



La'o Hamutuk submission to the National Petroleum and Minerals Authority (ANPM)

regarding the proposed Decree-Law on Onshore Petroleum Operations in Timor-Leste

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Introduction

La'o Hamutuk appreciates this opportunity to share our analysis and commentary on this proposed decree-law. Across the world, onshore petroleum operations have occasionally brought significant wealth to national treasuries, but they have also often brought great sorrow to citizens who live near them, as well as damaging the local and global environment and making other economic activities less productive. We hope that our suggestions will help ensure that oil and gas exploration on Timor-Leste's land will truly benefit our people.

We urge the Ministry of Petroleum and Mineral Resources (MPRM), the National Petroleum and Minerals Authority (ANPM) and other policy-makers to agree that on-shore petroleum activities should be undertaken and regulated in the best interests of the citizens of Timor-Leste. The proposed Decree-Law on Onshore Petroleum Operations is an essential element of ensuring that this country gains more in revenue and jobs from such activities than it loses in money, natural resources, disruption of local communities and environmental destruction. You have a difficult, complex and challenging task – we encourage you to approach it conscientiously and thoroughly, taking the necessary time and mobilizing expertise from various perspectives to ensure that Timor-Leste does not repeat the disasters of Nigeria, Ecuador, Equatorial Guinea and many other countries.

We appreciate that MPRM and ANPM have held several consultations on this proposed Decree-Law, including an extensive discussion with La'o Hamutuk. During those consultations and discussions, we and you have already identified major flaws in the draft legislation, and there are undoubtedly more. The experts and consultants who worked on this have not done their task adequately, and we hope that this submission will help identify further changes and corrections which should be done. However, La'o Hamutuk are not experts in these areas, and we have had limited time and opportunity to get advice from more knowledgeable people.

Although ANPM said that this draft has been reviewed by experts from Norway and Canada, they must not have been familiar with Timor-Leste, nor had a good understanding of the importance of laws like this to protect the rights of Timor-Leste's people. We encourage you to seek advice from people with a wider view than merely promoting the petroleum industry, and who can better understand the specific legal, social and environmental situation in this new, small, oil-dependent nation.

We have written this submission in English because the public consultation was conducted in English and Tetum, and no Tetum version of the draft Decree-Law exists. We are basing it on the English version, which has different sub-article numbering (especially in Article 7) than the Portuguese one.

Public consultation is essential, but must be heard and extended.

We are grateful that ANPM extended the public consultation period from two months to three, but it is still not enough. The soon-to-be-formed Council of Ministers and Parliament will include many people and parties who have never held political office and still need to learn about many issues. They will not be able to understand or give adequate attention to this complicated draft law for many months, as more urgent and time-dependent matters demand their attention. Once again, we encourage you to move more slowly, and to fully consider the issues we raise in this submission, as well as to get more diverse advice from experts knowledgeable about land rights, public consultation, environmental protection, emergency response, transparency and other areas. With more time, more effective consultation, and more input, MPRM, ANPM and the Council of Ministers will be able to enact a decree-law which would protect and improve the lives of Timor-Leste's citizens much more effectively than the current draft.

Please remember that consultation is different than socialization. In addition to telling people what this draft law intends to do, you need to listen to their input – to take their concerns on board and to modify the law to reflect them. At the Dili public consultation on 16 June, the majority of the time was spent simply reciting the topics covered by each article in the law, on the assumption that few attendees had read it in advance, leaving little time for substantive input. When people did offer critiques, the ANPM's usual reaction was to defend the draft, rather than to consider whether the suggestion had merit.

Although the Minister and President opened the meeting, neither stayed in the room to hear the consultees. Furthermore, in our private 6 July meeting with ANPM directors and staff, some aspects of the law were justified as "political decisions" – outside of the purview of technical staff to explain or change. Consultees, including civil society groups like La'o Hamutuk, are not technical or legal experts – you have already paid consultants lots of money to do that – but we do provide political input based on people's rights, needs, perspectives and experience. In a democratic state under rule of law, public consultation is inherently a political process, and the political leaders who make political decisions, including Ministers and Parliamentarians, should listen to the public who put them into office. Meaningful democracy requires more from its citizens than proofreading or unquestioning ratification, and more from its leaders than rule by decree.

We appreciate ANPM's summary of 16 of the points raised by La'o Hamutuk during our two-hour meeting on 6 July. However, some of them are more complicated than is expressed in that summary, and we have attempted to explain them below.

General concerns

We have tried to organize our comments by general topic, but many parts of the draft law have implications for more than one topic, so we apologize if the sequence is confusing.

A Law has more power than a Decree-Law, and should be respected or revised.

As a **Decree-Law**, this document cannot alter or override Parliamentary Laws or to take on powers exclusively assigned to Parliament by Article 95 of the RDTL Constitution (CRDTL). It can only legislate on matters enumerated in CRDTL Article 96, including definitions of new crimes, with an explicit Parliamentary authorization, which has not happened in this case.

Many sections of this law expand or alter Petroleum Activities Law 9/2005, which is not surprising. That Act was written mainly to cover offshore activities and failed to give adequate attention to issues which occur on dry land. In fact, La’o Hamutuk’s submission¹ while that law was being drafted recommended

“After this and related legislation has been in effect for two or three years, before any on-shore development contracts are signed, Government and Parliament should conduct an extensive review and revision process of all relevant legislation. This process must include public participation.”

Although our recommendation twelve years ago not to sign on-shore contracts immediately after the enactment of the Petroleum Act has been followed, our suggestion to review the Act has not. Many sections of the Petroleum Activities Law should be revised to incorporate lessons learned and a deeper analysis of the risks and complications of onshore petroleum exploration and exploitation, as well as other legislation which has been enacted since 2005 (including the Penal and Civil Codes, environmental legislation and land legislation). We encourage the proponents of this Decree-Law to temporarily withdraw it, and propose first a Parliamentary Law to revise Petroleum Activities Law 9/2005. Once that has been done, with fundamental issues addressed, a simpler version of this Decree-Law can establish specific regulations for onshore petroleum activities. It should be accompanied by a model PSC for exploration and production on dry land – something which has long been discussed but apparently never completed.

