

## SPC-EU Deep Sea Minerals Project comments on the ISA Draft Framework for the Regulation of Exploitation Activities in the Area

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### Respondent information:

The SPC-EU Deep Sea Minerals (DSM) Project is a partnership between the Secretariat of the Pacific Community (SPC) and the European Union (EU). The DSM Project is managed by the Geoscience Division (GSD) of SPC on behalf of 15 Pacific Island States namely: the Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Timor Leste, Tonga, Tuvalu and Vanuatu.

Each DSM Project member State is a signatory to the United Nations Convention on the Law of the Sea (UNCLOS) and member of the International Seabed Authority (ISA). Four of them (Nauru, Tonga, Cook Islands and Kiribati) are sponsoring States for current exploration contracts in the Area. Fiji and Tonga are members of the ISA Council and a Fiji national, Dr Russell Howorth, is the current chair of the ISA's LTC. Several Pacific Island States have active interest in DSM activities within their national jurisdiction, and have national DSM regulatory and fiscal regimes in place or under development.

The SPC-EU DSM Project is mandated to provide technical assistance to Pacific Island States to improve the governance and management of their deep-sea minerals resources through improved legal frameworks, increased technical capacity and effective monitoring systems.

A primary objective of the SPC-EU DSM Project is to support informed and careful governance of any deep sea mining activities in accordance with international law, with particular attention to the protection of the marine environment and securing equitable financial arrangements for Pacific Island States and their people. The SPC-EU DSM Project is also working to encourage and support participatory decision-making in the governance and management of national DSM resources.

The SPC-EU DSM Project includes within its scope both national jurisdiction and Pacific Islands' engagement with the ISA and the Area.

More information about the SPC-EU DSM Project and copies of publication and other resources produced by the SPC-EU DSM Project can be found here: <http://gsd.spc.int/dsm/>.

## I. General comments

| Draft regulation description  | Specific Elements  | Comments from the SPC-EU DSM Project  |
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| <b>Part I Introduction</b>  |  |   |
| Use of Terms and Scope  | Definitions applicable to the exploitation regime.                               | It is recommended to provide definitions for: <i>“Affiliated company”, “Applicant”, “Application”, “Contract area”, “Incident”</i> (it would be worth considering using a definition tailored on the basis of the one provided by the IMO Resolution A.849(10) - Code for the Investigation of Marine Casualties and Incidents as amended by Resolution A.884(21), <i>“Substantial activities”</i> ).   |
| <b>Part II Applications for approval of plans of work for exploitation in the form of contracts</b> |  |   |
| Forms of applications   | Defines requirement for a plan of work in a form to be prescribed in Annex I     | <ul style="list-style-type: none"> <li>• Consideration should be given to holding an international competitive tendering exercise for exploration tenements, in order to obtain the best contractor – rather than operating on a reactive first applicant-wins approach.</li> <li>• If a selected exploitation area overlaps with adjacent exploration licence areas, importance will have to be given to ensure that the exploration licence areas be readjusted to ensure there is no overlap with the exploitation area.</li> <li>• Due consideration should also be given to involve a Scientific Committee , composed of members of the LTC as well as DSM experts, established within the ISA in the process of assessing the applications received.</li> </ul>   |
| Financial and technical capabilities  | A key provision for the delivery of due diligence information about an applicant | <ul style="list-style-type: none"> <li>• Reference to the ability to mine in the “Contract area” within the team of the contract and commencing not later than [10] years after the contract has been awarded is recommended.</li> <li>• It is also recommended to include a specific requirement for the work plan to contain an independent, or independently verified, feasibility study supporting the financial and technical capabilities of the applicant.</li> <li>• It would be important to develop evaluation criteria needed for the Commissions’ assessment in light of the criteria already contained in national legislation as least to ensure consistency with the efforts already deployed by some countries and in particular Pacific Island States where amending existing legal instruments is challenging.</li> <li>• Key Evaluation criteria to assess financial and technical capabilities of applicants that should be taken into consideration are as follows:</li> </ul> |

