Article 155.5(b) (Lottery for employees)

We think that this provision legitimates bribery for the whole regulatory authority. It should be deleted to avoid widespread corruption.

Article 166 (Restrictions)

We suggest that the restriction on sand extraction should not only be at the beach, but also along riverbanks, where it can exacerbate erosion. We also think that this article needs further explanation about when sand can be extracted for tourism or beach engineering.

Article 168 (Arbitration)

We see that resolving disputes through the International Centre for the Settlement of Investment Disputes (ICSID) is an infringement on Timor-Leste's sovereign rights. Disputes within the territory of Timor-Leste should be processed through Timor-Leste judicial mechanisms and courts

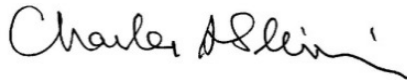
Finally, we hope that Parliament will listen to many of our suggestions, before approving this Mining Code Law, to create policies consistent with the state's principles to protect the environment, people's lives and sustainable goals. La'o Hamutuk remains ready to help your Excellencies if you would like further information.

Thank you for your attention.

Sincerely,



Juvinal Dias



Charles Scheiner Adilson da Costa Junior



Celestino Gusmão



Niall Almond

La'o Hamutuk Researchers on Economy and Natural Resources