The Law should maximize public benefits while safeguarding public rights.

Article 6 of the RDTL Constitution defines eleven fundamental objectives of the state, including rights and freedoms of the citizens, participation of the people, social justice, protecting the environment, preserving natural resources and valuing cultural heritage. Another paragraph – 6(d) – mentions developing the economy and technology; however, this is only one objective, and a law or activity which advances paragraph 6(d) but undermines many of the other ten violates the spirit of Timor-Leste’s Constitution. If it infringes on nationally and internationally recognized human rights, it may also violate the law.

The principal responsibility of regulations and regulatory bodies is to protect the public interest, not to give away Timor-Leste’s resources or other wealth to private companies. If a company doesn’t want to come because our rules are too strict and/or force them to share too many of their profits with our people, that’s their problem, not ours.

Prioritize public interests, not resource extraction.

Article 2.1(a) of the draft decree-law says the goal is to “ensure maximum ultimate recovery of Timor-Leste’s Petroleum resources” and Minister Alfredo Pires introduced the 16 June consultation by saying that the law has to balance the interests of the state, civil society organizations, and companies. However, we feel that the interests of Timor-Leste’s citizens – especially those who will be directly affected by petroleum activities – are most important, but are often ignored.

The goal of this law should be to maximize the benefits to the public, in terms of taxes and jobs, while minimizing the risks. The companies will look after their own interests. If a petroleum reserve is not

¹ <http://www.laohamutuk.org/Oil/PetRegime/LH%20sub1%20Eng.htm>

commercially viable, or if the economic, environmental and social costs are greater than the public benefits, it should be left in the ground – at least until technical or economic factors change the cost/benefit balance. There is no reason to allow or subsidize petroleum projects at public or state expense – the desires of national or private oil companies should not outweigh the public interest.

At the 16 June consultation, an ANPM representative claimed that CRDTL article 139.1 requires resource maximization in the national interest. This is incorrect; the article reads:

“1. The resources of the soil, the subsoil, the territorial waters, the continental shelf and the exclusive economic zone, which are essential to the economy, shall be owned by the State and shall be used in a fair and equitable manner in accordance with national interests.”

Although the preamble to this draft law mentions managing petroleum resources “in a sustainable way for the benefit of the people of Timor-Leste,” it does not mention protecting the environment, human rights, or nearby communities and residents. Similarly, Article 2 on the objectives doesn’t mention sustainability, public safety, accident prevention/containment, affected communities, or other essential factors. We encourage a broader perspective.

In Article 7(q),² “Commercial discovery” is defined as a discovery which “can be exploited commercially in accordance with Good Oil Field Practice.” Instead of a meaningless tautology, the definition must be clear: a discovery which justifies exploitation should be one where the balance – after subtracting investment, operational, corporate profit, social and environmental costs – is almost certain to yield positive benefits to the state treasury and the national economy.

“Good Oil Field Practice” is not good enough.

“Good Oil Field Practice” is referred to 71 times in this draft law, but is not defined clearly and does not refer to any document. It is vague and unenforceable. How is a company to know what it has to comply with? How can regulators enforce a standard which is not written down? It is also a weaker requirement in English than in Portuguese (“*Melhor técnicas e Práticas*” – **best practice**).

We realize that such vague wording is used in the petroleum legislation of many countries – especially those which fail to effectively protect their citizens’ environmental and human rights, or where foreign oil companies tell the government what to do. However, Timor-Leste can and should do better, learning from widespread resource-driven devastation and conflict in the 19th and 20th centuries to develop a 21st-century standard.

ANPM says “Good Oil Field Practice” allows a degree of “flexibility,” but who decides what range of flexibility is permissible? Although technologies and standards will change over time, a meaningless definition is worse than an outdated one. As discussed above, Petroleum Activities Law No. 9/2005 needs to be reviewed, and its article 23.1, which loosely defines “Good Oil Field Practice,” but leaves out any mention of local communities or livelihoods, is one area that needs to be amended.

Article 6.4 of the draft law lists some “internationally recognized organizations” whose documents can help define “Good Oil Field Practice.” However, nearly all of these are from the oil industry or subservient to industry interests, rather than those of the public. We suggest that the list should also include the International Association of Oil & Gas Producers (IOGP)³, IPIECA,⁴ the UN “Guiding Principles on Business and Human Rights,”⁵ the “Voluntary Principles on Security and Human Rights,”⁶ the World Bank’s “Pollution Prevention and Abatement Handbook,”⁷ the Extractive Industries Transparency Initiative (EITI), the World Business Council for Sustainable Development (WBCSD)⁸ and others. The

² Paragraph 7(ee) in the Portuguese version.

³ <http://www.iogp.org/>

⁴ <http://www.ipieca.org/>

⁵ <https://business-humanrights.org/en/un-guiding-principles>

⁶ <https://www.voluntaryprinciples.org>

⁷ http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_handbook_ppah_wci_1319577543003

⁸ <http://www.wbcsd.org/>

selection of appropriate standards should not be done by MPRM alone (Article 6.4), but also by other Ministries with competence in relevant sectors.

As it is difficult to legislate an effective definition of the practices to be followed, it is essential to ensure proper checks and balances, oversight, audits and independent reviews by third parties. It is also important to respect and empower state agencies which -- unlike ANPM, TimorGAP and MPRM -- are not directly involved in promoting the petroleum sector, including the Ministries responsible for environment, health, agriculture, land, and rural development, as well as oversight agencies such as the judicial system, Anti-Corruption Commission, PNTL and Provedor for Human Rights and Justice.

Other general topics

Article 3.1 should include other petroleum products, not only crude oil and natural gas.

Production of "fluids" [Articles 7(cc) and 7(t)] should explicitly include gases and slurries as well as liquids.

In recent years, unconventional gas and oil extraction, known as hydraulic fracturing or "fracking," has become widespread. It could be used in Timor-Leste, bringing a whole new set of environmental and social concerns which this draft law does not mention. ANPM told us that this draft law is not intended to allow such activities -- therefore, they should be explicitly excluded from this law and subject to other legislation if they are to be allowed at all.

Specific areas of concern

Petroleum regulation is part of the State of Timor-Leste, not above it.