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|                                       |  | <ul style="list-style-type: none"> <li>a) The applicant, during the term of the contract, can demonstrate that it will be capable of committing or raising sufficient financial resources to cover the estimated costs of the plan of work, and all other associated costs of fulfilling its financial obligations under the contract, including the payment of any fees, taxations, royalties, or similar payments arising in relation to the mining activities and minerals extracted.</li> <li>b) The applicant can demonstrate that it is technically capable of carrying out the proposed mining activities in accordance with the contract and plan of work and of fulfilling its operational obligations to the ISA, and to its Sponsoring State.</li> <li>c) The applicant has: (i) satisfactorily fulfilled all past obligations under any contract previously held by the applicant; (ii) satisfactorily fulfilled all past obligations under any authorisation to conduct activities relating to seabed mineral exploration or mining, outside of the Area jurisdiction; or (iii) satisfactorily explained to the ISA both the reasons for the failure to fulfil past obligations and the measures taken or put in place to guarantee that the same or similar failures will not re-occur in respect of the mining activities proposed in the application.</li> <li>d) The applicant (including each director, trustee, executive officer, secretary, affiliate or any other person associated or significantly connected with the ownership, administration or management of the applicant's business) has not previously: (i) been found on reasonable evidence to have breached a term or condition of an approval (however labelled) to conduct seabed mineral activities or similar sea or land based activities, which related to the protection or rehabilitation of the environment, the payment of fees, taxes or royalties, or the safeguarding of the interests of the local community; (ii) been convicted of an offence pertaining to the conduct of seabed mineral activities or similar sea or land based activities; or (iii) been convicted of an offence involving fraud or dishonesty.</li> <li>e) The applicant is not currently insolvent or under administration.</li> </ul> |
| Previous contracts with the Authority | Content of Exploration can be retained                                   | <ul style="list-style-type: none"> <li>• A rigorous assessment process has to be in place to assess the performance of Contractors on previous or soon-to-expire exploration contracts. If poor performance is proven exploration opportunities for the concerned area must be made available to other countries and interested parties.</li> </ul>   |
| Undertakings                          | Specific undertakings contained in Annex III, Article 4(6) or the UNCLOS | <ul style="list-style-type: none"> <li>• Specific and fundamental contract terms in respect of unfair economic practices including disclosure of anti-competitive practices and the obligation to pay fees and</li> </ul>   |

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|  |  | royalties are recommended.  |
| Data and information to be submitted for approval of the plan of work for exploitation | This draft regulation should outline the documents, information and other data required for an application | It is recommended that requirements also include: <ul style="list-style-type: none"> <li>• Technical Capacity – confirmation of operational and technical resources to complete the exploitation including use of best practice;</li> <li>• Commercial viability – confirmation of exploitation to operate at a commercial rate of return within the term of the licence; and</li> <li>• Public engagement and information plan.</li> </ul>   |
| Feasibility study  | Content and structure be defined for exploitation activities   | <ul style="list-style-type: none"> <li>• It is recommended that specific requirements be included to ensure that the assessment of commercial viability of proposed exploitation activities (by exploitation area) also takes into consideration the risk caused to the environment including fisheries. Pacific Island States are heavily reliant on the fishery industry as a major component of their GDP. It is therefore of critical importance to ensure that the opportunity cost of mining in the Area be calculated in light of the potential impacts caused to the marine environment and marine living resources.</li> <li>• Due consideration should also be given to develop specific guidelines that can be used for economic assessment purposes.</li> </ul>                   |
| Environmental impact statement (EIS)   | Content of EIS to be further defined/finalised and the resource-category specific                          | <ul style="list-style-type: none"> <li>• It is recommended to merge SIA and EIS.</li> <li>• The draft EIS template (ISA Tech. study N0. 10) developed with SOPAC Division of SPC (now Geoscience Division of SPC) has been already revised by SPC and this version can be made available to ISA.</li> <li>• Further clarification needed on the criteria and conditions that must be met for the 'independent environmental consulting firm' to be contracted for verification of the EIS [with specific rules to prevent conflict of interest].</li> <li>• A team of experts with specific areas of expertise relevant to deep sea mining shall be appointed to review the EIS. At least one representative of civil society organisation should be included in the review team.</li> </ul>  |
| Environmental management plan (EMP)  | Structure and content of EMP to be drafted/defined   | <ul style="list-style-type: none"> <li>• It is recommended that the team or panel of experts that review the EMP be the same as those that reviewed the EIA/EIS to ensure consistency. In fact, at the beginning of a project a team should be selected that will follow the entire project for the review of the EIA/ EMP / Monitoring reviews/ Incident reviews, mine closure reports etc.</li> <li>• Each plan (monitoring plan, management plan, conservation plan, remediation plan, restoration plan, rehabilitation plan) should have its own separate monitoring and evaluation process to measure its effectiveness and relevance.</li> <li>• EMP should be implemented on a regional basis and address cumulative effects of several exploration activities in a region.</li> </ul> |

