An Assessment of the Secretariat of the Pacific Community Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation

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in collaboration with PACIFIC NETWORK ON GLOBALIZATION
Introduction

The development of the Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation (“RLRF”) was initiated by the Secretariat of the Pacific Community (“SPC”), through a regional project, launched in 2011. Published in July 2012, the RLRF was prepared through a consultative process and purports to establish a comprehensive regulatory framework for deep sea mining (“DSM”) which governments can consider and adopt through corresponding implementing legislation.

Although we applaud the attempt to establish a regional regulatory mechanism, it is important to note that the RLRF, both in consultations and in the final framework, excludes key voices from civil society, particularly those representing indigenous communities, who are likely to be greatly—perhaps most—impacted by DSM. This oversight is not minimal, and risks substantial, irreversible harm to the interests and survival of indigenous groups in the region. Such exclusion is no longer passable under international law and existing frameworks devoted to the protection of the human rights of indigenous groups.

Furthermore, gaps and/or oversights in the RLRF could expose individual countries to liability—including compensation claims—under established international law for harms resulting from DSM that occur from activities under their control, both within and beyond domestic waters. In order to avoid complicity for transboundary pollution or damage to the marine environment affecting the rights of others, States would be well-advised to incorporate more expansive precautionary and rights-protective elements into any DSM regulatory framework.

In this context, we have undertaken a detailed analysis of the RLRF from an international law perspective, focused on omissions related to indigenous rights, specifically the right to free, prior, and informed consent (“FPIC”). We discuss the need to bolster and supplement the RLRF with discrete, comprehensive provisions incorporating FPIC and operationalizing the precautionary principle with the aim of safeguarding the human rights of local, indigenous populations. Only upon inclusion of such tenets will the RLRF be in full compliance with international environmental and indigenous safeguards.

Summary of Findings

The RLRF is a lengthy document with numerous provisions designed to establish an oversight regime for DSM in the Pacific region. Various areas of the RLRF fail to address States’ responsibilities to indigenous peoples under international law regarding their right to FPIC for development activities that impact their traditional lands, territories, and resources.
Overall, the RLRF paints a positive picture of DSM—one that arguably prioritizes creating a climate favorable to industry and DSM operators over the economic and cultural rights of indigenous peoples. It advises States to incentivize investors by providing an environment that fosters investment, recommending that States provide predictable and stable governance, reasonable taxation, and legislation that takes into account corporate risks and investments. It similarly emphasizes the purported benefits of DSM while downplaying the range of adverse impacts (actual and potential) associated with DSM. By stating that any impacts are “extremely minimal” or, alternatively, that DSM-related activities have “almost no impact,” the Framework minimizes the importance of State adherence to the precautionary principle, a binding international legal norm.

Along a similar vein, the RLRF relegates the concerns and interests of indigenous peoples to the sidelines, largely ignoring their rights to land, culture, and resources. Specifically, there is no mention of indigenous peoples’ right to FPIC in development activities which may potentially affect them. FPIC and other indigenous rights are fundamental protections, codified at the international level, arising from the recognition that indigenous peoples have been particularly vulnerable to activities like mining and other extractive and large-scale industries in the past. Historically, indigenous peoples worldwide have experienced displacement, loss of land, depletion of means of subsistence, negative health impacts, and other cultural and social deprivations as a consequence of these activities. Such harms are likely to be replicated in the case of DSM, particularly if regulatory frameworks lacking comprehensive protections, such as formal recognition and operationalization of FPIC, are adopted.

By giving short shrift to any potential negative impacts of DSM, the RLRF creates an assumption of prosperity stemming from DSM exploration, with little to no adverse environmental, health, or cultural effects, including on indigenous and other vulnerable groups. In a process that is already being fast-tracked and dictated from above by multinational corporations ("MNCs") and foreign governments, this assumption poses great risk to Pacific Island States, citizens, and indigenous peoples. Regardless of whether DSM is carried out in these countries’ Exclusive Economic Zones ("EEZs"), in the Area, or on the high seas, any activities that have the potential to impact local indigenous populations trigger protections under not only the aforementioned body of indigenous and human rights law, but under environmental law tenets such as the precautionary approach and the principle of avoidance of transboundary harm (for more, see below discussion).

We recommend that the existing RLRF be significantly revised to include: substantive provisions incorporating the norm of FPIC as it relates to indigenous islanders and other vulnerable communities; greater recognition of existing and future negative impacts of DSM; more comprehensive provisions on the precautionary principle and transboundary harm; and other
Applying an Indigenous Rights Law Framework to the RLRF

As designated vulnerable members of society, indigenous peoples are afforded a special relationship with the State and are thereby provided with certain rights to ensure the protection of their distinctive cultures and their traditional lands, territories, and resources. These rights are established norms under international mechanisms such as the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), the International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (“ILO Convention No. 169”), and various treaty bodies and case law from institutions such as the Inter-American Court of Human Rights (“IACHR”), the Human Rights Committee, the Committee on Economic, Social and Cultural Rights (“CESCR”), and the Committee on the Elimination of Racial Discrimination (“CERD”). The duty to obtain indigenous peoples’ free, prior and informed consent (“FPIC”) regarding development activities that impact their lands, communities, and culture is expressly recognized by these international instruments and bodies. This duty is premised on indigenous peoples’ right to self-determination, particularly their right to “freely determine their political status and freely pursue their economic, social and cultural development.”