In our discussions, ANPM told us that the consultants who drafted this Decree-Law used the Organic Law for the Ministry of Petroleum and Mineral Resources, Decree-Law No. 16/2016 of 22 June, as the legal basis for many of its provisions. However, that law is likely to be replaced in the next few months, when the new government defines its structure. Furthermore, as a Decree-Law it cannot override Parliamentary Laws, and cannot grant MPRM powers and processes which belong to other ministries. This Ministry [we surmise that MPRM is intended by Article 7.2(mmm)⁹] is not "first among equals." In fact, it must yield authority on issues like land rights, environmental licensing and oversight, protected areas, health, security and many other areas where petroleum activities will interact with the public.

In particular, environmental licensing and oversight is the mandate of another ministry, as is land ownership and expropriation. Onshore petroleum operations must respect the laws, processes and powers of these bodies, rather than trying to create a separate regime of its own. Article 7.2(mmm) implies that there is only one relevant Ministry, but this is clearly incorrect -- other ministries and competent agencies should be authorized as observers (Article 35), to supervise compliance (Article 189), to conduct inspections (Article 190) and to carry out other functions.

During fifteen years as an independent nation, Timor-Leste's ministers and legislators have worked hard and enacted many laws. This draft decree-law ignores all of them, except the Petroleum Activities Law, as it states in Article 7(rrr). The draft decree-law contradicts or violates, among others, laws on land (Law 6/2017), expropriation (Law 8/2017), Petroleum Fund (Law 9/2011), civil code (Law 10/2011), labor code (Law 4/2012), criminal code (Decree-Law 19/2009), base law on environment (Decree-Law 26/2012), environmental licensing (Decree-Law 5/2011), protected areas (Decree-Law 5/2016), bidding rounds (Decree 7/2005), private investment law (pending), procurement laws, and others. According to article 201 of this draft decree-law, all these existing laws are to be revoked. This would be unconstitutional for Parliamentary Laws, and it would destroy a painstakingly constructed legal framework covering many sectors. **Article 201 must be deleted from this draft decree-law.**

⁹ The definition of "Ministry" as "the ministry or other entities to whom responsibilities and competencies in respect of the application of this Decree-Law or other Applicable Law related to Petroleum Operations are assigned" which is tautological and unclear. Assigned by whom? Which part of which 'applicable law'? What 'other entities'?

If, after careful consideration, the drafters of this law believe that amendment or revocation of another decree-law is necessary to address a specific situation, they should spell it out rather than taking a sledgehammer to Timor-Leste's entire legal system.

Furthermore, the draft refers to "Applicable law" 105 times, and "applicable standards" nine times. If this law does not say what other law or standard is applicable, how is an oil company or regulator to know?

Below are a few examples of the many areas which need to be harmonized with existing laws:

- Article 10 needs to be coordinated with Protected Areas Decree-Law 5/2016, not only at the discretion of the Council of Ministers. Article 173.2 should not allow arbitrary violation of protected areas when someone decides oil is more important than culture or environment.
- Article 11.2 needs to comply with land and other laws, even if the Ministry doesn't "stipulate conditions."
- Article 127 needs to be consistent with the labor code and other laws relating to occupational health and safety.
- Article 195 needs to be consistent with the penal and civil codes and with the tax laws.
- Articles 196 and 199 violate article 6.1(e) of Petroleum Fund Law 9/2005. All petroleum-related revenues must be deposited directly into the Petroleum Fund, not paid to the Ministry or ANPM.¹⁰

Appeals to court

Furthermore, Timor-Leste's court system is responsible for applying sanctions and hearing appeals from administrative or Ministerial decisions. The law appears not to consider this, nor the role of PDHJ in receiving, forwarding and mediating local grievances. It should make clear that individuals and communities affected by petroleum operations always have the right to appeal these decisions to the Ministerial level and, if that is unsatisfactory, to the judicial system. That is the essence of democracy under the rule of law.

The law should be clear that all administrative and ministerial decisions can be appealed to court, not only to the Ministry as described in Article 194. This Article should state that any natural or legal person whose legal rights may be affected by a decision or action under this law has standing to appeal both to the Ministry and to the Courts. Although this is guaranteed by Article 26 of the Constitution of RDTL,¹¹ it should be explicit in this law.

Petroleum Activities Law Article 20.2 says:

- "(a) If a dispute arises relating to the interpretation and/or application of the terms of an Authorisation between an Authorised Person and the Ministry, the parties shall attempt to resolve that dispute by means of negotiation.*
- (b) If the dispute cannot be resolved by negotiation, either party may submit the dispute to arbitration or to the competent judicial authority."*

However, this right to appeal on environmental issues is not only for contract-holders ("authorized persons") and the Ministry but for any citizen, as stated in Articles 6.5-6.7 of Decree-Law 26/2012:

- "5. Any citizen who deems that the terms of the present law or any environmental legislation or regulation has been infringed or is at risk of being infringed is entitled to petition the courts, under the general terms of the law, to stop the causes of the said infringement and to secure the respective compensation, irrespective of having suffered or eventually suffering any damages or having a personal interest in the matter.*
- 6. The rights provided for in this article shall also apply to legal persons after due adaptation.*
- 7. The State must ensure the implementation of rights under the law especially for vulnerable groups."*

¹⁰ ANPM currently retains some fees it collects from oil companies, a violation of the Petroleum Fund Law which is a legacy of TSDA's bi-national origins. However, this applies only to the JPDA, not to other offshore or onshore petroleum activities.

¹¹ Section 26 (Access to courts).

"1. Access to courts is guaranteed to all for the defence of their legally protected rights and interests.

2. Justice shall not be denied for insufficient economic means."

We suggest that a similarly broad standing requirement should apply to potential violations by onshore petroleum operations of the rights of local communities, workers or landowners.

Draft explosives decree-law

We understand that MPRM is currently preparing a draft Decree-Law on Import, Transportation, Storage and Use of Explosives for the Implementation of Projects of Public Interest, although ANPM declined to answer our inquiry about this. Although that decree-law will apply to mining and blasting, it also has implications for onshore petroleum activities, including seismic prospecting. We do not understand why it has not been circulated for public consultation, and why this draft Onshore Decree-Law, as well as the draft Mining Law currently before Parliament, do not refer to it.