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|  |   | <ul style="list-style-type: none"> <li>• A programme for identifying and establishing networks of protected and representative areas including marine reserves should also be implemented, in close collaboration with relevant regional organizations.</li> <li>• Due consideration should also be given to establishing a Central Data Repository and Environmental Information.</li> </ul>   |
| Social impact assessment and action plan (SIA) | Content/action plan to be defined for exploitation activities and socio-economics impacts in the Area | <ul style="list-style-type: none"> <li>• It is recommended to merge SIA and EIS.</li> <li>• Although it is true that due to the remoteness of exploitation activities, no immediate communities or individuals will potentially be significantly affected by operations, consideration should be given to potential impacts that may be caused to the fishery industry of developing States when exploration activities will be undertaken in limited distance from their EEZs. Due consideration should also be given to sea transport routes and marine protected areas close to the exploitation areas that may be affected.</li> <li>• In addition to this, particular emphasis will have to be given to the cultural aspects of deep sea mining for some populations living in adjacent areas (i.e pacific communities for exploitation activities undertaken in the Clarion-Clipperton Fracture Zone).</li> <li>• Further discussion is required to include specific reference to the “Common heritage of mankind” and ensure that the action plan will require from operators to contribute to the common knowledge understood as a common goods. Such discussion should imperatively involve a wide range of stakeholders including representatives of civil society, relevant regional organizations, Academia etc.</li> <li>• It is recommended that specific actions relating to the use of the proceeds put into the Seabed Sustainability Fund will have to be incorporated, planned and allocated with performance indicators against the performance of the activities in the Area will be monitored.</li> </ul> |
| Financing plan                                 | Structure and content of plan to be developed   | <ul style="list-style-type: none"> <li>• Mining of DSM resources should only be permitted where there is such a market for the produce that the benefits and returns to the ‘Common Heritage of Mankind’ will outweigh the costs and losses. No incentives that would reduce the ‘take’ by the ISA for the ‘Common Heritage of Mankind’ should be implemented.</li> <li>• In line with this, it would also assist the international community to have some understanding of what the returns to ‘mankind’ will be, and how this will be distributed – in order for the ISA to take an informed cost-benefit approach in permitting mining activities in the future.</li> <li>• Relevant provisions of the regulations need to ensure that the rights of the contractors to use the exploitation permit/licence to raise capital are not abused.</li> </ul>  |
| Closure plan                                   | Structure and content of plan to be developed   | <ul style="list-style-type: none"> <li>• It is recommended that the closure plan includes a time schedule and estimated annual expenditures.</li> </ul>   |

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|   |  | <ul style="list-style-type: none"> <li>• It is also recommended to rename this “Closure and Rehabilitation plan”.</li> <li>• Closure plan may be reviewed to address impact of damage done. It should be flexible to change and not too rigid but must have a universal set of standards and guidelines that may be convened by an expert working group.</li> <li>• In line with this, it is recommended that any closure plan be designed to ensure that all residual foreign materials and installation are removed from the Area, and takes into account any ongoing monitoring and other measures in the EMP.</li> <li>• Additionally, any closure plan should include and follow principles of the London Convention &amp; Protocol when further requirements that address deep se mining waste will need to be developed.</li> <li>• The costs associated with the closure plan have to be determined and allocated towards the end of the mine life.</li> </ul>   |
| Size and location of exploitation area(s) covered by the plan of work   | Guidance criteria for determining the size (and location) of exploitation area(s)  | <ul style="list-style-type: none"> <li>• The areas in which ore materials occur will determine the size of exploitation area. This should be determined at the resource definition stage of exploration.</li> <li>• Not only is it proximity to APEIs but potential for impacts to extend into these areas needs to be considered.</li> <li>• Will PRZ and IRZs be mandatory for each mineral type?</li> <li>• The number and proximity (in time and space) of different exploitation sites offered under contract, to ensure that cumulative impacts of mining are being appropriately predicted and mitigated or managed.</li> </ul>   |
| Fee for applications  | Wording can be adapted from the exploration regulations  | <ul style="list-style-type: none"> <li>• All kinds of fees associated with exploitation application and approval must be identified and clearly defined.</li> <li>• It is recommended that a part of the fees be used to ensure effective participation of all relevant stakeholders to the public review.</li> </ul>  |
| Public review of the Environmental impact statement and Environmental management plan [and Social impact assessment and Closure plan] | An open, inclusive and cos-effective decision-making-process needs to be developed for the review of specific documents by interested parties. | <ul style="list-style-type: none"> <li>• Documents should be publically available online indefinitely – not just for the review period. Any official review report or amendments to the original documents after the review process should additionally be available.</li> <li>• The <i>Guidelines on Procedures and Information Requirements for Review</i> that are going to be drafted will need not only to provide greater clarity and guidance over the substance and content of the reviews for exploitation programmes but also, on the processes of such reviews.</li> <li>• Representation and participation of developing States and particularly, those located at proximity of mining sites (i.e Pacific Island States for exploitation activities undertaken in the Clarion-Clipperton Fracture Zone) is of critical importance.</li> <li>• The Authority must consider having public review meetings in countries closer to the mining area (e.g. Mexico and Kiribati for the CCFZ).</li> </ul> |

