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Submission to the International Seabed Authority on the report to ISA members and stakeholders *Developing a Regulatory Framework for Mineral Exploitation in the Area*

Submitted by e-mail to: consultation@isa.org.jm

By the Deep Sea Mining Campaign, Earthworks, MiningWatch Canada, Oasis Earth and the Mineral Policy Institute
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INTRODUCING OUR ORGANISATIONS

The **Deep Sea Mining (DSM) Campaign** is an association of NGOs and citizens from the Pacific, Australia, Canada and the US concerned about the likely impacts of DSM on marine and coastal ecosystems and human communities.

As an emerging threat, DSM has not been widely discussed beyond mining and technical circles. A key aim of the DSM campaign is to raise the profile of this issue among government and civil society stakeholders. We seek to generate debate and critical thinking about the risks and costs of this industry at all levels - from grassroots communities to political leadership.

We have produced several articles, fact sheets, [two science based reports](#), and conducted advocacy and participated in discussions on DSM at international, Pacific regional and national levels.

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MiningWatch Canada (MiningWatch) is a pan-Canadian initiative supported by environmental, social justice, Aboriginal and labour organisations from across Canada. The organization was created by founding members in 1999 to address the need for a co-ordinated public interest response to threats to public health, water and air quality, fish and wildlife habitat and human rights posed by irresponsible mineral policies and practices in Canada and by Canadian companies around the world. With Canadian and global partners, MiningWatch carries out and/or supports the monitoring, analysis and advocacy necessary to improve corporate practices and inform policy and regulatory development by public decision-makers.

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Earthworks is a US-based nonprofit organization dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions. Earthworks fulfills its mission by working with communities and grassroots groups to reform government policies, improve corporate practices, influence investment decisions and encourage responsible materials sourcing and consumption.

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Oasis Earth is a marine conservation consulting organization based in Anchorage, Alaska, providing technical advisory services regarding ocean conservation issues to governments, industry, NGOs, and

civil society around the world. A particular focus of Oasis Earth's work is environmental impacts of extractive industry, such as offshore oil and gas development and Deep Sea Mining (DSM). Oasis Earth also works to establish Citizens' Advisory Councils to provide effective engagement of and oversight by civil society stakeholders regarding extractive industry projects.

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The **Mineral Policy Institute** (MPI) is an international civil society organisation with a volunteer board representing members from across the world. Operating from Australia MPI focuses on assisting communities affected by specific mining projects and on achieving industry reform through improvements to policy, law and practice.

With a strong emphasis on free prior and informed consent, MPI undertakes a supportive and background role to assist mining affected communities. MPI's aim and role is to support communities to more effectively protect their rights and respond to mining issues that impact on them.

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RESPONSE TO THE DRAFT REPORT

1 BEST PRACTICE DEEP SEA MINING DECISION MAKING

Our submission focuses on three elements critical for best practice deep sea mining (DSM) decision making: the implementation of the *Precautionary Principle*, achieving *Free Prior and Informed Consent* (FPIC), and gaining broad civil society support.

There is limited understanding about the full impacts of DSM on marine ecosystems, species and food chains, including those relied upon by our own species. Furthermore, this unprecedented form of mineral extraction has the potential to cause irreparable harm to large areas of the deep ocean floor.

Due to these significant risks and the lack of public information and discussion about them, DSM has yet to gain support from communities that may be affected by it and from civil society more broadly.

In the Pacific region, due to uncertainty surrounding the impacts of seabed mining, it has been met with widespread opposition from communities, churches, NGOs, scientists, fishery managers, academics and student associations. In New Zealand, the environment protection agency (EPA) recognised that scientific information and baseline scientific research was inadequate to identify the scope and significance of potential impacts on the environment, existing commercial and community interests. Thus in landmark decisions over the past year, the EPA has rejected New Zealand's first



PHOTO: GRASSROOTS RESISTANCE TO DEEP SEA MINING. A NEW IRELANDER PUTS UP A "GORGOR" NEAR THE SOLWARA 1 SITE IN THE BISMARK SEA OF PAPUA NEW GUINEA TO PROHIBIT THE ENTRY OF NAUTILUS INC. ACCORDING TO CUSTOMARY LAW NEW IRELANDERS HAVE THE RIGHT TO DESTROY VESSELS ENTERING THEIR WATERS ILLEGALLY.

two applications to mine for minerals within their EEZ. In Namibia and in the Northern Territory of Australia moratoria are in place for shallow seabed mining for similar reasons.

These decisions establish a precautionary precedent for DSM decision making.

DSM exploration itself has the potential for significant impacts particularly in the later stages of proving ore bodies. It is extremely regrettable that the ISA has granted exploration licences without consideration of environmental impacts or the concerns and aspirations of society in regard to this potentially high risk and untested form of mineral extraction. It is indeed notable that the Center for Biological Diversity has announced that it is [suing the United States Government](#) over the granting of exploration permits for the Clarion-Clipperton Zone in the absence of environmental impact studies.