Public consultations should implement Free, Prior and Informed Consent.

Public consultations need to be required by the law, especially with potentially affected local communities. As we mentioned on page 2 regarding the consultation process for this draft decree-law, consulted parties need to be informed in advance and have the right to withhold their consent to activities which will infringe on their rights. Article 4.2(b) mentions “that owners or users of potentially affected land [should be] adequately informed of the type of Petroleum Operations to be undertaken, the approximate duration of the Petroleum Operations and potential damage that could be caused to property.” But they should also be informed about impacts to health, agriculture, water supplies, fisheries, freedom of motion, air pollution, accident risks and consequences and other potential effects of petroleum operations on their lives. Once they have that information, they should have the right to object and to appeal decisions taken over their objections.

During the 16 June public consultation on this draft decree-law, ANPM showed a short film depicting onshore seismic prospecting activities. However, the audio track was soothing classical music, with no sounds emitted by the seismic boomers. We hope that public consultations under this law will avoid misleading propaganda and truly help the public understand how their lives could be affected by petroleum activities.

Article 19.2(xii) mentions “particularly vulnerable environments including local communities” with regard to seismic and geological surveys, including use of explosives. Any area near human beings should be considered “particularly vulnerable” in Timor-Leste, where Post-Traumatic Stress Disorder is widespread. Effective public notice should be mandatory (improve Article 20), including clear explanations to community people. How close will seismic activities be to people and animals? Is there a risk of landslide or damage to nearby roads and houses? Why is there a “flora and fauna observer” (Article 20.5) but nobody looking at the effects on human beings?

Article 7(ddd) defines “local communities” as “a village, settlement or hamlets where Timor-Leste citizens usually reside;” and uses that term to define who is entitled to information and consultation. However, all people potentially affected by a project have these rights, including those who live or work downstream, live as isolated individuals or families, or have livelihoods which depend on air, land, watersheds or water which could be affected by the project. Articles 22-25 of Law no. 8/2017 on Expropriation describes one model of consultation, in which all interested people are welcome to participate, effective notice is given, adequate time is allowed, and a detailed report is prepared at the end of the process.¹² Although the Expropriation Law is not perfect, it illustrates some important facets of consultation which were left out of the draft Onshore Petroleum Activities Decree-Law.

Article 9.7 on opening new areas for petroleum activities should require MPRM to wait for a 60-day comment period before making its recommendation to the Council of Ministers.

Third-Party consultants need to be independent, qualified, empowered and widely used.

The definition of “Third Party Consultant” in Article 7(aaaaa), as well as references in Articles 37.6, 125.5 and elsewhere, should specify their independence and that they have no conflicts of interest

¹² Article 9.11 of this draft decree-law only requires that “decisions” be published. This should be expanded.

relating to the area that they are advising on. This may be inherently problematic, as they are being paid by a company with a stake in their outcome; nevertheless, they should be as impartial as possible.

Furthermore, it should be clear when a Third Party Consultant or auditor needs to be involved. Articles 37.1, 61.3, 81 and 191 seem to leave it up to the Ministry to decide, which undercuts the concept of checks and balances.

Perhaps a new article can be added to this decree-law (or to the Petroleum Activities Law) defining the independence and impartiality of a Third-Party Consultant, when they need to be involved, how they are selected and how that selection can be challenged. This could then be referenced by other articles.

Provisions on Transparency and Public Information are shamefully bad.

Timor-Leste's governments have repeatedly committed themselves to transparency, with Timor-Leste being a founding member of EITI, creating Transparency Pillars and Portals, and enacting Articles 29 and 30 of the Petroleum Activities Law which require contract transparency. Although implementation has sometimes fallen short, we expect that this nation will continue to work toward these goals.

Unfortunately, the draft Onshore Decree-Law betrays that commitment, with few requirements for effective public notification.¹³

Article 50 of Decree-Law 26/2012 on Environmental Licensing requires that:

- “1. Public bodies which develop programmes, plans or projects that have significant effects on the environment shall submit an annual report on these to the Ministry responsible for the environment.*
- 2. The ministry responsible for the environment shall submit an annual report to the Council of Ministers on the state of the environment based on the reports referred to in the preceding paragraph.*
- 3. The reports provided for in the preceding paragraph shall be published for consultation in the official languages.”*

This decree-law should comply with those requirements. It needs clearer definition on when public reports are needed, as well as public information on reportable events, storage of toxics, emergencies, spills, leakage, cleanup, containment, and health and environmental impacts (which are often undetected for a long time).

Many of the documents referred to in the law should be part of a publicly-available registry (preferably on-line as well as on paper), with copies available to anybody who requests them. Mandatory, timely public disclosure should include the documents referred to in the following articles, among others:

- 9 (Strategic assessment of possible petroleum operations in a given area)
- 12-13 (Prospecting Authorization application and grant or refusal)
- 16 (seepage use)
- 18 (work programme and budget)
- 23 (annual report from exploration)
- 25.8 (report on whether a discovery is commercial)
- 26 (declaration of development area)
- 32 (relinquishment)
- 45 (well completion)
- 52 (development plan)
- summary of 53 (annual work plan)
- 60 (annual production report)
- 61 (reserves statement)
- 71 (storage facility plan)
- 76 (storage operational plan)
- 78 (pipeline project plan)
- 83 (annual pipeline operations report)
- 88 (decommissioning plan)

¹³ The MPRM website (www.mprm.gov.tl -- mentioned in Article 9.5 and other places) will not exist for at least 123 more days.

- 95-100 (petroleum contracts)
- 120 (health and safety plan)
- 125 (incident reports)
- 131 (emergency response plan)
- 141 (environmental assessment, as already required under Decree-Law 5/2011, but MPRM may be creating a parallel process)
- 143 (environmental license, already required under Decree-Law 5/2011)
- 144 (environmental management plan, already required under Decree-Law 5/2011)
- 147.4 (annual environmental performance report)
- 148 (spill notifications)
- 163 (local content plan)
- 167 (annual local content report)
- 171-172 (needs public reporting about use of and access to both public and private land).