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|   |   | <ul style="list-style-type: none"> <li>• In addition to this, it is recommended that the ISA develop a list of suitable independent verification consultants comprising CSOs' representatives from adjacent costal states, academia and relevant regional organizations for evaluating EIAs and EMP submissions.</li> </ul>   |
| Independent technical expert working group/sub-committees | Consider setting up expert working groups or sub-committees to support the work of the Commission | <ul style="list-style-type: none"> <li>• This should be formalised in the regulatory framework.</li> <li>• Due consideration should be given to representation and participation of developing States and particularly, those located at proximity of mining sites (i.e Pacific Island States for exploitation activities undertaken in the Clarion-Clipperton Fracture Zone) as well as key stakeholders (i.e CSOs' representatives, relevant regional organizations, Academia...).</li> <li>• It is also recommended that expert working groups and committees be established within the ISA.</li> <li>• Due consideration would be needed to identify the criteria and conditions that must be met for ensuring 'independence' of these working group/sub-committees.</li> </ul> |
| <b>Part III Contracts for exploitation</b>                |   |   |
| Rights of the Contractor                                  | Wording can be adopted from the Exploration Regulations   | <ul style="list-style-type: none"> <li>• Exploration activities must be allowed to continue under an exploitation licence but mining shall not be allowed in exploration areas/tenements.</li> </ul>  |
| Obligation of the Authority                               | To provide clarity on any obligations of the Authority  | <ul style="list-style-type: none"> <li>• The functions of the Authority must be clearly defined in relation to the establishment and operations of the Enterprise.</li> </ul>   |
| Duration of contracts/renewal                             | This draft regulation relates to security of tenure and a key contractual term for contractors    | <ul style="list-style-type: none"> <li>• Guidelines should be developed for establishing the (i) criteria for contract duration, (ii) application and evaluation criteria for a substantive review and (iii) application and evaluation criteria for renewal of an exploitation contract should take into consideration: the resource type, the size of the site and the commercial viability.</li> <li>• Review should also be triggered where a substantial breach of the contract or the regulation.</li> <li>• Depending on the deposit type, mining licence shall be issued for no less than 3 years and no more than 6 years. Similarly, renewal of mining licence must be between 3-6 years.</li> </ul>  |
| Performance requirements                                  | This draft regulation should specify the production obligations under a plan of work              | Environmental performance requirements are also important factors that need to be set and inspected. Performance against environmental criteria must be assessed for renewals/extensions of permits.  |
| Conservation of the natural resources of the Area         | General obligation to avoid unnecessary waste   | <ul style="list-style-type: none"> <li>• It is recommended that penalties be applied for unnecessary waste and a waste management plan be designed to avoid unnecessary waste and address immediate proactive measures to ensure the removal of unnecessary waste that may have been generated.</li> <li>• Mining of DSM resources should only be permitted where there is such a market for</li> </ul>   |

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|                               |  | <p>the produce that the benefits and returns to the Common Heritage of Mankind will outweigh the costs and losses. No incentives that would reduce the 'take' by the ISA for the 'Common Heritage of Mankind' should be implemented. We do not find it problematic if this approach means that only select and small areas of seabed are selected for mining, and/or if it means that seabed mineral resources are left un-mined for longer periods – unless and until such a time as knowledge and technology have improved so as to make the global benefits of extraction of low-grade resources outweigh the 'costs' both financial and environmental.</p> <ul style="list-style-type: none"> <li>• There should also be a degree of flexibility for the contractor/mining company to determine the level of production with conditions attached.</li> <li>• In line with this, it would also assist the international community to have some understanding of what the returns to 'mankind' will be, and how this will be distributed – in order for the ISA to take an informed cost-benefit approach in permitting mining activities in the future.</li> <li>• On marine genetic resources: the protection, research and use of such a resource must be clearly defined in the regulation,</li> <li>• Last but not least, it is recommended that contractor project applications be required to explicitly address the responsibility related to the 'Common Heritage of Mankind' with regards to natural capital.</li> </ul> |
| Use of sub-contractors        | To specify the obligations on a contractor where sub-contractors are engaged                         | <ul style="list-style-type: none"> <li>• Clear rules should be provided for the use of sub-contractors. This should be articulated in a contractor-sub-contractor agreement.</li> <li>• It is also recommended to make clear that a sub-contractor cannot be responsible for the main mining activities and that the ultimate responsibility and liability will remain with the contractor particularly with regards to potential environmental impacts caused by mining activities. .</li> </ul>  |
| Vessels operating in the Area | To specify the obligations on a contractor in relation to vessels undertaking activities in the Area | <ul style="list-style-type: none"> <li>• It is worth considering requesting that only vessels flying a flag meeting the performance criteria/standards set out by the International Maritime Organization be allowed to be used for activities conducted in the Area.</li> <li>• It is also likely that structures and not only "vessels" will be used therefore it is recommended to specify the obligations of the contractor using such structures.</li> </ul>  |
| Health and safety             | To specify the additional measures that supplement existing international agreements                 | <ul style="list-style-type: none"> <li>• It is recommended that the ISA works in close cooperation with the International Labour Organization and the International Maritime Organization on this particular matter.</li> <li>• Training of monitoring and enforcement officials for pacific island states is vital to avoid contractors from taking advantage of loopholes and lack of proper health and safety resources with small island states.</li> </ul>  |