RECOMMENDATIONS

In order to develop best practice decision making we strongly urge the ISA to not issue seabed exploitation licences nor any further exploration licences without the following conditions being met:

- a) the free, prior and informed consent of Indigenous Peoples for exploration and exploitation**
- b) the broad support of potentially affected communities and wider civil society (gained via processes underpinned by the key principles of FPIC) for exploration and exploitation**
- c) peer-reviewed research on the potential impacts of the DSM operation to marine ecosystems and species**
- d) peer-reviewed research on the potential impacts of the DSM operation to the health and the economy of human communities at local, national and regional levels**
- e) peer reviewed research on the cumulative impacts of DSM operations and the establishment of mechanisms and strategies to address these**

We suggest that one way to achieve peer review would be for the ISA to establish an Independent Scientific Advisory Committee to provide independent scientific and technical advice to the Authority and to sponsoring Governments on aspects of DSM critical for decision-making.

As the global steward of the ocean commons we also believe it is incumbent upon the ISA to oversee a process of discussion aimed at defining how DSM decision-making will meaningfully incorporate the Precautionary Principle and obtain the consent of Indigenous peoples, affected communities and wider civil society.

In addition, we recommend that where FPIC and broad support for DSM has been obtained that the ISA require the establishment of *Citizen Advisory Councils (CACs)* for projects within the Area and facilitate the establishment of CACs in national waters.

The following sections provide the rationale and further explanation of these recommendations.

1.1 PRECAUTIONARY PRINCIPLE

Best practice decision making requires that there to be sufficient scientific information about the full range of risks to enable environmental managers to determine how these risks may be mitigated. Only then can participatory decision making processes determine whether risks are within socially acceptable bounds and FPIC and broader civil society support be granted (or withheld).

In the absence of such scientific data, as is currently the case in relation to DSM, the application of the precautionary principle would dictate that DSM exploitation should not proceed. The definition provided by the United Nations World Charter for Nature (1982) provides a more rational response to the high levels of potential risk and uncertainty associated with DSM, than does the definition favoured by the DSM industry that is offered by the Rio Declaration principle 15.

The UN World Charter states that:

activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed.

Reports by the DSM campaign and Professor Richard Steiner examining the EIS of the Nautilus Solwara 1 project herald the widespread and unpredictable harms that may result from DSM.

Amongst other factors, the reports highlight the lack of baseline scientific data on the biota and fauna of the receiving environment; the lack of research into the movements of DSM plumes and the lack of understanding of the toxicology and the physical impacts of those plumes.

The reports also detail the many flaws and gaps that exist in the Nautilus Solwara 1 EIS. The fact that an operational licence was granted by the Government of Papua New Guinea despite these deficiencies, identifies the need for independent scientific advice and strong EIS processes and capacities.

We recommend that the ISA establish an Independent Scientific Advisory Committee (ISAC) to provide independent scientific and technical advice to the Authority and to sponsoring Governments on aspects of DSM critical for decision-making.

Presently, the Authority and sponsoring governments receive scientific advice and input primarily from companies with vested interests in a particular policy or regulatory result of the Authority. Such advice is not always strictly objective. A properly structured ISAC will be comprised of scientists with no direct connection to DSM industry, permitting governments, or ISA members. It will include representatives of all relevant scientific disciplines, including deep sea biology, pelagic biology, physical and chemical oceanography, marine engineering, and social science.

The ISAC should review and comment on any/all scientific and technical matters within consideration of ISA, including regulatory development for exploration and exploitation activities, leasing, EIA development, permitting, and project development and oversight.

Given the current lack of capacity within many of the countries sponsoring DSM exploration, the ISAC should also review and approve EISs for exploration and exploitation.

1.2 FPIC AND CIVIL SOCIETY SUPPORT IN THE CONTEXT OF DSM

We acknowledge that achieving FPIC and broad civil society support in the context of DSM in the Area will be challenging. We do not suggest that FPIC is a “one size fits all” solution. On the contrary, a flexible approach should be employed to adapt its key elements to different circumstances. FPIC has already been applied in a wide range of cultures and mining situations (e.g. Doyle and Carino, 2013). However we would urge the ISA to not be overly pre-occupied with previous applications of FPIC but to adapt its key elements to this new realm of DSM.

An important distinction between public participation and FPIC is that FPIC entitles indigenous peoples to determine the outcome of decisions that affect them. Participation on the other hand is commonly interpreted as a process of consultation about projects that others make final decisions on. Hence FPIC provides a stronger ‘standard’ than participation in terms of human rights.

In consideration of the uncertainties and risks posed by DSM it would be appropriate that the stronger standard enabled by the underpinning elements of FPIC be applied not only to gaining the consent of Indigenous Peoples but also to obtaining broader civil society support for DSM.

As summarised from the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007), these key elements are:

Free - Consent is free from force, intimidation, manipulation, coercion or pressure by any government or company.