Article 98 should specify complete compliance with the evolving international EITI standard, not just with “Timor-Leste EITI as applicable from time to time in accordance with Applicable Law.” There is no Timor-Leste EITI law yet, but Timor-Leste has committed to comply with the global EITI standard. Furthermore, Article 187.18(c) should reference the EITI standard, not simply “reporting requirements under the EITI in Timor-Leste.” That standard includes, for example, contract transparency (also required by RDTL Law 9/2005) and beneficial ownership disclosure. However, according to Timor-Leste’s 2014 EITI Report,¹⁴ Timor-Leste has failed to fulfill these transparency requirements. We should be getting better, not worse.

Article 185 on provision of information to the Ministry should also cover provision of information to the public and local communities, as well as maintaining a public registry.

Article 187 is worrisome, as it focuses on preventing the sharing of information, rather than the presumption of transparency which underlies democracy and EITI. Article 187.1 essentially makes everything secret for at least two years, while Article 187.3 allows this secrecy to be prolonged indefinitely. Rather than saying (in Article 187.18) that “this article shall not prevent the disclosure of information and data if...”, the law should say that “all information and data must be disclosed to the public unless ...” and list specific exceptions.

This draft law endangers the environment and confuses evaluation and licensing.

Licensing

Timor-Leste enacted laws on basic environmental principles (Decree-Law 26/2012) and environmental licensing (Decree-Law 5/2011) five years ago. Although implementation of these laws is a work in progress, they nevertheless spell out the principles, evaluations, management, planning, approval processes, consultation and public information requirements for projects with environmental impacts, including in the petroleum sector.¹⁵ They should be clearly referenced in the sections of the proposed Decree-Law for Onshore Petroleum Operations that deal with environmental evaluation and licensing, including definitions in Article 7(kk, ll, mm, nn), Article 5 on Compliance and Articles 138-141 on Environmental Management.

If environmental regulation is to be effective, it should be administered by a different body than the one responsible for promoting and/or implementing the project; otherwise there is an inherent conflict

¹⁴ This most recent EITI report is at <http://www.laohamutuk.org/Oil/EITI/2017/EITI2014En.pdf>, pages 82 and 89.

¹⁵ Article 30.1 of the Basic Law on Environment Decree-Law 26/2012 says that “The special legislation applicable to the mining industry does not preclude the application of the present law to the activities provided in it.”

Annex I of Decree-Law 5/2011 on Environmental Licensing lists “Extraction of Oil and Gas (for commercial purposes): Extraction phase of the petroleum sector and the classification according to this award represents all activities from the physical preparation for the project area to the start of drilling for oil and gas (“Drilling”) and to the decommissioning phase”, as well as pipelines, storage sites and refineries, as Category A projects requiring the most rigorous environmental evaluation, management and licensing requirements.

of interest. However, many parts of the draft onshore decree-law, including Articles 7(mm), 73, 131.1, 140, 141.2, 141.3, 142.2, 142.3, 143, 144, 145, 146, 148, 150.4 and 150.5, give “the Ministry” (the Ministry of Petroleum and Mineral Resources) authority to approve or modify environmental impact assessments, monitoring, management plans and other powers which belong to the National Directorate for Pollution Control and Environmental Impact (DNCPIA) in the Ministry of Trade, Industry and Environment (MCIA), which is the “Environmental Authority” defined in Article 1(b) of Decree-Law 5/2011. MPRM is not authorized to approve Environmental Licenses “in coordination with the ministry responsible for the environment” as proposed Article 143.1 says, or for “organising and conducting the environmental licensing procedure for Petroleum Operations” – those powers belong to MCIA alone.

ANPM told La'o Hamutuk that the draft onshore decree-law is not intended to require a second environmental assessment and licensing procedure administered by MPRM in addition to the one already required under MCIA, but that is what it appears to do. References to “the Ministry” in the environmental parts of this draft law need to be changed to make clear that environmental licensing and oversight responsibility resides in MCIA, not in MPRM.

Standards

Articles 69, 138.1 and 139 of the draft decree-law invoke “As low as reasonably practicable” (ALARP) as the standard for managing environmental risks. Article 138.1 also says that environmental risks should be managed “using the best environmental practice and employing best available techniques.” However, the best practice is “as low as reasonably **achievable**” (ALARA), which we suggest is a more appropriate standard. By allowing companies to disregard environmental protection measures which are not “practicable” and techniques which are not “available” in small, isolated Timor-Leste, the ALARP benchmark places our environment at risk, endangering health, safety and livelihoods.

Waste management and disposal, including restoration when a project is finished

Article 7(ccccc) of the draft decree-law defines “waste material” as “useless” or “of no value.” In fact, material treated as “waste” by a petroleum operation often has value – consider the flaring of natural gas. The law should be written to encourage reuse or recycling of “waste materials”, minimizing the amount to be discarded.

Petroleum activities often create pollution and contamination which endure long after a project is “decommissioned.” For examples, see UNEP’s *Environmental Assessment of Ogoniland*¹⁶ or the U.S. National Academy of Science’s *Cumulative Environmental Effects of Oil and Gas Activities on Alaska’s North Slope*.¹⁷

Timor-Leste’s standard for clean-up after access, prospecting, exploration or production should not be mere “remediation” (return to the original use as specified in Article 91), but to restore lands and waters (rivers, seas, watersheds, tidal zones, ground water, not only “disturbed lands”) to the condition they were in before petroleum activities began. Benchmarks in Article 91.2 could also include agriculture (without contamination of products), clean ground and river water and normal fish populations.

When La'o Hamutuk raised this in our meeting, ANPM asked us to suggest a standard for restoration of land to pre-project conditions. We have not had time to research this thoroughly, but ANPM should consult with experts to identify one which is more detailed than Article 1(w) of Decree-Law 26/2012: “...re-establish the environmental conditions existing prior to the verification of degradation or damage to the environmental components.”

Article 181(g) on mandatory insurance should specify restoration of the environment to its pre-accident state.

