

Mining law: Permission to dive underground, damaging priceless land

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Timor-Leste's National Parliament is currently discussing a draft Mining Code. This draft was approved by the Council of Ministers in August 2016, after two years of secret discussions and several revisions led by the Ministry of Petroleum and Mineral Resources (MPRM). This draft law follows the government's initiative to create rules to open the way for mining activities. The Government considers this law as "extremely important" for Timor-Leste, to support development, economic growth and prosperity for this nation.

However, to ensure benefits for the people, the law should not just give strong legal incentives to investors to look for riches under the ground, but must enable the state to protect Timor-Leste's environment. The law should consider important issues, such as the geographic, economic, social and environmental conditions, as well as global conventions which Timor-Leste has signed.

This article will discuss how mining will impact on Timor-Leste, including lessons we should learn from the experiences of other countries. Hopefully, National Parliament will consider the ideas in this article as they make their decisions, and the article can also help people in Timor-Leste, especially in communities whose land could be the site of mining activities, to understand the risks and benefits which the mining industry could bring to their lives.

Before introducing a new law, we need to learn from other countries' experiences.

The advantages which the mining industry can bring are to provide state revenues, create jobs, and support other economic opportunities. In countries like Australia and South Africa, mining is the primary industry, providing a significant contribution to their economies.

However, there are also many countries where exploiting their mineral wealth has a dark history of environmental destruction, poverty, conflict, and undermining democracy. In these countries, to ensure benefits for the interests of companies, officials and the elite, leaders use their political, economic and legal powers to limit or undermine people's ability to advocate for their rights. Civil wars in Sierra Leone, Angola and Congo, corruption and conflict in Indonesia,

and mismanagement in the Philippines are examples of the consequences of mining activities on social life, democracy and governance in producing nations.

In West Papua, the U.S. company Freeport mines gold and copper. Although this produces money for the Indonesian central government and the Papua province, the money has failed to free the Papuan people from poverty and protracted conflict. Some mountains have already been lost, many rivers are contaminated, and military authorities often inflict violence against indigenous people. To ensure money for the Jakarta government, the military has become a vanguard for company interests, and Jakarta's desire for these resources overrides the right of the Papuan people to determine their future.

Timor-Leste's black history during the Indonesian occupation cannot be separated from the exploitation of mineral resources, most of which was done by companies supported by Indonesian soldiers. For example, extraction of marble from Ilimanu, Manatuto benefited from the occupation, through PT Marmer Timor-Timur, a branch of the PT Batara Indra Group, an Indonesian company greatly influenced by the Indonesian generals responsible for Operation Seroja, Indonesia's invasion of Timor-Leste.

Timor-Leste should learn from our own experience during the occupation, and also from other countries which are unable to manage mining for their people's benefit. Hence, when Timor-Leste has created the legal structure to open the way for mining activities, local communities in the affected areas may experience problems. Negative impacts can result by design or from accidents, and can occur during the construction phase, normal operations, explosions, spills, and after the project has been closed. Some dangers take a long time before they are visible, such as cancer, birth defects, and reduced agricultural production.

Negative impacts from mining are often larger than the benefits received by citizens. The greatest benefits from mining go to large mining companies, mostly from other countries, and the mined products will benefit consumers in other countries. Timor-Leste's Government and Parliament are responsible to ensure benefits for Timor-Leste's citizens, and to *protect the environment and safeguard sustainable development*, as the RDTL Constitution says, rather than enact laws which open the way to environmental destruction.

Chemical waste threatens our environment.

Timor-Leste, as a small half-island nation, does not have vast mineral resources like other countries, and is not appropriate for mining activities. Mining can degrade our land, displacing communities, farming and other economic activities. High mountains or beautiful land could vanish from our map when we allow mining companies to exploit us.

Vegetation and biodiversity need to be protected from threats. Some areas, such as Ilimanu which could be threatened by marble extraction, while Caisidu in Baucau has the potential for limestone extraction and other areas also have possibilities. Waste from mining can pollute ground water, land and the sea, killing humans, plants and animals which depend on them. This happens because mining activities always produce or require chemicals to break down rocks, or extract valuable ores. Chemical wastes will be dumped into the sea, rivers or air, as the easiest way to dispose of this garbage. For gold extraction, mercury is often used but is very dangerous to people's health.