Based on these international human rights norms and mechanisms, the RLRF is insufficient and fails to safeguard indigenous peoples’ rights. The Framework mentions indigenous peoples only once and instead uses terms such as “citizens,” “communities,” “stakeholders,” and “public.” This has the effect of conflating indigenous peoples—to whom, under international law, special duties are owed—with the general population of island nations, thereby obfuscating States’ specific obligations to indigenous peoples.

The RLRF also minimizes States’ responsibilities to obtain indigenous peoples’ FPIC as set out in various international mechanisms, including the UNDRIP. The necessity of obtaining the FPIC of indigenous peoples in regard to the development, occupation, and use of their property, and in any measures that may affect their community, is explicitly provided for in Articles 10, 11, 19, 28, and 29 of the UNDRIP. Other protected rights of indigenous peoples under the UNDRIP include the rights to life, religion and customs, tradition and history, health, traditional “lands, territories, waters and coastal seas and other resources,” and the duty to consult and include indigenous peoples in the decision-making process in any measures affecting them. However, the RLRF mentions the UNDRIP only once and describes it as an instrument that States may choose to implement. Because DSM has already impacted and has the potential to continue to affect indigenous land, subsistence, and culture, it considerably endangers relevant human rights law considerations. What follows is an in-depth critique and analysis of the RLRF based on relevant areas of indigenous and environmental law.
indigenous peoples’ protected rights and triggers protections under the UNDRIP as well as other international instruments—protections that are not “optional” under such circumstances.

The 1997 General Recommendation No. 23 on indigenous peoples issued by the Committee on the Elimination of Racial Discrimination (“CERD”) applies the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) to indigenous peoples, and calls on States to recognize and protect indigenous peoples’ culture, lands, and economic and social development. Recommendation No. 23 establishes that, regarding indigenous peoples, “no decisions directly relating to their rights and interests [be] taken without their informed consent.” The application of the ICERD to indigenous peoples represents a binding obligation on States that have signed and ratified the treaty, which includes many Pacific Island States.

General Comment No. 21, the right of everyone to take part in cultural life, issued by the CESCR in 2009, reaffirms these duties and the need to secure indigenous peoples’ rights, including the right to FPIC. The Comment establishes that “[i]ndigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and ultimately, their cultural identity.” It also urges States parties to “take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.”

In affirming the right to FPIC, both the CERD and the CESCR have recognized legal principles established by the ILO Convention No. 169, which instructs governments to consult with indigenous peoples “before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.” Such consultation, which must be carried out in good faith through participation “at all levels of decision-making,” is arguably customary international law, and the failure of the RLRF to incorporate it contravenes the same.

Various international case law also provides support for the norm of FPIC for indigenous rights. The case of *Angela Poma Poma v. Peru*, a decision adopted by the UN Human Rights Committee in 2009, addresses impacts on water beneath indigenous peoples’ lands and upholds States’ duties to obtain indigenous peoples’ FPIC. The decision reiterates that indigenous peoples should be provided with “the opportunity to participate in the decision-making process,” and that participation must be “effective” and “requires not mere consultation but the free, prior and informed consent of the members of the community.”

The Inter-American Commission on Human Rights has developed considerable jurisprudence on
indigenous peoples’ right to FPIC, requiring “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent.” In 2004, the Commission stated that FPIC is generally applicable “to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.”

Similarly, the Inter-American Court of Human Rights (“IACHR”) has issued relevant decisions concerning indigenous peoples. In Case of the Saramaka People v. Suriname, the IACHR found that the “State had a duty to actively consult” with the indigenous Saramaka people in accordance with their customs and traditions. According to the Court, the duty of consultation with indigenous peoples requires “the State to both accept and disseminate information, and entails constant communication between the parties.” Additionally, consultations “must be in good faith, through culturally appropriate procedures, and with the objective of reaching an agreement” and “must be in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community.” Consultations need to consider “traditional methods of decision-making.” Furthermore, the State is required to ensure that indigenous peoples are “aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily.” The IACHR has recently affirmed a State’s duty to consult with indigenous peoples as “an obligation that has been clearly recognized” in the Case of the Kichwa Indigenous People of Sarayaku v. Ecuador decision. This case reinforces the Saramaka decision through its detailed confirmation of the requirement of prior good faith consultation with indigenous peoples through culturally appropriate procedures.

Additional influential support for indigenous rights can be found in the United Nations Development Group’s Guidelines on Indigenous Peoples’ Issues (“UNDG Guidelines”), which is said to represent the model approach to development sensitive to the rights of indigenous peoples. Based on the UNDRIP, the ILO Convention 169, the Convention on Biological Diversity and other relevant international instruments, the UNDG Guidelines affirm that indigenous peoples have the right to define and decide their own development priorities. Specifically, the UNDG Guidelines provide that even in the case of state-owned sub-surface resources, indigenous peoples still possess the right to FPIC for the exploration and exploitation of said resources, and have the right to any benefit-sharing arrangements concerning the same. Additionally, any government-issued permits for extraction or even prospecting of natural resources ought not be granted if the development activity hinders indigenous peoples’ ability to continue to use and/or benefit from these areas, or where the FPIC of indigenous peoples concerned has not been obtained. Other elaborations of FPIC-related requirements can be found in the regulatory regimes of international institutions such as the World Bank Group,
whose 2003 review on extractive industries includes recommendations to incorporate FPIC-related items in their performance standards. Such sources register the growing realization among non-state actors of the need to pay due regard to indigenous peoples’ right to FPIC.