Articles 27-29 on relinquishment should explicitly explain the Authorized Person’s responsibility to clean up all areas relinquished after unsuccessful prospecting, restoring them to a condition at least as good

¹⁶ http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf

¹⁷ <https://www.nap.edu/download/10639>

as before they started. ANPM told us that prospecting can take place on private land (with the state taking it over after if a commercial discovery is made), so people could be living or farming in areas where non-commercial test wells have been drilled, making environmental restoration especially important.

The relinquishment report required in Article 31.2(e) should include verification that the area was restored to its initial condition, as well as a description of how all significant pollution and waste produced by the exploration was disposed of.

Article 41 on well abandonment needs a provision to monitor and address longer-term environmental effects of an abandoned well, such as contamination of ground water that may not be apparent at the time the well is abandoned. Who will be responsible if an abandoned well continues to leak for decades?

Article 43 should include the removal and safe disposal of waste, toxic chemicals, and contaminated soil and water after drilling, not only clearing the "surface area" of material and equipment.

Article 47 on the 'protection of completed wells' should include a process for long-term monitoring. If land adjacent to the abandoned well is used for homes or schools, or if it reverts to private ownership, future users need to know that it is safe. If tailings or other drilling waste has gotten into rivers or watersheds, these also need to be monitored.

Article 86 on pipeline discontinuance should require environmental restoration and removal of all contaminated materials, not just a "safe condition." Abandoned pipes will deteriorate and toxics can leach into the environment over time, even if the condition is "safe" when the pipeline stops operating. Article 86(e) mentions "added chemical substances" – all potentially dangerous materials should be covered.

The Decommissioning Plan required under Article 88 should be part of the Environmental Management Plan submitted to DNCPIA to obtain the Environmental License before the project is begun (not two years after production starts, as 88.1 specifies). Its documents (Article 88.4(h)) and approval (Article 89) need to be consistent with Decree-Law 5/2011 and subject to MCI environmental licensing processes and oversight.

Article 160 of this draft decree-law refers to Article 16 of Petroleum Activities Law 9/2005 in relation to restitution and reparation for unauthorized petroleum activities. However, that Article's requirement to "clean-up pollution resulting from those Petroleum Operations, or reimburse the costs of clean-up to Timor-Leste" is too vague, and this law should call for restoration to conditions prior to the illegal activities.

Omissions and corrections

La'o Hamutuk identified a few more errors and omissions in the environmental articles of this draft decree-law which we list here, but there are probably many other parts of the law which should be corrected or tightened up to adequately protect Timor-Leste's fragile environment.

- Although Article 33.3 includes three pages spelling out what a Drilling Plan requires, it does not mention compliance with Decree-Law 5/2011 on Environmental Licensing, but only Article 33.3(n) requires a summary of environmental submissions "required under this Decree-Law." Drilling Plans and operations must be consistent with the approved Environmental Management Plan, and should also include plans for accident and spill management (not only fires and blowouts), the control of emissions and waste and remediation.
- Annex I of Decree-Law 5/2011 requires a Category A environmental license and management plan for sites which will store more than a million liters of oil or petrochemicals, and this should be included in Article 141.1(b).
- Similarly Articles 25-28 of Decree-Law 5/2011 require approval of a revised EIA, EMP and license for any significant project change, not only when, as Article 141.3 of this draft decree-law says, MPRM "may require" them.

- Article 141.4 of this draft decree-law should include emergency response and ways to restore a site to its pre-project condition, as well as any environmental impacts which could continue after the project is finished.
- Article 147 should require retention of records for longer than five years – some environmental damage can take much longer to manifest itself, such as birth defects, cancers or slow leakage into ground water or farmland. In Article 153, “appropriate measures” is not a measurable or enforceable requirement to protect soil and groundwater.
- Article 157 should include compensation to local people or communities for damage to lands, homes, farms, water supplies and livelihoods.
- In Articles 159 and 160, a typographical error replaced “91” with “94.”

Emergency response should protect local communities and clean up the mess.

This proposed decree-law does not adequately recognize the dangers posed to local communities by abnormal operation -- accidents, spills, fires, explosions and other unexpected occurrences. We should learn from the wide range of disasters in worldwide petroleum operations, and do better. This section lists a few parts of the law which need to be improved in this area, but there are undoubtedly more.

In the event of an accident, spill or leakage, what are the plans to notify people living nearby and downstream to evacuate, not to use local water, use face masks, avoid people or livestock in certain areas, etc.? Will people have been warned in advance what could happen, what to do and what not to do, so that they can adequately respond to an emergency? How will people know when they can resume normal activities?

The definition of Reportable Spills in Article 7(gggg) should be broadened to include all reportable events – fires, leaks, explosions and accidents – anything which significantly deviates from normal operation and the plans for Health, Safety and Environment.

The Annual Production Report (Article 60) should include information on unforeseen events – accidents, spills, leakage – as well as ‘normal’ pollution and emissions, including monitoring of nearby and downstream water, soil and air.

The Storage Facility Plan (Article 72) should include plans for containment of leaks and spills, as well as response to fires and explosions. Article 74(b) should not only refer to crude oil, but to all stored liquids and gases. The records required by Article 75.2 should include spills and other unforeseen events.

Articles 7(g) and 78 discuss plans for “associated pipeline facilities” connected with onshore petroleum production. However, there is currently a plan to build functionally identical pipelines between Suai port and the Betano refinery. A Pipeline Project Plan should also be required for oil pipelines which begin at a port rather than a well, and should include plans for containment and clean-up of leaks and spills, as well as response to fires and explosions. Article 78.3(s) is poorly translated: *pode* should be “can”, not “may”.

The Emergency Response Plan in Article 131 should be part of the Environmental Management Plan required to obtain an Environmental License under Decree-Law 5/2011. It needs to be approved by DNCPIA (not just submitted to MPRM) before an Environmental License is granted, which happens long before the “commencement of petroleum operations.”

The Oil Spill Contingency Plan in Article 146 should cover spills of materials other than “oil” which are used in petroleum operations. It should also include leaks and unplanned releases of solid and gaseous materials. It should consider fires and explosions, pipe breaks and other leakages – perhaps “spill” needs to be defined. Article 146 should also include provisions for sanctions if the plan is not followed in the event of an actual spill.

