

## Terms of Reference

for

### Development of a Regional Legislative and Regulatory Framework

#### 1. Purpose of TORs

1.1. The preparation of these TORs is a first-stage activity of the SPC-SOPAC project: 'Deep Sea Minerals in the Pacific Islands Region: A Legal and Fiscal Framework for Sustainable Resource Management' ('**the Project**'). Result Area 1 of the Project is the development of a Regional Legislative and Regulatory Framework for the sustainable development of deep sea minerals in the Pacific Islands region ('**the RLR**').

1.2. These Terms of Reference ('**TORs**'), prepared in consultation with countries and other partners participating in the Project, seek to follow-up from the Project's Inaugural Conference held in Nadi in June 2011, by setting out a terms of mutual agreement, to guide the development of the RLR<sup>1</sup>.

#### 2. Background to RFRL

2.1. In response to the growing interest in deep sea minerals exploration and mining in recent years within the Pacific Islands region, SPC-SOPAC with the support of member countries, and the EU has established the 4-year Project (2011-2014) to provide technical assistance to member countries, and to promote a regional approach. The objective of the Project is to expand the economic resource base of States in the region, by developing a viable marine minerals industry, and by strengthening governance and capacity in the sustainable management of deep sea mineral resources in the region. The Project aims to achieve sound and regionally-integrated legal, fiscal and environmental frameworks, improved human and technical capacity, and effective monitoring systems in the region. The development of the RLR is an initial step towards achieving these goals.

2.2. The Project's Inaugural Conference in June 2011 in Nadi was a key activity within Result Area 1, and provided participating Pacific Island countries ('**PICs**') and other interested parties with an introduction to the Project, and assisted the Project in its identification of the existing status of exploration, legislation and policy within the region, as well as constraints.

2.3. The Chair's Report of the Conference noted that its participants supported a regional approach to governance of deep sea mining issues; recognised it to be essential that legislative instruments are in place prior to mineral exploration; and confirmed the need for support in this area from the Project.

2.4. The PICs participating in the Project are: Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Tonga, Samoa, Solomon Islands, Timor Leste, Tuvalu, Vanuatu<sup>2</sup>. There are numerous other interested partners to the Project, from international organisations, private sector and civil society – see Appendix 1.

2.5. Each participating PIC is a signatory to the UN Convention on the Law of the Sea ('**UNCLOS**') and other relevant regional and international instruments, which directly or indirectly provide rights and duties that are relevant to deep seabed mining.

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<sup>1</sup> These TORs do not cover subsequent activities that the Project will deliver, which will include offering support for the development of national level policy and legislation in each participating State, and capacity-building in marine minerals, policy development, fiscal regimes, environmental monitoring etc.

<sup>2</sup> Pacific Overseas Countries and Territories can also join the Project if they wish to, provided additional funding is made available accordingly.

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2.6. In relation to the International Seabed Area, the International Seabed Authority and the Advisory Chamber of the International Tribunal on the Law of the Sea have emphasised that UNCLOS treaty obligations assumed by State parties require adoption *before commencement of work by contractors* of a comprehensive legal framework, no less effective than international rules, to regulate marine mining activities. This should include administrative measure such as monitoring, inspection, active supervision and enforcement necessary for securing compliance by persons within jurisdiction.

2.7. Comprehensive policy regimes, legislation and regulations necessary for the governance of deep seabed mineral resources are however lacking in the region.

### 3. Objective of RFRL

3.1. The Project seeks to ensure that legislation and regulations governing the management of deep sea minerals and associated fiscal regimes within the region are consistent and harmonised, and will:

- Promote fair distribution, and economically efficient revenue management, for wealth generated from deep seabed exploration and exploitation.
- Provide a solid foundation to support PICs and entities within their control and jurisdiction to meet their legal obligations to their citizens, to other States and to the international community.
- Incorporate good governance principles.
- Provide guidelines to assist participating PICs to protect and preserve marine resources and the marine environment and to take all appropriate measures necessary to ensure that activities under their control or jurisdiction are conducted with minimum risk of environmental harm.
- Provide guidance regarding appropriate measures to meet or mitigate legal liability.
- Assist PICs to create an 'enabling environment' to promote investment and private sector participation in developing national marine minerals industry.
- Take into account potential interference with other sea users and marine activities.

3.2. The Project is concerned to ensure that the RLRF should be balanced so as to afford appropriate protection to the marine environment and biodiversity, while not 'over-regulating' to the extent that well-managed investment is dis-incentivised.

### 4. Scope of RLRF and Strategy for Development

4.1. The Project funding agreement requires that the RLRF is formulated, and agreed by all participating PICs before the end of June 2012. This will be achieved through the following processes :

Task	Who?	By When?
First-draft RLRF prepared	Project Legal Advisor	31/12/11
First-draft RLRF reviewed on paper by relevant PIC contacts, other competent professionals, and interested stakeholders.	PICs and all partners	28/02/12
Second-draft RLRF, incorporating feedback received, prepared and disseminated to all interested parties.	Project Legal Advisor	31/03/11
Regional workshop to review the second-draft RLRF and produce a third-draft RLRF.	PICs and all partners	30/04/11
Finalisation and circulation of the RLRF to interested parties.	Project Legal Advisor	31/05/12
Signature of the RLRF.	PICs	30/06/12
Publication of the RLRF.	Project Team	30/06/12

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4.2. The RLRF will cover both exploration and exploitation activities, both within PIC-owned Exclusive Economic Zones, and PIC activities within the International Seabed Area.