In addition to international instruments, there are numerous domestic legal instruments and case law underlining the importance of, and demonstrating compliance with, FPIC. For example, in Australia, consent must be obtained in connection with mining through statutorily created indigenous-controlled Land Councils, while New Zealand law recognizes Maori landowners’ right to consent for activities that may affect their land. The influential Colombian Constitutional Court has held that “the information or notification that is given to the indigenous community in connection with a project of exploration or exploitation of natural resources does not have the same value as consultation.” Rather, “formulas for concerted action or agreement with the community” should be presented so that the indigenous community “declares, through their authorized representatives, either their consent or their dissatisfaction in relation with the project, and the way in which their ethnic, cultural, social, and economic identity is affected.” The Canadian Supreme Court has also upheld on a number of occasions the duty to consult with and obtain consent from indigenous peoples, even in the case of predicted minor impacts on traditional lands and resources. In 2003, the South African Constitutional Court recognized and confirmed indigenous peoples’ ownership of subsoil and other resources, obviating any right of the state to issue concessions on indigenous lands, and recognizing the need for indigenous peoples’ FPIC.

These decisions, combined with the aforementioned existing international mechanisms and jurisprudence, are evidence of a strong presumption against the legality of any proposed framework or regulation which purports to undertake development activities without any provisions for the protection and consultation of indigenous peoples. It is imperative that the RLRF be amended to include a comprehensive, discrete section that realistically and objectively (1) assesses potential impacts on indigenous peoples, (2) provides ways to prevent and minimize such impacts, and (3) enacts provisions requiring indigenous peoples’ FPIC in line with international law and existing best practices.

The RLRF is also largely devoid of any incorporation of basic international human rights law, an omission which risks framing DSM entirely as an industry and environmental proposition, when in fact it is likely to affect many foundational rights of local and indigenous island communities. This oversight should be remedied by the addition of a section recognizing States’ obligations under international human rights law, and discussing possible implications and violations of these rights as a result of DSM, including, but not limited to: effects on the right to a livelihood, the right to work, the right to family, the right to a clean environment, the right to health, and the right to housing. These rights are all contained and reiterated in established declarations and treaties, including the Universal Declaration of Human Rights, the International Covenant on
Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights (known collectively as the International Bill of Rights).

Applying the Precautionary and Transboundary Harm Principles to the RLRF

The precautionary principle is a foundational tenet of international environmental law, codified in binding international treaties such as the Kyoto Protocol, and reaffirmed in various subsequent instruments, including, for instance, the Rio Declaration on Environment and Development. It posits that in the absence of conclusive scientific evidence of consequent harm, states have a duty to err on the side of caution. This principle—widely recognized in national legal frameworks and considered a general principle of the law of nations—commands states to adopt a precautionary stance in the face of threats of harm to human health or the environment. Toward that end, the principle commands both states and non-state actors (such as MNCs) to examine, at all times, the full range of available alternatives to the contemplated project, including that of no action.

Under the precautionary approach, there is a social responsibility to protect people and the environment, which must be preemptively addressed. Given the unprecedented degree of scientific uncertainty surrounding the deep sea and the fact that little to nothing is known about the exigencies of seafloor mining technologies and the potential impacts on the natural and human environment, DSM activities require strict application of the precautionary principle. Moreover, it is in relation to the sea that the precautionary principle is singularly well established and thus arguably binding as a matter of customary international law.

However, despite numerous references to the precautionary principle, the RLRF fails to follow the letter of the principle itself, first, by stating that an Environmental Impact Assessment (“EIA”) may or may not be necessary depending on the project size and effect and that different levels of EIAs may be sought—and by further allowing activities that will have “a less than a minor or transitory impact” to proceed without any EIA. The RLRF also reframes potentially negative impacts as opportunities for research, science, and education, while insufficiently addressing any negative impacts of DSM in the initial, prospecting phase. Disregarding the potential risks of DSM contravenes the precautionary principle and the duty of due diligence.

Both the precautionary approach and the principle of avoidance of transboundary harm can be considered general international due diligence obligations not to cause harm to the environment within and beyond national jurisdiction—including outside of a country’s EEZ, in the Area, and on the high seas. The obligation not to cause transboundary harm has a long
history, from the Trail Smelter case, Principle 21 of the Stockholm Declaration, the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, and the decision of the International Court of Justice (“ICJ”) in the Pulp Mills case. In the influential advisory opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons, the ICJ—referring to the transboundary harm principles of the Rio and Stockholm declarations—recognized the following:

[... T]he environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

Under this reasoning, activities sanctioning DSM (providing permits, assistance, receiving revenue, etc.)—even if carried out beyond the EEZ—could be recognized as falling under a State’s “control”; thus a country could be held responsible for any harm that occurs against other nations or peoples in such situations. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has additionally found that States and other parties may be entitled to claim compensation for damage to the marine environment “in light of the erga omnes character of the obligations relating to preservation of the environment of the high seas and in the Area.”