Unfortunately, this draft law does not implement clear principles about the legal responsibilities of companies to ensure protection of communities, their livelihoods and their environment. One danger is that the article about environmental management focuses mostly on minor waste like dust, rather than dangerous toxic chemicals. In addition, there is no article which clearly defines the environmental, health and safety standards that mining companies have to obey, although the law repeatedly invokes "Good Mining Industry Practices" as a standard for the mining industry. We should not forget that standards acceptable in the mining industry does not mean

that they are good for people's lives. In addition, "Good Mining Industry Practices" are not defined, so this is an unenforceable, meaningless goal.

Another important concern is that environmental protection under this law does not spell out companies' obligations to decommission and restore mining areas to their prior conditions. The draft law just says that the Government can take a mining area from the company if the company abandons the area, but does not require the company to restore the area before it leaves. This weak provision is a huge advantage for mining companies.

Our commitment to manage chemical waste is lacking.

So far, one significant obstacle to the state's protection of Timor-Leste's environment has been that the institutions responsible for environmental regulation and toxic waste management lack the will to fulfill their responsibilities. In many cases, regulators fail to carry out their legally-mandated functions because they don't have enough human or financial resources, or because of strong political interference with their duties. Therefore, this legal regime will cause Timor-Leste to become more vulnerable to toxic wastes from mining, threatening our tourism sector, health, and livelihoods of farmers and fisherpeople whose lives depend on water, sea and land.

When regulation is weak, it's easy for companies to violate legal principles. Many projects in Timor-Leste never had Environmental Impact Assessments or licenses, which are legally required before carrying out major state and private projects.

These violations illustrate Timor-Leste's vulnerability to threats from large projects, whose owners rarely want to comply with our rules. One example is how the government's environmental directorate has to kneel before the institutions which promote the petroleum and mining sector, and give way to companies with great political and financial power, rather than protecting citizens' lives.

If Timor-Leste does indeed have valuable minerals under our land, but we do not yet have the institutions and capacity to protect our people from mining's negative impacts, that wealth will still be there when we are better prepared. We can develop them after we have strengthened our regulatory system, especially with an effective and strong environmental licensing process, rather than introduce a new, heavy, and complex law.

Timor-Leste's agencies which oversee environmental licensing need support including adequate financial and human resources, and they need political independence so that they can make decisions to protect our environment more effectively.

Evictions will happen often, forcefully, and inevitably.

Once Timor-Leste opens the way to the mining industry, many people will be forcibly evicted from community land. Community people may receive compensation, but they have no right to refuse to surrender their land. They must obey state and company decisions if their land is considered "public domain," as described in the proposed Land Law which Parliament has already approved and is pending promulgation or veto by the President of the Republic.

This draft mining law continues another restriction on community rights, which does not give attention to public consultation with the community before "opening, closing or redefining areas" for mining. Community rights are often violated because laws don't consider their existence or their voices. One experience is the eviction of people in Suai because of the Tasi Mane project under MPRM and TimorGAP, which should be considered by Parliament before approving this law.

This defect contradicts the evolution of mining and project practices to improve transparency and communication with local communities. Although it is not yet universally adopted as a legal standard except for indigenous people, the principle of "Free, Prior, Informed Consent" (FPIC) should be included in this mining law. The law should provide adequate, easily-understood information with enough time for people to freely discuss and decide, without intimidation or

outside intervention. Communities should also have the right to withhold consent if the proposed project does not respect their rights or serve the national interest.

Another danger is that this draft law gives “exclusive rights” to mining companies to enter and occupy the mining area, including areas outside the concession. This expanded right to companies violate the rights of communities who live near the mining area, even if their land is not included in the contract area. To avoid this violation of community rights, a mining company should only be able to conduct its activities in the area defined by its contract, and should also allow access to police and community leaders, particularly to ensure that company activities don’t threaten people’s lives.

When regulators aren’t independent, corruption and abuse of power happens.

In addition, one negative consequence of the mining industry is to tempt national and local officials to get involved in corruption, especially in the granting of mining contracts. In nearby Indonesia, many cases of corruption involve government officials who issue licenses without following good governance rules.