We encourage MPRM and ANPM to engage an environmental expert who is not linked to the petroleum industry to thoroughly review the environmental chapters of this draft decree-law in order to identify and revise other problematic articles, as neither La'o Hamutuk nor the people who have

worked on this so far appear to have the in-depth knowledge needed to protect Timor-Leste's environment.

Health and Safety require better protection.

Although La'o Hamutuk has no special expertise in occupational health and safety, we identified a number of issues which should be changed before this draft is enacted. A thorough review by more qualified people would probably find many more.

As discussed above on page 10, the "As low as reasonably practicable" (ALARP) benchmark for health and safety cited in Articles 7(iii), 117, 118.2, 119.1(a), 120.12(c) and 127.1 is not good enough, and should be changed to "as low as reasonably achievable" (ALARA).

The Verification of Design (Article 7(p)) should also examine storage of potentially toxic or combustible materials, accident response, and the methods for remediation.

Article 118.3 should also require that the Authorized Person inform its personnel and the public about risks, emissions, spills and unforeseen events.

Article 119.1(a) should refer to approved Environment Management Plans, not merely Good Oil Field Practice. It should require public reporting of accidents and emergencies, especially when there is a potential danger to nearby people, which should also be included in Article 120.8(j). Article 120.8(o) should include containment and cleanup of spills and leaks. Article 120.8(r) calls for "any other matters of importance for health and safety" which is meaningless, as 120.8 above says that the Health and Safety Plan's contents are "not limited to" this list.

Article 125 should require notification for any significant deviation from the Safety Case. Article 125.2(a) provides for initial notification (which cannot wait 24 hours for many types of serious incidents), but should require ongoing and frequent updates for any emergencies which may put the public or the environment at risk. The investigation report in Article 125.2(c) should include a description of the clean-up and remediation which has been done and what is still pending. It should also include a list of the quantities and materials which have been released. In Article 125.4, other important purposes of an incident investigation are to determine who is at fault, whether negligent or criminal behavior is involved, and whether adequate clean-up and remediation has been done.

This law violates people's right to access and own land.

Article 4.3(f) of Expropriation Law 8/2017 includes "*Exploração [exploitation] de petróleo, gás, minerais e infraestruturas de energia geotérmica;*" as one of the "public utility" reasons for expropriation – exploitation, not prospecting. It also says "*4. O preenchimento de alguma das alíneas anteriores não constitui presunção de utilidade pública, devendo esta ser justificada nos termos da presente lei.*"

Articles 4.3 and 172 of the draft decree-law on onshore petroleum operations say that prospecting (prior to discovery and production), Access (Articles 15 and 172) and Safety Zones (Article 134) can take place on private land. This is good, as it would be unfortunate and illegal to expropriate land temporarily, for prospecting which does not find a commercial discovery. However, the law needs to clearly spell out how petroleum activities on private land will occur -- what is the landowner entitled to, can they be temporarily displaced, and what other rights and obligations do they have? Who will protect landowners from unscrupulous companies, reducing the inevitable imbalance of wealth, knowledge and power? Agreements should be approved and monitored by the Provedor or another institution responsible for protecting community rights.

Since the recently-awarded PSCs cover 2,000 km² (more than one-eighth of Timor-Leste's territory), most of which is privately or communally owned, these are urgent and important questions.

The Laws on Expropriation and Spatial Planning were only promulgated in the last few months following a decade of work and this onshore decree-law was drafted before they were finalized. It should be reviewed in light of these laws, and should be consistent with and subsidiary to them. Given the

complexity and inconsistencies in this decree-law's provisions relating to land, it would be better not to try to re-invent such provisions, but rather to use the provisions in the new land laws.

Article 16 on seepage use needs to be more clearly defined and limited. How deep a well is someone allowed to drill? There should be public consultation and information, an Environmental License and other requirements. What if a seep is on private land, or in a river which supplies water to local or downstream communities?

Article 134 on Safety Zones needs clarification and expansion. What rights do private landowners have? Article 134.2 should include farmlands and fisheries as facilities to avoid risk. The notice requirement in 134.6 (newspapers and nonexistent MPRM website) will not reach local residents; local authorities should be involved, as well as visits to households who may be directly affected.

Article 135 on protection of local communities needs to be strengthened and made more explicit, not just "others who may be affected." It should refer to watersheds, farmland, fisheries and residences.

It is unclear how this law interacts with traditional law (*tara bandu*). It appears to violate Protected Areas Law Decree-Law 5/2016. Although Article 173.1(l) prohibits petroleum operations within a national park, article 7.2(ooo) says that this law covers Jaco island, which is part of Nino Konis Santana National Park.

Article 173.2 overrides all the other protections "when the economic value or other benefits clearly exceed the value of the ... restricted use" and should be deleted. Value to whom? Will there be public notice and consultation, possibilities to appeal? The non-applicability of Article 173.2 to areas excluded by Article 10 of this law is meaningless: the Council of Ministers excludes areas under Article 10, and although Article 173.2 says that the Council of Ministers cannot authorize petroleum operations in excluded areas, it has the power under Article 10.3 to repeal the exclusion of an area. If 173.2 is not deleted, it should specifically exclude certain types of land from the override process of Article 173.2, such as those described in 173.1(a, b, c, d and l).

Article 174 applies to sub-surface activities, but what about activities on the surface? Can an authorized person, or others, travel across land covered by an authorization, farm on it, graze cattle, etc.? Miners should not be the only people allowed to work in authorized areas.

Article 176 should include compensation for damage to air and water, especially where it affects agriculture, watersheds or fisheries. It should not be necessary to prove damage to "human life and health" if toxics enter the air, ground water or food chain. Such damage, including stillbirths, birth defects and cancers, may not appear for decades and could impact a random fraction of the population. This concern also applies to Articles 177.1(a) and 178.1 – the fact that health effects may not be immediately visible shouldn't prevent them from being compensated.

Article 177.1 should allow any person to apply for damages on behalf of others injured by a project; it should also have a provision for actions on behalf of a class or community, as described in Articles 63.2 and 63.3 of Decree-Law 26/2012.

Article 177.2 should allow appeals to court, if the decision of the political Council of Ministers on compensation is not acceptable.