Combined with specific regional protection instruments such as the Convention for the Protection of Natural Resources and the Environment of the South Pacific Region (the “Noumea Convention”), to which the RLRF makes reference, the precautionary principle and that of transboundary harm require a much more cautious approach to the prospect of DSM, whether it occurs in domestic waters or further offshore.

**Recommendations and Conclusion**

Given the importance of the aforementioned rights and the likelihood of their violation through the implementation of an insufficiently protective regulatory framework, it is advised that P-ACP States seek a separate evaluation of DSM activities from an indigenous and human rights-centered perspective in order to be fully compliant with their obligations to indigenous peoples and the environment under international law. This will address the RLRF’s lack of provisions incorporating established norms and emerging best practices. Ultimately, substantive sections that operationalize the norm of FPIC—particularly as it concerns indigenous communities predictably or potentially affected by DSM activities—are required to bring the RLRF into
conformity with international law. The RLRF could further benefit from the addition of separate and broader international human rights law sections to supplement the international environmental law norms presently accounted for in the framework. Finally, the existing provisions on the precautionary principle must be significantly revised to incorporate a true, precautionary approach that also addresses the issue of transboundary harm and responsibility for damage caused in domestic waters, the Area, and the high seas. Language over-estimating the potential benefits of DSM and minimizing potential harms should be amended to present a more balanced approach. Annex 1 contains a non-exhaustive, section-by-section critique of the RLRF, with some suggested language and areas for revision.
Section-by-Section Critique of the RLRF

1. **Why Have This Regional Legislative and Regulatory Framework (RLRF)?**

2. **Deep Sea Minerals**

   2.6. Different mining methods will be employed due to the different types of mineral deposits associated with the deep sea (e.g., seafloor massive sulfides, polymetallic (or manganese) nodules, and cobalt-rich crusts). The RLRF states, “Each DSM project will therefore need to be assessed by any State, on the basis of its individual workplan.” The different types of DSM activities are described in the following section 2.7, however, a process for this assessment is not provided, nor is there any built-in mechanism for consultation with DSM project-affected communities let alone indigenous communities. The lack of specification may create a trial-and-error situation for DSM work plan assessments.

   2.7. Footnote 6 describes this section as “[a] slightly-amended version of the International Seabed Authority’s defined terms in its Mining Code.” The most material difference is the expansion of the search for DSM deposits beyond the Area, to include areas “within national jurisdiction.”

3. **Legal Rights to Deep Sea Minerals**

4. **Balancing Competing Interests**

   Although this section is titled, “Balancing Competing Interests,” it focuses largely on the supposed benefits of DSM (e.g., using subheading language such as “Benefits to citizens” and “Attracting investment”). Possible concerns and adverse interests are swept under the subheadings of “Environmental protection,” “Responsible management of economic benefits,” “Responsible management of social impacts,” and “Striking a balance”—language that minimizes potential adverse interests and concerns associated with DSM.

   4.2. This section mentions only benefits and does not address actual or potential impacts to “citizens.” Discussion of benefits to citizens includes contributing to government revenues, and the possibility of “creating jobs and training opportunities,” “strengthening the domestic private sector,” “encouraging foreign investments,” “funding public service improvements,” “contributing to infrastructure,” and “supporting other economic sectors.” There is no mention of indigenous peoples, benefits to indigenous peoples, or any possible development opportunities for, or negative impacts on, indigenous peoples.

   4.3. The language in this section discourages States from “imposing regulatory obligations that carry a disproportionate burden or cost in relation to the risks and impacts envisaged, such that it would make DSM activities in that State’s jurisdiction or under its control unworkable.” Rather than emphasizing the regulatory responsibility of States, this section focuses on attracting and incentivizing DSM investment. No mention is made of the fact that States may freely elect to delay or even disallow DSM activities in line with the precautionary
Provisions such as this could have a “race to the bottom” effect, whereby P-ACP States continually lower important standards and protections in order to compete for DSM revenue.

4.5, 4.6, 4.7, 4.8. These sections allude to concerns registered by “[v]arious groups and commentators” about the impacts of DSM activities (§4.5). This language minimizes the growing civil society response, and in some cases outright opposition, to DSM. Additionally, while these sections state that there will be “potential risks to the ecosystems and biodiversity,” they do not mention current negative impacts already being felt by project-affected communities in this pre-mining, prospecting phase of DSM. These sections concede that some “destruction or modification of deep sea biota, their physical habitat and the deep seabed ecosystem will be unavoidable in DSM mining” (§4.7). However, section 4.6 reframes these impacts as an opportunity for education and scientific research. Section 4.7 further implies that the duty of obtaining informed consent may be satisfied merely by setting forth a “detailed consideration of individual projects.”