Under Article 14 of this draft law, issuing mining licenses is the responsibility of the National Petroleum and Minerals Authority (ANPM), as regulator. This provision doesn’t stand alone, and other articles mention that the MPRM shall influence ANPM in making decisions.

Provisions about the respective mandates of MPRM and ANPM create legal confusion in articles like 17.3, which says that the regulator will approve a pre-viability study after receiving authorization from the member of the government responsible for mining, Article 25.3 (MPRM can sign a contract after receiving a proposal from ANPM), Article 25.4 (MPRM can delegate its contract-signing power to ANPM), and Article 31 (ANPM issues licenses after being authorized by MPRM). The confusion of responsibilities between these two agencies creates opportunities for abuse of power and weakens mechanisms of transparency and accountability in the exercise of state functions.

Another kind of corruption happens when companies give gifts to people in regulators or oversight institutions. Although some provisions forbid people from receiving offers or direct benefits from mining companies for their personal interest, there is still an opportunity for companies to give awards or Christmas presents to regulatory staff, or to provide cars or other things to support regulatory activities. The draft law appears to legitimize gifts to ANPM. How can a regulator conduct free and independent supervision when their staff receive presents from or their work is supported directly by the companies they are supposed to regulate?

Also, this draft law promotes ANPM and MPRM as part of the team which issues environmental licenses, another opening for conflict of interest. In truth, the responsibility to issue environmental licenses rests solely with the relevant environmental directorate under the Ministry of Commerce, Industry and Environment, to ensure that the decision to issue a license is independent and follows legal procedures, rather than involving ANPM and MPRM as institutions with economic and political interests to promote the mining industry. They are less likely to follow environmental rules when they take their decision.

Also, the government plans to create a state-owned mining company in Timor-Leste. Although we do not yet have specific proposed legislation to establish this public company, we should learn from our history of establishing the TimorGAP, E.P. state-owned oil company a few years ago, nearly all of whose activities depend on support from the state budget.

With limited experience, financial capacity, and commercial planning, there is the possibility for a state-owned mining company and avoid following TimorGAP’s example, and not spend public money to pay its directors and other expensive operational costs, while receiving much less revenues than it spends.

We should remember that state-owned companies often enjoy privileges from their status, but don't follow rules and principles about transparency, environmental protection and good governance. We should consider these risks, anticipating them in the law. Furthermore, the draft mining law fails to require that mining contracts be made public, as required by the Extractive Industries Transparency Initiative (EITI) which Timor-Leste has already adopted.

Although the draft law refers to an Annex containing the specific provisions of a model contract, this has not been provided to Parliament. The model mining contract is very important in order to know what economic benefits Timor-Leste will receive and what are the obligations that the mining company will have. Without a clear model contract, citizens will now know if money has disappeared, or if government officials are diverting some for their personal or political interests, rather than for people's lives.

We continue to undercut the sustainability of our economy.

Clearly, a nation which promotes mining must sacrifice some of its land. The transformation of agricultural land to mining areas happens in nearly every country which produces minerals. Unfortunately, Timor-Leste doesn't have much arable land, and we will continue to lose it if mining advances.

In addition, this policy will continue to bind Timor-Leste's future to dependency on non-renewable resources – petroleum and minerals. For the last ten years, we have been extremely dependent on income from exporting oil and gas from fields under the Timor Sea. Although this sector has provided money to our state, it has encouraged Timor-Leste to ignore developing sustainable sectors of our economy, such as agriculture, tourism, small industries and other non-petroleum sectors.

At times, Timor-Leste has very high expectations for itself as a mining nation, and is establishing a Minerals Fund, but we forget that the minerals we have are mostly rocks – not metals or gems. Mining limestone, marble or gravel will not provide nearly as much money as oil and gas already have.

Timor-Leste's Elang-Kakatua and Kitan oil fields are already exhausted, Bayu-Undan will only provide a little more money over the next few years, and Greater Sunrise remains uncertain. Nevertheless, creating a new legal regime for mining is not the way to replace petroleum revenues.

Creating this regime is a response from people who have worked in the extractive sector and wish to continue such unsustainable activities. In truth, the depletion of our petroleum reserves should be an opportunity for Government to begin to prioritize non-oil development, as well as making state expenditures lower and more efficient, rather than creating laws which continue to bring us down a non-sustainable path.