Article 182.1(e) implies mandatory insurance should cover *force majeure* and "acts of God", with no exception to the responsibility for remediation. This should be explicitly stated, as some insurance policies exclude such things.

Local content benefits from the petroleum industry are illusory.

This draft decree-law includes eight articles on Local Content, implying that employment and subcontracts from petroleum exploration and production can be a major contributor to Timor-Leste's development. This is not true, and has already created unrealistic expectations, leading to many graduates in Petroleum Engineering unable to find work. In fact, the petroleum industry is among the least efficient job creators of any economic sector. Spending on health care creates three times as many

direct and indirect jobs as spending on oil and gas, while spending on education creates five times as many.¹⁸

ANPM asked La'o Hamutuk to help improve the local content provisions, especially to provide more jobs for Timorese people. ANPM needs to respond to the popular belief that there are many jobs to be had in the sector. However, as you can't get blood from a stone, we reiterate our frequent appeal for the government and the private sector to invest in human resources – education and health care – both to provide jobs and to improve people's quality of life and economic productivity. The only potential benefit from developing the petroleum sector is revenues to the state; it should not be looked to as the solution to other economic problems.

Article 7(v) says that Corporate Social Responsibility is up to "[the Authorized Person's] own initiative." If it's merely charitable contributions or social works to promote the company's profile in Timor-Leste, there should be no need to consult and report to the ministry as required by Articles 163.12 and 167.3(e).

Article 164.2 allows a company to "temporarily" employ workers of other nationalities if no qualified Timorese citizens apply, but has no requirement for the company to recruit locally. Article 164.7 prohibits discrimination by nationality, which contradicts the intent of this article. However, the anti-discrimination clause needs to be broadened to be consistent with Article 6.2 of the Labor Code Law 4/2012, which prohibits discrimination "on the basis of colour, race, civil status, gender, nationality, ascendency or ethnical origin, social position or economic status, political or ideological convictions, religion, physical or mental condition, age or health status."

Last year, MPRM conducted a public consultation on a draft Decree-Law on Employment in the Extractive Activities, but it was never enacted. If this is still being considered, it needs to be consistent with this onshore petroleum decree-law.

TimorGAP should not get special favors; the playing field should be level.

Although one of the principal motivations for this draft decree-law appears to create an environment which will attract international companies to explore for oil and gas in Timor-Leste, some provisions undercut this objective by providing special arrangements for the TimorGAP national oil company. The role of ANPM and this decree-law should be to safeguard the national interest, not only the interests of TimorGAP.

TimorGAP is exempt from liability (Article 94.1) and decommissioning (Article 93.7) responsibilities, placing the state at risk. How will they be held to account? If they're part of a joint venture, are all partners freed from these responsibilities?

TimorGAP gets immediate, automatic ownership of equipment brought in by other companies (Article 99). ANPM told us that this provision was a technical way to get state title to equipment after a project is completed as part of cost-recovery, but it is not well thought out. What happens when a company like Timor Resources has two PSCs – if they bring in equipment for one are they not allowed to use it for the other?

Article 102.1 exempts TimorGAP from technical qualifications and financial obligations unless they are the operator, and Article 197.9(c) exempts them from transfer fees. Does this make sense?

Article 102.7 allows TimorGAP to intercept any potential sale of an interest in a PSC from one company to another, forcing other joint venture partners to work with TimorGAP (which has no obligation to pay for exploration costs). This could deter some companies from coming to this country.

Article 180 makes the Ministry free from all claims relating to an Authorised Person's conduct of Petroleum Operations, and Article 180.2 says that the Authorised Person is entirely responsible. However, if that is TimorGAP, which is freed of liabilities by other parts of this Decree-Law, will the State have to absorb the costs?

¹⁸ R. Bacon and M. Kojima, *Issues in estimating the employment generated by energy sector activities*, World Bank, 2011.

Article 169.3 requiring use of the nonexistent Suai Supply Base is absurd for operations not near Suai or for which another facility would be more appropriate. ANPM already told La'ó Hamutuk that they will remove the Suai Supply Base from this Article, making the mandatory requirement to use “petroleum infrastructure in Timor-Leste” as their base of operations. However, the question remains whether Timor-Leste’s revenues should be reduced to cover inefficient operations in order to subsidize the Tasi Mane project or other petroleum infrastructure in Timor-Leste.

Avoiding favoritism

Government Decree 7/2005 describes open bidding rounds for new petroleum contracts, as was done in 2006 and is described in Article 13 of Petroleum Activities Law 9/2005. However, this proposed decree-law makes no reference to open tenders for onshore areas. It also does not refer to a Model PSC – will each case be negotiated individually?

Timor-Leste has signed four new Production-Sharing Contracts since 2006 – two offshore and two onshore. Every one has been a direct award without an open bidding round, and every one has involved TimorGAP. If this pattern continues, it will be a reversal of the open, corruption-resistant, transparent policies that the Petroleum Activities Law attempted to implement in 2005. However, this draft decree-law appears to continue that trend, which could scare away legitimate companies and attract unscrupulous ones looking to take advantage of Timor-Leste.

Article 170 on procurement should include a blacklist of companies which have been listed by international agencies as involved in corruption or with which Timor-Leste has had bad experiences.

Supply of petroleum to domestic market

When will the requirement in Article 97 to supply petroleum to the domestic market be used? Is the domestic market obliged to purchase petroleum from local producers if it is more costly than it would be from other sources? In other words, is this a backhanded way for the state or Timorese consumers to subsidize unviable petroleum operations?

Article 97 requires exporters to provide petroleum to the domestic market on 60 days’ notice, which could force them to violate long-term contracts with other customers.

Conclusion

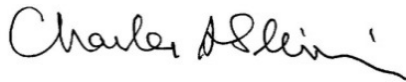
Once again, La'ó Hamutuk thanks the ANPM for the opportunity to share ideas through this submission and in consultations and meetings, and we would be glad to continue to do so. However, as indicated in the previous 15 pages, we believe that a lot of work is needed before this draft law will be ready to send to the Council of Ministers. We hope that you will take the time to do it right, to ensure that both Timor-Leste’s petroleum resources and our people are protected from the often rapacious practices of the international petroleum industry.

Thank you very much for your attention.



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