4.11. The section avoids mention of any established responsibilities of care to indigenous peoples under international law, and fails to include them as potential project-affected parties. Where this section does address the possible adverse effects of DSM upon communities, it does so casually, in a manner that belies the gravity of any such effects, e.g., “associated land-based activities will adversely affect local communities’ property food sources and lifestyle.”

5. DEEP SEA MINERALS ACTIVITIES AND POLICY AT NATIONAL LEVEL

5.3. This section mentions only the encouragement of “informed debate amongst relevant stakeholders and the public,” again failing to specifically identify indigenous peoples as being among those entitled to consultation.

5.4. This section refers to a “benefit cost analysis,” reframing the classic “cost benefit analysis” and placing any presumable benefits of DSM ahead of any potential costs. Further, no actual mechanism for computing costs and benefits is provided. The section mentions that a “complete understanding” of potential DSM costs and benefits is required, but does not make moving forward with DSM activities contingent on acquiring this understanding, despite admitting, in an earlier section (§4.7), how little is known about the costs of DSM, particularly those to the deep sea environment.

5.5. This section makes only passing mention of the fact that deep sea minerals are non-renewable resources. While it also references an assessment of “environmental, social and cultural impacts,” it makes no mention of (1) indigenous peoples as among those likely to be impacted by DSM activities, (2) any requirement for consultation with indigenous peoples, let alone the obligation
to seek out or obtain their FPIC. It also fails to mention current impacts indigenous peoples are already facing in the initial exploration or prospecting phase.

5.7 While proposing that certain principles—such as the “importance of the sea to the State’s citizens’ well-being and livelihoods” and the “importance of public participation in the planning, decision-making, and conduct of DSM activities”—be expressly recognized in national policy, the framework again fails to specifically reference FPIC or indigenous peoples as units in themselves (collectivities to which certain duties are owed).63

6. INTERNATIONAL AND REGIONAL LEGAL OBLIGATIONS

6.16. This is the only section in the RLRF that mentions indigenous peoples and their rights. UNDRIP is identified as an international instrument that States may elect to reaffirm in their national policies. This framing falls far short of established best practices concerning indigenous peoples and their rights in the realm of extractive industries, and further minimizes States’ obligations to indigenous peoples. It ignores the obligations contained in other relevant treaties that are binding on many Pacific Island States, such as ICERD, ICCPR, and ICESCR.

7. IMPLEMENTING INTERNATIONAL OBLIGATIONS IN NATIONAL LAW

7.1. This section recommends incorporating relevant international law as “high level statements” in the way of a preambular ‘purpose and principles’ component of future DSM legislation. Beyond the fact that this recommendation flies in the face of a separate recommendation contained in the very same section, i.e., that States “set clear parameters and avoid ambiguity,” a preambular incorporation of international law minimizes its import by removing it from the actual substantive provisions of the law. The pertinent rules and principles of international law should instead be incorporated concretely within the substantive provisions of any legislation, thereby providing a more meaningful deterrent.

8. MARITIME ZONE DELINEATION AND EXTENDED CONTINENTAL SHELF CLAIM

9. RELEVANT EXISTING DOMESTIC LAW

10. ESTABLISHMENT OF EQUITABLE FISCAL REGIME

10.2. This section proposes that each P-ACP State creates a welcoming fiscal framework “in order to attract and sustain foreign company interest in the State’s DSM resources.”

10.5 – 10.7. These sections encourage States to establish a “stable, predictable, equitable, and transparent” competitive fiscal regime, to create a simple tax regime, and to avoid tax disincentives that might discourage DSM exploration and industry.

10.9 This section states, “Some P-ACP States may have existing rules that place restrictions on foreign investment . . . Consideration may need to be given to amending such regimes where this may be necessary to provide an environment that is conducive to DSM activity funded by overseas companies and investors.”
This provision advises States to amend current restrictions on foreign investment to incentivize DSM activities and investment with insufficient regard for the reasons for the implementation of such rules.

11. **Revenue Management**

   11.2. This section envisions a protected savings account for DSM revenue: “Most States with such savings accounts place at least some of the funds in overseas investments that provide a steady, and—it is hoped—permanent, income for the nation.” No mention is made of how such revenue will be distributed among domestic populations, and what share, if any, indigenous peoples would have in a DSM revenue savings account scheme. Any such scheme must properly account for FPIC and the economic rights of indigenous peoples.64

12. **Institutional Implementation**

   12.4. This section mentions “public notification of, and participation in, decision-making” but again fails to include indigenous peoples as discrete entities to which special duties of consultation, including FPIC, is owed. Adequate indigenous representation in any governmental body tasked with oversight and decision-making relative to DSM should be assured.

13. **Allocation of Sites**

14. **Administrative Arrangements**

   14.2 Although this section states that, “DSM activity must not take place within a State’s national jurisdiction, nor in the Area under that State’s sponsorship, unless and until permission has been given,” “permission” is defined as “a licence and/or a sponsorship agreement” rather than also including permission from indigenous peoples using culturally appropriate methods and good faith consultations.65

   14.14. This section mentions the necessity of preserving “independence and impartiality” and “public confidence in the procedures” through an independent regulatory body or oversight by an Ombudsman or Attorney General. It also recommends public participation and procedures for appeals. However, it does not mention the duty of States to consult indigenous peoples if they seek to “strengthen the integrity of the system.”

