



**global witness**

## **Global Witness comments for the public consultation on the Timor Leste Petroleum Fund Draft Act.**

Global Witness welcomes the commitment shown by Timor Leste to the transparent management of the country's petroleum revenues and thanks the Government for the opportunity to take part in the public consultation on the Petroleum Fund draft Act. We recognize the responsibility which this imposes on us, as an international organization, to be impartial and constructive in our comments.

There are several features in the draft Act which create the basis for a strong and credible law that safeguards the public interest in transparency and accountability. However, a number of provisions in the draft Act seem ambiguous. We are concerned that these ambiguities could undermine the effective working of the Act and, if a government comes to power in Timor Leste which is less committed to transparency than the current government, might be used to block the publication of information which the public needs to know, or to hinder the resolution of any problems in the Fund.

If these ambiguities are resolved, we believe that the Petroleum Fund would stand as evidence of Timor Leste's commitment to petroleum revenue transparency, and would stand as a model of good governance for other countries in the region.

The following aspects of the draft Act seem very positive to us because they ensure clarity and comprehensiveness. The draft Act will:

- Provide a clear and comprehensive definition of petroleum-related payments (Article 6.1)
- Ensure that all payments into the Fund (Article 19) and out of it (Article 7) are made into a single account.
- Ensure that transparency is a fundamental principle of revenue management (Article 18)
- Ensure oversight of revenue management via the Petroleum Fund Consultative Council (Chapter V).
- Prevent encumbrances on the assets of the Fund (Article 11). This should prevent any future government from borrowing against petroleum revenues, a practice which has caused serious fiscal and transparency problems in several oil-producing countries.

However, we would like to raise the following issues:

### **Public disclosure of payments by extractive companies**

There appears to be no provision, in the draft Act or other Timor Leste laws to date, for payers of revenues (that is, extractive companies, directly or indirectly via the Timor Sea Designated Authority) to publicly disclose these payments. At present, the draft Act envisages that these payments will only be disclosed, as receipts, by the government itself, with no obligation on companies themselves to publish.

The benefit of “double disclosure” by payers and recipients of revenues is that the public can clearly see both sides of the transaction, and can compare the receipts of the government with payments by the companies. This would add to the credibility of the process, without imposing any disadvantage on the government, and indicate the commitment of companies operating in Timor Leste to good governance.

We are aware that certain oil companies have been opposed to disclosing their payments around the world because this would allow governments to easily compare the terms of deals which companies have struck with other governments and thus to strike better deals for their own countries. This lack of transparency may benefit the companies themselves, but we do not see any benefit in it for the public interest of Timor Leste. We note that in the United States, companies publicly disclose their tax payments to the government.

The “double disclosure” of revenues by payers and recipients is a cornerstone of the Extractive Industries Transparency Initiative, which has been endorsed by Conoco-Philips and many other oil companies likely to invest in Timor Leste, and is a central feature of transparency initiatives in such countries as Nigeria and Azerbaijan.

We therefore recommend that the law require extractive companies to publish all their payments to the government, whether directly or indirectly via the Timor Sea Designated Authority. The EITI offers possible models for such disclosure.

### **Confidentiality**

The draft Act allows for information to be withheld from the public on the grounds of “confidentiality” (Articles 8.8, 10.10, 17.3, 17.7, 18.1, 20.5) but does not define what kinds of information will be considered confidential, under what conditions.

We are concerned that a blanket exemption for confidentiality might be used in future to withhold information which the public needs to know. To avoid this possibility, the Act should spell out what kinds of information can be kept confidential, for what time period, on whose authority. These persons could be required to justify their decisions to Parliament and the Petroleum Fund Consultative Council. Information about petroleum-related payments is of such overriding public interest that it should never be confidential.

### **Adaptation of information for public reports**

The draft Act states that data “may be adapted for public information” (Articles 14.2 and 17.3). We believe the Act should stipulate that any adaptation can only be made in order to improve ease of understanding by the public, and that the adapted document must accurately reflect the content and meaning of the original. This way, the public can be confident that published documents will include all the information they need to know.

### **Barring payments outside the Fund**

A strong feature of the draft Act is its clear requirement that all petroleum-related payments must go into the Fund and payments elsewhere are “null and void” (Article 6). We recommend that the Act could go further and forbid any petroleum-related payments, by any party, to places other than the Fund.

### **Independent Audits**

Article 23 of the draft Act covers the appointment of an independent auditor. We understand the intention is that the government will appoint the independent auditor until the Tribunal das Comptas is created: at this point, this responsibility will pass to the Tribunal. We feel that this intention should be made explicit, as the current wording of the draft is ambiguous and could be read to mean that no independent auditor needs to be appointed before the Tribunal is in operation.