Prior - Consent is obtained prior to authorisations, allocation of exploration permits, operating licences etc.

Informed - all the relevant information must be presented to communities and civil society in an accurate, and accessible manner independent of vested interests.

Consent - civil society has the right to say “Yes” or “No” to the project - civil society can withhold consent or can determine the conditions for consent if it is given.

As the global steward of the ocean commons it is incumbent upon the ISA to oversee a process of discussion to define how to meaningfully incorporate the Precautionary Principle and the key elements of FPIC into DSM decision-making processes.

We offer the following to be considered in relation to this task.

Legal status and Recognition of FPIC

UNDRIP provides one of the clearest articulations of FPIC. While as a declaration UNDRIP, does not have the binding legal status of conventions (treaties), it is endorsed by 144 Governments and represents the aspirations of Indigenous Peoples globally. It should also be noted that FPIC was recognized prior to UNDRIP in many other international law instruments including in legally binding instruments (Doyle and Carino, 2013 p7-9) Via these legal instruments FPIC has the force of customary international law. Furthermore FPIC is gaining recognition by the mining sector (through the ICMM) and financiers (IFC Performance Standard).

As a proposed new industry, shouldn't DSM follow industry leaders rather than laggards?

Who provides (or withholds) consent for DSM exploration and exploitation?

The question of whose FPIC and whose support must be obtained prior to issuing DSM permits for exploration and exploitation requires further thought and discussion. However, there are strong arguments for broadening rather than narrowing the scope of who is included in such decisions.

The concept of *interested and affected parties* as it appears in some national environmental management acts and EIA regulations reflects a trend toward broadening the categories of people entitled to receive information and participate in environmental decision-making in relation to development projects. In the case of Namibia the decision to enact a moratorium on marine phosphate mining took into account the interest, needs and values of *interested and affected parties*. Under the Namibian Environmental Management Act 2007, these include any person, group of persons or organisation interested in or affected by an activity.

The interconnected nature of ocean environments and mixing due to upwellings and currents, makes the wide dispersal of DSM generated particulates and pollutants likely. For example, it is known that particulates from DSM exploration activities in the Clarion Clipperton Zone of the North Pacific can extend to 100km as a dense cloud¹.

Modelling and research into the toxicology of such plumes is yet to be conducted. Thus it is possible that deep sea mining projects would impact on the territory, rights, and interests of many coastal communities, who would then have a right to be included in decisions about whether to allow exploration or exploitation.

It is conceivable that much of the population of small island states located near a DSM operation could be impacted - possibly the situation that may arise for PNG, Tonga, Fiji, or Vanuatu. This would argue for the participation of the entire population of such states in DSM decision-making. Indeed the Republic of Vanuatu began a national process of consultation in October 2014 and the Minister for Land and Natural Resources who leads this process [has endorsed FPIC and the Precautionary Principle](#) as a basis for the national DSM consultation.

Furthermore, there is now over 1.5 million square kilometres of Pacific Ocean floor under exploration leasehold and a significant area of other world oceans. If only a small proportion of this area were to be mined, the cumulative impacts of many operations must be anticipated by regional strategic environmental management plans. Wide reaching cumulative impacts would also be a factor in determining the scope of who has the right to provide (or withhold) consent for DSM exploration and exploitation.

Citizens' Advisory Councils

In cases where FPIC has been provided by indigenous peoples and broad support gained by civil society, these rights holders should be given the opportunity to be directly involved in the review and oversight of DSM operations in their offshore region. To be effectively engaged, citizen stakeholders need their own organization with sufficient funding, staff, authority, broad representation, independence, and mandate to oversee DSM development.

We recommend that where there is clear evidence that FPIC and broad support for DSM has been obtained that the ISA require the establishment of *Citizen Advisory Councils* (CACs) for projects within the Area and facilitate the establishment of CACs in national waters.

1. Dr. Malcolm Clark, National Institute of Water and Atmospheric Research, NZ in his presentation to the SPC-SPREP REGIONAL WORKSHOP: "Environmental Perspectives of Deep Sea Mineral Activities" 9th – 13th December 2013, Nadi, Fiji

The purpose of these DSM CACs is to provide informed public advice, oversight, and engagement with DSM development. These citizen councils could be funded from government resource revenues and should provide advice on all aspects of DSM projects. Citizen councils should be comprised of all major stakeholder constituencies potentially affected by the DSM project – e.g., Indigenous Peoples, fishing, shipping, conservation, tourism, women, youth, science, and coastal communities.

Properly structured, these CACs will become the eyes, ears, and the voice for stakeholders regarding DSM projects and provide an on-going mechanism for communication between citizens, government, and industry. The CAC should exist for the lifetime of the DSM project.

Citizen councils do not substitute for effective governmental or intergovernmental oversight (e.g. by the ISA), but complement and enhance such.

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CONSENTS

We hereby give express consent to make our contact details and our submission publicly available. We also look forward to be contacted by the ISA in future and to be a member of the stakeholder group.



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