   14.17 The “user pays” principle is proposed to help fund a regulatory body to oversee DSM operations in each State. This principle allows only for “actual and reasonable costs” with “transparent” calculations. However, this section advises against “[i]mposing upfront costs on DSM operators carrying out exploration work” in order not to discourage investment.

   14.22. The environmental impact assessment is an important tool to help States decide whether or not to grant licenses to a specific DSM project. This section states, “[t]he regulatory regime should specifically require the applicant to conduct an EIA as soon as the DSM is sufficiently defined to permit meaningful analysis, and before any mining activity takes place.” While DSM operators should be required
to submit comprehensive EIAs, there should also be a parallel requirement to obtain EIAs from independent experts or parties.

14.34. Although the license requires the DSM operator to have an “EIA, EMP, and a feasibility study,” these assessments ought also to include comprehensive analyses of potential social and cultural impacts associated with DSM. States should provide competing independent EIAs and studies on DSM impacts.

15. Decision-making

15.3. This section suggests that “it may be considered unnecessary to have a full public notification or hearing process for a ‘minor’ activity that has been assessed to have little negative social or environmental impact.” Given the largely unknown effects on DSM in general, as confirmed by sections 4.5, 4.6, 4.7, 4.8, it is untenable that any DSM activity be pre-emptively deemed “minor,” allowing for the possibility of bypassing public notice and hearing requirements—especially if this determination is made by DSM operators themselves. This section further states that “[i]f marine or coastal stakeholders are identified through the application and EIA processes, DSM operators should be encouraged to obtain free and prior informed consent from those persons as part of its application.” The use of the language “if” and “should be encouraged” understates States’ obligations under international instruments, such as those enshrined in Articles 25 and 26 of the UNDRIP, to obtain FPIC from indigenous peoples. It also again fails to specifically identify indigenous peoples as potential holders of rights in this regard, making instead only vague and elusive reference to “stakeholders.”

16. Public participation

16.1. This section mentions “citizens,” “communities,” and “interest groups,” but fails to specifically reference indigenous peoples. It recommends public participation to “enhance public knowledge” and to receive “public consent” for DSM projects. Again, international law instructs that it is indigenous peoples whose “free, prior, and informed consent” must be obtained separately from that of general communities, and prior to the commencement of development activities tending to adversely affect their rights in their traditional lands, territories, and resources.

16.2. This section cites Principle 10 of the Rio Declaration and the “participation of all concerned citizens, at the relevant level.” For indigenous peoples, the principle of FPIC necessitates that each prong (“free,” “prior,” “informed,” and “consent”) be satisfied “at the relevant level” respecting projects that could potentially harm their economic, environmental, social and cultural ways of life. The overall extent of public participation should be expanded to include more than information and judicial access at the national level.

16.4. This section suggests that in order to facilitate public participation, opportunity for public comment should be provided. It also suggests that the policy “may wish to include provision for early identification of, and consultation with, interested or
potentially effected persons and communities.” Indigenous peoples fall under “potentially affected persons and communities” so their specific identification should occur very early on in the process, and their FPIC sought in good faith and through culturally appropriate measures.

16.5 This section mentions an independent “Citizens’ Advisory Council” that will serve an “advisory function” relative to DSM operations in P-ACP States. However, under this section, this Council would not have any decision-making power, but merely the option to advise and make recommendations, with no assurances that indigenous peoples would even be included or participate in such a body. As expressed above respecting section 12.4, indigenous representation in any such body should be encouraged.

16.6. This section explains that “public participation in operational implementation and decision-making” can be achieved through notification and an opportunity to respond (i.e., to submit testimonies and appear at hearings). These responsive activities do not necessarily constitute meaningful engagement at any level of decision-making relative to DSM activities. This section further states that “[c]onsideration should also be given to mechanisms to avoid delays or obstructions caused by purely vexatious or frivolous interventions.” This language opens up avenues for DSM operators to portray legitimate attempts by civil society and indigenous actors to consult on or contest proposed DSM activities with potential harmful impacts as “vexatious,” “frivolous,” or causing undue delay.

17. JUDICIAL OVERSIGHT OF DECISION-MAKING

17.2. In this section, which proposes access to courts of law for certain aggrieved parties, the specter of “vexatious intervention” is again raised, as is the suggestion that states ought to pre-emptively shield themselves from such challenges. This belies the UNDRIP requirement that States provide “effective mechanisms” for “any action which has the aim or effect of dispossessing [indigenous peoples] of their lands, territories, or resources,” and falls short of actually guaranteeing the kind of redress envisaged by the UNDRIP for indigenous peoples whose rights have been violated.

18. ENVIRONMENTAL MANAGEMENT

18.1. One proposed method of completing the EIA is to have a “pre-selected pool of expert individuals and companies, from which the operator must choose, to prepare the EIA.” The selection process for this pool is not specified. This model provides the most choice and agency to the DSM operator as opposed to a group of independent experts over which the State and advisory bodies containing indigenous members have a say.