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| Training   | Training obligations on a contractor                     | <ul style="list-style-type: none"> <li>• Particular emphasis needs to be placed on developing countries with the development of training opportunities.</li> <li>• Shipboard training shall be part of this training and contractors are expected to make rooms available on the mining vessels to accommodate trainees.</li> <li>• A dedicated amount of money collected through fees application and other should be systematically allocated to this.</li> </ul>  |
| Periodic review of the implementation of the plan of work for exploitation | As per content of Exploration Regulations                | <ul style="list-style-type: none"> <li>• We reiterate that mining licence should not be issued for more than 6 years.</li> <li>• Periodic reviews should be conducted mid-way through the term of the licence and six months before the expiry of the licence. E.g. if a 6 year mining licence is issued period review should be held just before the end of the 3<sup>rd</sup> year and just before the end of the 6<sup>th</sup> year.</li> <li>• It is recommended that all plans be reviewed against the EIS &amp; EMP.</li> <li>• Periodic review should also be made on environmental performance and compliance with permit conditions.</li> <li>• Adaptive management should allow for changes to be made to conditions after the review process.</li> </ul>   |
| Responsibility and liability   | As per Exploration Regulations                           | <ul style="list-style-type: none"> <li>• An international framework is needed to ensure prevention and response measures to recover the costs, or to claim compensation or other relief on behalf of the international community. Particular emphasis should be given to prevention of loss and secondarily, on establishment of mechanisms to achieve restoration of the loss or compensation (including through application of the 'polluter-pays' principle).</li> <li>• The insurance should anticipate not only the value of the company's at-sea assets and worker protection, but also potential liability for damages – such as compensation for transboundary impacts, or the costs of clean-up of unanticipated environmental harm.</li> <li>• The responsibility and liability pertaining to the ISA should be clearly identified (i.e ISA's obligation to verify that the information supplied by the contractor confirms that it is adhering to best environmental practices).</li> </ul> |
| <b>Part IV Protection and preservation of the marine environment</b>       |  |  |
| Protection and preservation of the marine environment                      | General wording in Exploration Regulations to be adapted | <ul style="list-style-type: none"> <li>• Protection and preservation of the marine environment must be considered at a regional level and not only on a site-by site-basis. Regional plans or Regional Strategic Environmental Assessments need to be conducted.</li> <li>• Should there be obligations on contractors to do research in APEIs?</li> <li>• The various streams of waste need to be considered separately, but under a single waste management RRP: routine vessel discharges, atmospheric discharges, solid waste,</li> </ul>  |