We note that important components of the independent auditor’s report must be included in the Minister’s Annual Report to Parliament (Article 14.2) However, Article 20.5 states that: “The Minister shall provide for the publication of the independent auditor’s report in such form and manner as may be adapted for public information. The independent auditor shall ensure that in preparing the report, measures are taken to prevent the disclosure of confidential information.”

We are troubled by this provision, since the independent audit is absolutely central to the credibility of the Fund. What will happen if, at some time in the future, the auditor uncovers discrepancies which are embarrassing to the government in power at the time? We are concerned that a future government might interpret these Articles to mean that the Minister has the power to edit out any embarrassing parts of the auditor’s report before publication, which would clearly be contrary to the public interest in transparency.

We recommend that the Act should require the independent auditor’s report to be published in full, without redactions or omissions, within a specified time period. Perhaps the report, in full, could be published alongside the Minister’s Annual Report.

We note that the draft Act already requires “free access to public information” (Article 18.2) and requires other key information to be freely available to the public (Article 18.3). The publication in full of the independent audit and of the Council’s reports to Parliament would be consistent with the intention of Articles 18.2 and 18.3.

We also recommend that in the event that the independent auditor is unwilling to sign off the audit, or includes any qualifications in its report, then the Annual Report should disclose the auditor's objections and what steps will be taken to resolve them.

### **Follow-up Actions**

We are not clear, from our reading of the draft Act, what administrative or judicial steps must be taken if there is evidence of discrepancies in the Fund. There may already be provision, in other Timor Leste legislation which we are not aware of, for follow-up investigations and, if necessary, referral to the judiciary. We believe the Act should spell out what actions must be taken if problems emerge, citing other laws as appropriate. This will ensure consensus amongst all parties about what to do if there are any problems.

### **The Petroleum Fund Consultative Council**

The creation of a Consultative Council to advise Parliament (Article 15.2) is welcome because it offers a source of alternative opinion on the operations of the Fund. We note that the Consultative Council is not so much an independent watchdog with strong executive powers of its own, as an advisory body to Parliament. The Council will have the power to demand information from the Minister and the Central Bank, but the draft Act does not explicitly give it the power to publish its conclusions or take any follow-up action, other than to inform Parliament.

The draft Act places the ultimate responsibility for overseeing the Fund, and for following up any problems, with Parliament. Parliament will be required to publish the Council's reports "in such a form and manner as may be adapted for public information" (Article 17.3) Once again, there is an exemption for confidentiality.

While recognizing the principle of parliamentary sovereignty, we see a potential problem that might emerge in future. What would happen if the Council's report exposed problems in the Fund which were embarrassing to the government of the day? Legislators from the government party might face a conflict of loyalties, and the question of whether or not to publish information could become politicized, with damaging consequences for the Fund's credibility with the public.

To avoid this potential problem, the Act should require that the Council's reports will automatically be published, in full, at the same time as they are given to Parliament. We believe this would safeguard the public right to information without trespassing on the prerogatives of Parliament to take decisions about the Fund.

We also suggest that as well as sharing its findings with Parliament, the Council be given the right to seek the advice of the Provedor, or other government agencies concerned with the oversight of public finances, and to share its findings with these agencies. This would ensure that the Council has access to the best possible expert opinion.

We note that the Council will include high-ranking former officials, which is positive because it will ensure that the Council's views are taken seriously. The membership is weighted towards former members of the executive and members selected by the current executive (a maximum of seven out of 11 seats on the Council.) There is, however, only one seat for Parliament and none for the third arm of government, the judiciary. Perhaps the Act could ensure the widest spread of views by including, for example, a representative from the judiciary and one from the parliamentary opposition.

We wonder if the term limits for the first five seats on the Council (Article 16.1 Items a-e), and the strict specification for who is allowed to take these seats, might prove inflexible in practice. What happens if the only eligible candidate does not want to sit on the Council? Or what if a person appointed to the Council turns out to be unsuitable? It might be hard to remove them for five or 10 years. To avoid this problem, we would like to suggest that the categories of people eligible to be appointed under Items a-e of Article 16.1 might be expanded, to make it easier to fill all the seats. We also suggest that the terms of all members should be limited to three years.

The civil society representative on the Council should be selected by civil society organizations themselves. We recognize that this may be complicated in practice but if the government is seen, rightly or wrongly, to be picking its favoured candidate to represent non-government organisations, the Council's credibility could be undermined.

In conclusion, we are grateful to the Government for allowing us to submit these views to its public consultation. We are very encouraged by the progress towards revenue transparency in Timor Leste and would like to offer whatever help we can in helping the Government and citizens to achieve their goal of "wise management of petroleum resources for the benefit of current and future generations."

**Global Witness**  
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