18.6, 18.11. This section contains contradictory language about the inevitability of damage in the early phases of DSM, as compared to section 4.7, which finds that
“[s]ome destruction or modification of deep sea biota, their physical habitat, and the deep seabed ecosystem will be unavoidable in DSM mining.” Conversely, section 18.6 states, “DSM exploration is a staged process, which may have almost no impact in early evaluation stages” (emphasis added). There is already evidence that early DSM exploration has had significant adverse impacts on indigenous peoples in at least one P-ACP State, and section 18.11 itself mentions the unknown risks and uncertainties of DSM. In contravention of the precautionary principle, section 18.6 fails to provide that proceeding with caution includes the options of delaying and/or staying DSM operations entirely.

18.19. This section states that “the precautionary approach requires an assessment of possible harm that is considered unacceptable.” Principle 15 of the Rio Declaration states that even without scientific consensus, preemptive measures must be put in place “where there are threats of serious or irreversible damage.” However, this section envisages “social debate” in deciding what level of harm, if any, is acceptable in regards to DSM operations. It is unclear which portions of the population will be afforded the opportunity to participate in any such debate, and there are no mechanisms for the results of these debates to be implemented in actual policy.

19. OCCUPATIONAL HEALTH AND SAFETY

20. DUE REGARD TO OTHER SEA USES/IMPACT ON FISHERIES

20.2. With regard to the introduction of DSM into waters with fishing operations, this section states that “due to the depth and pressure of their operating environment, the anticipated impact of DSM activities on fish (in the less deep water column) is extremely minimal.” This section admits that this judgment is made by DSM operators themselves, and no mention of State or third party fishing agencies’ findings are provided. Comprehensive studies have been conducted since as early as the 1970s, with the U.S. and Germany leading such studies of DSM’s environmental impacts. These studies have found that DSM “will seriously destroy the top few centimetres of the seabed, causing major disturbance and disruption to the flora and fauna in the mining tracks.” Moreover, a mortality rate of 95-100 per cent may be expected for organisms found there. Scientists also found that the “discharge of waste water from the mining ship” containing “particulate matter and trace metals” would end up in the water surface affecting photosynthesis. In addition, onshore processing for DSM is expected to bring waste and pollution similar to mining operations on land. Greenpeace International has asserted that DSM activities will kill organisms as a result of “disturbance and the discharge of waste,” and the “release of sediment plumes, clouds of potentially toxic particles that will smother species and habitats, and could expose seabed communities to heavy metals and acid,” and cause pollution and contamination of the food chain.
21. Marine scientific research
22. Due regard to other states
23. Capacity-building
24. Regional co-operation
25. Transitional provisions

25.3. This section suggests that regulating authorities “provide a temporary transitional license permitting activities to continue, while a new application for consent, under the new regime, is underway.” This fast-track process and transitional scheme would allow DSM operators who are already exploring the Area to continue their operations without a clear legal framework in place, thereby contravening the precautionary principle.

25.4, 25.6. Section 25.4 states that “transitional provisions should seek to give pre-existing DSM operators neither an advantage nor a disadvantage over new applications.” However, it is unlikely that DSM operators who have gained significant knowledge about the relevant portion of the deep sea at issue as well as hands-on experience within this new industry will not be advantaged compared to their new applicant counterparts, especially given the additional benefits granted to those exploring in the preliminary stages. This envisaged transitional scheme risks creating a deep sea minerals “rush” as DSM operators flock to the region and push to gain licenses in order to secure competitive advantages before any protective legal and regulatory frameworks have been implemented. Section 25.6 posits that establishing DSM government policy and regulatory frameworks could take many years, or at least “12 to 36 months,” a timeframe which would provide substantial time for transitional license holders to continue to exploit finite minerals while causing potentially inestimable damage to indigenous peoples and the environment.

26. Model template for a national DSM regulation bill

26.1 The model template does not provide for inaction, or the refusal to allow any DSM operations, as an option for States electing to follow the precautionary principle to a more cautious end. The template should be revised to include these options, as well as the proposed sections on indigenous rights and a comprehensive international human rights law framework.

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1 The SPC includes the following countries and territories: American Samoa, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Northern Mariana Islands, Palau, Papua New Guinea, Pitcairn Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, and Wallis and Futuna, plus Australia, France, New Zealand and the United States of America (four of the founding countries).

2 Referred to as the SPC-EU EDF10 Deep Sea Minerals Project (or “the DSM Project”), the initiative is funded by the European Union (“EU”) and implemented by the Applied Geoscience and Technology Division of the SPC. Pacific-ACP states regional legislative and regulatory framework for deep sea minerals exploration and exploitation/prepared under the SPC-EU EDF10 Deep Sea Minerals Project, §1.2 [hereinafter RLRF].
Civil and Political Rights.

must engage in good faith consultations with indigenous peoples prior to the exploration or exploitation of resources

55 (2011). ("[T]here is a clear consensus within international human rights jurisprudence that at a minimum States must engage in good faith consultations with indigenous peoples prior to the exploration or exploitation of resources within their lands or actions that would impact their traditionally used resources.").

The UN Human Rights Committee is tasked with oversight regarding compliance with the International Covenant on Civil and Political Rights.