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|  |   | hazardous waste, return water discharges, tailings disposal, submarine side-casting of sediments. Site specific waste management should be addressed in the EIA and the EMP.   |
| Environmental management                       | To operationalise the EMP   | <ul style="list-style-type: none"> <li>• Environmental standards need to be set early, but with flexibility to allow adaptive management. The two year review of the EMP must also consider any changes in RRP's and reflect these changes to ensure equal application of standards.</li> <li>• The EMS guidelines should be developed in tandem with the EMP guidelines and as such should have similar priority ratings of 'b'.</li> </ul>   |
| Emergency orders                               | As per Exploration Regulations  | <ul style="list-style-type: none"> <li>• Working group including the International Maritime Organization and relevant regional organizations coordinating marine pollution response and search &amp; rescue operations (such as SPC and SPREP for the Pacific Region) should be created with the aim of establishing specific guidelines to be followed in case of 'incident' triggering emergency measures.</li> <li>• It is recommended that the ISA reserves the power to hold or commission inquiries into incidents (or any other matter in the interests of the orderly conduct of seabed mineral activities in the Area) in cooperation with the International Maritime Organization, the relevant regional organizations and representatives of the Flag state and/or the Sponsoring state.</li> </ul> |
| Strategic environmental management plan (SEMP) | The requirement to conduct regional SEIAs and deliver regional SEMPs          | <ul style="list-style-type: none"> <li>• Strategic approval of exploitation is needed. Approvals should not be based on a first-come-first-served basis, rather they should be based on results of the regional SEA taking into account cumulative impacts.</li> <li>• PRZs and IRCs need to be sufficiently addressed to their permanence – will they remain as such after licence relinquishment?</li> <li>• SEAs are critically important first steps and as such should be given a priority rating of 'a'.</li> </ul>  |
| Rights of coastal States                       | The wording from the Exploration Regulations remains relevant                 | <ul style="list-style-type: none"> <li>• It is recommended that specific requirements be included to ensure that the assessment of commercial viability of proposed exploitation activities (by exploitation area) also takes into consideration the risk caused to the environment including fisheries. Pacific Island States are heavily reliant on the fishery industry as a major component of their GDP. It is therefore of critical importance to ensure that the opportunity cost of mining in the Area be calculated in light of the potential impacts caused to the marine environment and marine living resources.</li> </ul>  |
| Environmental bonds and performance guarantees | To provide for a bond or financial guarantee where requested by the Authority | <ul style="list-style-type: none"> <li>• A flat-rate environmental bond will likely be inappropriate among mineral types. Clear formulas for calculating the bond need to be determined.</li> <li>• The rating of 'a' might be too high, and 'b' may be more appropriate.</li> <li>• It is important to have a valuation system for Bonds where certain limits apply to</li> </ul>   |

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|  |  | <p>certain degree of damage to the environment or nearby communities livelihood for e.g. fishery communities whose fishing zones are affected by unnecessary waste from mining activities off-shore.</p> <ul style="list-style-type: none"> <li>• The quantum of a bond may vary according to the scale, and perceived risk, it should be calculated on a site specific basis, and take into consideration; location, size, duration, mineral type, potential risks of a particular mining operation and prior history of the contractor.</li> <li>• Such bond should be deposited before ISA is granting a contract. Rules that regulate such deposit should be developed and include specific provisions prescribing that the annual interests generated be allocated to the ISA for specific purposes such as nature conservation, marine scientific research, training and capacity building of developing countries.</li> </ul> |
| Restoration and rehabilitation of the marine environment | A general restoration obligation where restoration is feasible seems appropriate | <ul style="list-style-type: none"> <li>• While rehabilitation may not be initially possible, and hence not obligatory, mechanisms need to be in place to make adaptations should new information become available that indicates effective measures could be taken. Again suitability will be dependent on mineral type.</li> <li>• Any solid waste materials other than rock materials dumped intentionally or unintentionally by the mining company shall be removed from the mining site by the mining company.</li> </ul>  |
| Adaptive management approach                             | A regulation that better defines adaptive management                             | <ul style="list-style-type: none"> <li>• Adaptive management is critical for a new industry such as deep sea mining. To ensure appropriate change are made as mining progresses.</li> <li>• The EMP should not be a permanent document, and needs to be subject to periodic (2 years) review. Adaptions must be able to be made each way (more strict, or more lax) as learnings are found.</li> <li>• Adaptive management needs to be implemented and addressed from the beginning as it is pivotal for all aspects, as such the priority 'c' rating is to low and should be given a 'a'.</li> </ul>  |
| Seabed sustainability fund                               | To establish fund with targeted objectives                                       | <ul style="list-style-type: none"> <li>• It is recommended that a certain percentage calculated on the commercial value of the ore extracted for each mining site be allocated to this fund.</li> <li>• The establishment of the Sustainability fund is highly appropriate as long as the fund is used for its intended purposes. Alternatively, an independent committee is to be established to oversee the use of this fund.</li> </ul>   |
| Environmental liability trust fund                       | As recommend by the Seabed Disputes Chamber of the ITLOS                         | <ul style="list-style-type: none"> <li>• Such Fund should be established to address the gaps identified by the ITLOS in its Advisory Opinion (February 2011) such as when a contractor is insolvent or otherwise unable to meet its obligations.</li> <li>• Although a portion of production royalties received by the Authority could be allocated</li> </ul>   |

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|  |  | <p>to this fund, it is also recommended that a certain percentage calculated on the commercial value of the ore extracted for each mining site be allocated to this fund. This approach will ensure that the risk associated with the exploitation of the mining site be compensated, for the benefit of mankind’.</p> <ul style="list-style-type: none"> <li>• No exploitation should start without this Trust fund established.</li> </ul>  |
| <b>Part V Confidentiality</b>  |  |   |
| Confidentiality of data and information & Procedures to ensure confidentiality | The wording of the Exploration Regulations <i>may</i> be relevant    | <ul style="list-style-type: none"> <li>• Given the ‘Common Heritage of Mankind Principle’, it is recommended that the ISA publish ALL information it holds/receives (including copies of successful contract applications, and copies of the resulting contracts, including EIA, EIS and work programmes) except for information that is commercially sensitive, relates to personal private matters or proprietary such that the ISA may not lawfully publish it.</li> <li>• Technical and geological data that is commercially sensitive should be submitted to the ISA under confidentiality, however environmental data should be submitted to the ISA and made publically available. This data is necessary for independent assessment of impacts and suitability of EMPs as well as for the benefit of mankind and the development of science.</li> <li>• Sharing of research data and facilities and cooperative research efforts should be facilitated and encouraged by the Authority.</li> </ul>  |
| <b>Part VI General procedures</b>  |  |   |
| Duty to cooperate  | A general duty on all parties to cooperate and exchange is necessary | <ul style="list-style-type: none"> <li>• The role of regional organizations should be given more importance, in accordance with UNCLOS and particularly with regards to the duty to cooperate.</li> <li>• Strengthening relationship and strategic partnerships between the ISA and relevant regional organizations is of critical importance in ensuring implementation, enforcement and information sharing. This is particularly true for those regional organizations such as the SPC which aim at promoting ‘<i>special interests and needs of developing countries</i>’<sup>1</sup> as it is also referred to in UNCLOS (Preamble, Art.148, Art. 143, Section 1, para. 5 (h) of the 1994 Agreement, Art.169, etc.).</li> <li>• It is worth noting that as a development organization, the SPC provides technical assistance, advice and information to its Member States on a wide range of issues. With regards to DSM, the role of the SPC is exclusively to provide such assistance to enable Pacific States (more specifically P-ACP States) to make informed decisions. Although the assistance provided by the SPC in relation to this particular matter mainly focuses on</li> </ul> |

<sup>1</sup> See Para.2 of the Preamble of the Canberra Agreement which is the founding treaty establishing the Pacific Community (SPC).

|   |   |   |
|---|---|---|
|   |   | <p>DSM activities that may occur in areas within national jurisdiction, similar assistance, upon request from the participating States and with due regard for the role and competence of the ISA, is provided for activities that may occur beyond national jurisdictions (the Area).</p> <ul style="list-style-type: none"> <li>• Mine inspectors appointed by the Authority shall be making routine inspection an check both at the mining site and the port of discharge to cross-check the amount of ore materials extracted.</li> </ul>   |
| <b>Part VII Enforcement, offences &amp; penalties</b> |   |   |
| Inspection  | To include inspection regime in headline regulations rather than standard terms of contract | The costs associated with the inspection scheme should be easily identified, the inspection regime should be funded through annual fees collected from the contractors for the exploitation license. Inspection should enable additional interested parties to participate such the International Maritime Organization, the relevant regional organizations and representatives of the Flag state and/or the Sponsoring state.   |
| Offences & penalties                                  | Specific, measurable offences to be defined together with associated penalties              | <ul style="list-style-type: none"> <li>• With regards promoting best environmental operating practices, the success of a regulatory regime lies in its ability to induce compliance. An effective regulatory regime therefore should both incentivise compliance, and set sanctions against non-compliance.</li> <li>• In line with this, it is recommended that ISA to take any one or more of a range of administrative actions including: issue written warnings (including warnings in relation to possible action the ISA may take in the event of future breaches); enter into a written agreement providing for the contractor to undertake a programme of remedial action and to mitigate the risk of re-occurrence; issue an enforcement notice – having the force of a court order - for the contractor to prevent or correct a breach; impose an administrative penalty for each day during which the breach continues; impose temporary restrictions on the activities of the contractor until the ISA is satisfied that action has been taken to remedy the breach and to mitigate the risk of re-occurrence; and commence a process under the Exploitation Regulations to vary, suspend or revoke the contract.</li> <li>• Penalties should be triggered only by material breaches, of key provisions of the Mining Code or contract, and there should be flexibility to enable the penalty's severity to match the severity of the breach.</li> <li>• As a result of the above, the ISA should budget to cover the full cost of performing its functions, including its inspectorate, and should not rely on collecting penalty fines to make up its essential budget.</li> <li>•</li> </ul> |

| <b>Part VIII Disputes</b> |                                |  |
|---------------------------|--------------------------------|--|
| Settlement of disputes    | As per Exploration Regulations | <ul style="list-style-type: none"> <li>• If a working paper is to be prepared by the ISA on this specific matter, it is recommended to take into consideration the need of ensuring that Developing states when acting as a Sponsoring State, can access a trust fund that will enable them to cover the costs induced by the settlement of disputes. In line with this, it is recommended to involve the ITLOS and the ICJ to investigate the different options to be taken into consideration to ensure that the existing trust funds will be able to provide the assistance required when Developing States are parties to a dispute.</li> <li>• Settlement of disputes before the ICJ and the ITLOS should prevail in case of disputes arising from activities undertaken in the Area as it would be of critical importance to ensure that the 'Common Heritage of Mankind' be taken into consideration and not only the interests and damages caused/suffered by Governments or private companies.</li> </ul> |