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3 RLRF, supra note 2, at §4.3.
4 Id. at §§10.5 – 10.7.
5 Id. at §§4.2, 23.6 - 23.7.
6 Id. at §20.2.
7 Id. at §18.6.
10 RLRF, supra note 2, at §6.16.
11 Id. at §§4.2, 4.8, 4.11, 5.3, 5.7, 6.16, 10.5, 11.1, 12.4, 14.14, 15.3, 16.1, 16.3.
12 UNDRIP, supra note 9, at art. 7.
13 Id. at art. 12.
14 Id. at art. 13.
15 Id. at art. 24(2).
16 Id. at art. 25, 26.
17 Id. at art. 32.
18 RLRF, supra note 2, at §6.16.
20 Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997), at 4(d). In the post-2007 UNDRIP era, more than thirty percent (30%) of all cases addressed by the CERD, in the context of its Early Warning and Urgent Action procedure, have involved contests related to the failure of state parties to obtain indigenous peoples’ FPIC in relation to extractive industries.
21 Members of the SPC who have signed or ratified the ICERD include the following: Fiji (ratified), Nauru (signatory), Palau (signatory), Papua New Guinea (ratified), Solomon Islands (ratified), Australia (ratified), France and its territories (New Caledonia, French Polynesia, Wallis and Futuna) (ratified), New Zealand (ratified; administers Cook Islands), and the United States and its territories (Guam, Northern Marianas Islands, American Samoa). The United Kingdom, while not a member of the SPC, has ratified the ICERD, and extended its ratification to bind the Pitcairn Islands. See Status of Ratification, International Convention on the Elimination of All Forms of Racial Discrimination, Office of the High Commissioner for Human Rights, available at http://indicators.ohchr.org/ (last accessed Aug. 19, 2015).
22 The Committee on Economic, Social and Cultural Rights is the body tasked with oversight of the International Covenant on Economic, Social and Cultural Rights.
24 Id. at ¶36.
25 Id.
26 Id. at art. 15.2.
27 Id. at art. 6.1(b).
29 The UN Human Rights Committee is tasked with oversight regarding compliance with the International Covenant on Civil and Political Rights.

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31 Id.
32 IACHR, Report No. 75/02, Case No. 11.140, Mary and Carrie Dann (United States), Dec. 27, 2002, ¶131.
34 The Inter-American Court of Human Rights is the regional court system of the Organization of American States.
36 Id.
37 Id.
38 Id.
39 Id.
41 Id. at ¶¶ 166-67, 177.
44 Aboriginal Lands Rights (Northern Territory) Act 1976, Pt. IV; Aboriginal Lands Rights Act 1983 (NSW), §45(5); Aboriginal Land Act 1991 (Qld), §42; Torres Strait Islander Land Act 1991 (Qld), §80; Mineral Resources Act 1989 (Qld), §54; Mineral Resources Development Act 1995 (Tas), Pt. 7; and Aboriginal Land (Jervis Bay Territory) Act 1986 (Cth), §§43, 52A(1), (2).
46 Constitutional Court, Ruling SU-039/97, as translated in R. ROLDÁN, INDIGENOUS PEOPLES OF COLOMBIA AND THE LAW. A CRITICAL APPROACH TO THE STUDY OF PAST AND PRESENT SITUATIONS 104 (2000).
47 Id.

1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.
The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea considers the incorporation of the precautionary principle in many international treaties and instruments as evidence of making it “part of customary international law.” Responsibilities and Obligations of States Sponsoring Persons and Entities with Respects to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Case No. 17, Order of Feb. 1, 2011, ¶135 [hereinafter Seabed Disputes Chamber Advisory Opinion].

See id; See also Catherine J. Iorns Magallanes, The Precautionary Principle in the New Zealand Fisheries Act: Challenges in the New Zealand Court of Appeal (2005). Victoria University of Wellington Legal Research Paper No. 59/2014, available at SSRN: http://ssrn.com/abstract=2079837 (last accessed Feb. 27, 2016); See also id. at 6, n.8 (“[T]he precautionary principle’s explicit endorsement by a wide range of international and national bodies, by a large and growing number of international environmental and natural resource treaties, national constitutions, and legislation, as well as by courts and tribunals suggests a pattern of state practice and a breadth of application which must support a good argument that it has emerged as a principle of customary international law.”) (quoting David Freestone, “International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle” in ALAN BOYLE AND DAVID FREESTONE (E.Ds.), INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 137 (1999)) (internal quotation marks omitted).

RLRF, supra note 2, at ¶3.2.


Seabed Disputes Chamber Advisory Opinion, supra note 51, at ¶¶179-180.


Rio Declaration, supra note 50, at princ. 15.

This section considers public participation to be a fundamental principle of any DSM policy, but does not specify if the public includes indigenous peoples, and the processes to promote this participation.

UNDPR, supra note 9, arts. 3, 13, 23, 29.

Saramaka People v. Suriname, supra note 35, at ¶133.

UNDPR, supra note 9, art.10, 11, 19, 28, 29.

Id. at art. 8(2)(b).

Rio Declaration, supra note 50, at princ. 15.


Id. at 33.

Id.

Id.

Id.


Id. at 8.