## **II. Additional Comments:**

### **(i) Protection of other sea users' competing interests.**

Although specific provisions have been identified for being incorporated to ensure 'protection of submarine cables and pipelines', it is also recommended that dedicated provisions ensuring protection of other fundamental rights be given due consideration and more particularly, fisheries and shipping. Regional and local consultations in the Pacific region have revealed a primary concern amongst those consulted to be the potential for seabed mineral activities to affect adversely fish populations. Indeed most Pacific Island States' border the Area, and rely for their livelihoods upon sustainable use of the sea and its living resources. Pacific Island States will be keen to ensure that activities in the Area do not unduly interfere with the various existing uses of their ocean space (e.g. trade and commercial/artisanal fishery, aquaculture, shipping, traditional sea users, research, military endeavours, petroleum, transport and communication, marine scientific research, bioprospecting, energy facilities (e.g. solar, wave, nuclear), waste disposal plants, recreation and tourism, cultural activities, conservation measures). Therefore, reassurance in this regard could be provided by the ISA: (a) requiring contractors to take into account potential impact on fish populations, and other existing or planned marine use in their EIAs, and in monitoring of activities; (b) as a matter of policy itself taking any adverse effect on fisheries and other marine uses into account in decision-making about seabed mineral contracts, and monitoring of activities; and (c) collaborating with relevant agencies, and more specifically regional organizations, with responsibility and expertise with regards other marine uses.

### **(ii) Preferential rights of Developing States and importance of acknowledging the specific circumstances of Small Island States (Large Ocean States)**

The UNCLOS sought to recognise the particular 'interests and needs' of Developing Island States in its provisions relating to DSM activities in the Area. UNCLOS uses the term 'developing State', but does not define the term. Therefore, discussion and clarification of this point should be prioritised by the ISA as Small Island Developing States, such as the Pacific Islands, face multiple challenges, including competing demands on very limited State human, technical and financial resources. It is difficult for such Governments to prioritise engagement with the ISA – for example to expend time and funding in training relevant staff about ISA-related issues, and sending a delegation to Jamaica for the Annual

Session. It is therefore recommended that dedicated mechanisms by which the ISA itself can assist developing countries and the most exposed to developing challenges, to engage with the ISA on a level playing field with better-resourced countries, be established.

(iii) **The role of regional organizations should be strengthened through the development of the regulations of exploitation of activities in the Area.**

The Pacific Islands Region has an agreed Regional Ocean Policy, which promotes regional co-operation as one of its key principles, complemented by a multi-national ocean governance framework adopted by Pacific Island Countries and Territories (*the Pacific Oceanscape*), which emphasises the importance of a regional approach to the sustainable development, management and conservation of the ocean. This regional policy is guided by international law, which requires States to endeavour to harmonise policies relating to seabed activities at the appropriate regional level. In line with this, as a development organization, the SPC provides technical assistance, advice and information to its Member States on a wide range of issues. With regards to DSM, the role of the SPC is exclusively to provide such assistance to enable Pacific States (more specifically P-ACP States) to make informed decisions. The SPC, through the SPC-EU DSM Project, supplied initial information, advice and assistance to governments to develop national dialogue and support policy decisions about whether or not a participating State is interested in mining its deep sea minerals. In line with the general assistance provided by the SPC, the SPC-EU DSM Project has provided on-going support and assistance to several P-ACP States in the development of their national DSM Policy and DSM legislation that cover activities that may be conducted within national jurisdiction and beyond, in the Area. Such assistance is not provided by the ISA and therefore justifies the complimentary role played by the SPC. It is also worth noting that assistance for implementation is provided by the SPC (SPC-EU DSM Project) through the 'National Offshore Minerals Committees' that have been established and funded to conduct specific activities in relation with the development and implementation of national regulatory frameworks that support sustainable management of DSM activities. Although the assistance provided by the SPC in relation to this particular matter mainly focuses on DSM activities that may occur in areas within national jurisdiction, similar assistance, upon request from the participating States and with due regard for the role and competence of the ISA, is provided for activities that may occur beyond national jurisdictions (the Area).

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Suva, Fiji, 7<sup>th</sup> June 2015