4.3. The RLRF will be designed in consultation with Project partners to provide a user-friendly 'road map' for national level policy and legislation. It will cover: establishing operational parameters (e.g. size of mining area, duration of operation), licensing processes, due diligence measures, contractor prerequisites, performance standards, contract content, transfer of technical knowledge and capacity-building of State nationals, mining standards and practices (including operational safety), conservation of resources and protection of the environment, and administrative procedures (including reporting, monitoring and enforcement). Where appropriate, template wording and model documents will be provided.

## 5. Resources Available

5.1. **Human Resources:** The Project is run by a team of 3 SOPAC staff members, based at the SOPAC Secretariat in Suva. The development of the RLRF is the responsibility of the Project's Legal Advisor (Hannah Lily), who will be in post from October 2011-October 2014. Hannah Lily reports to the Project's Team Leader (Akuila Tawake) and is supported by the Project Assistant (Vira Atalifo). This work will be steered and supplemented by input from the Project stakeholders (see below), and by expert advice obtained on a consultancy basis.

5.2. **Financial Resources:** The Project is funded under an EU Contribution Agreement with additional funding provided by SOPAC in-kind. This budget covers the salaries of the Project Team. In relation to the RLRF deliverable, funds are also budgeted as follows:

- EUR 60,000 for the regional workshop.
- EUR 35,000 for consultancies<sup>3</sup>.
- EUR 15,000 for printing, translation, and distribution.

5.3. **Information Resources:** The Project benefits from a wealth of pre-existing laws, policies, guidance, and precedent documents that will inform the RLRF, including (amongst others): UN Convention on the Law of the Sea (UNCLOS), Noumea Convention (SPREP), Madang Guidelines, Pacific Island Regional Ocean Policy (PIROP), Convention on Biodiversity (CBD), International Seabed Authority's Mining Code, February 2011 Advisory Opinion from the International Tribunal of the Law of the Sea, IMO Conventions (e.g. MARPOL), Extractive Industries Transparency Initiative (EITI), International Marine Minerals Society's Code for Environmental Management of Marine Mining; as well as work already undertaken in relation to national deep sea mining regimes in the region by individual states – including that supported by the World Bank and the Commonwealth Secretariat.

## 6. Governance and Stakeholders

6.1. The Project, via its Team Leader, reports to the Manager of SOPAC's Oceans and Islands Program (Arthur Webb), and is ultimately accountable to the Director of SOPAC (Russell Howorth). Synergy between the Project and other work of SOPAC (e.g. maritime boundaries) is recognised, and will be built upon where beneficial.

6.2. The Project also has a Steering Committee to validate the overall direction and policy of the Project within the confines of the funding agreement, and to keep track of the implementation of the Project activities. The Steering Committee comprises representatives

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<sup>3</sup> There is also additional funding in the budget for consultancy support for development of national level regulatory frameworks – which falls outside the scope of these TORs.

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from SPC, EU and the PICs participating in the Project. It meets at least annually<sup>4</sup>, and communicates as appropriate between meetings electronically.

- 6.3. The Steering Committee acts as focal point for their country for the Project. For the purposes of the RLRf each PIC Steering Committee member will either put the Project Legal Advisor directly in contact with an alternative legal focal point for their PIC, or will act as single point of contact: referring matters relating to the RLRf to colleagues (including those in other government departments, where relevant) for their view, collating the responses, and passing these back to the Project Legal Advisor.
- 6.4. The Steering Committee have agreed these TORs, and will agree the final RLRf. The involvement, commitment and agreement from all participating PICs on the purpose, methodology, and content of the RLRf is essential to enable subsequent phase of the Project (development of national level policy and legislation, based on the RLRf model).
- 6.5. The Project also relies on invaluable input from other expert stakeholders, who will be consulted and informed throughout the development of the RLRf, and who include representatives from: industry, academia, NGOs, supra-governmental organisations, civil society, and regional bodies; with expertise in: law, local communities, mining, environmental protection, marine biology, geology, governance, and fiscal matters – see Appendix 1.

## 7. Other

- 7.1. **Challenges:** The differences in each PIC may make agreement about the structure and content of the RLRf more difficult. This will be mitigated by making the RLRf both a high-level (rather than prescriptively detailed) product, and one with variable options, such that it can be tailored to suit different contexts. This will make it a more useful tool for the subsequent phase of the Project, which will support each participating PIC individually to develop its legislation and regulatory regime nationally.
- 7.2. The logistical aspects of the multi-country, multi-stakeholder nature of the Project; obtaining local community perspective to such a high-level and technical product; reaching agreement on the final text by the deadline of June 2012; and drafting a document that recognises competing interests, but is not unduly swayed by any one, may also be challenges the Project faces in developing the RLRf.
- 7.3. **Assumptions:** These TORs rely upon each participating PIC to support the aims of the Project, and to invest in the development of the RLRf by nominating a suitable focal point, actively engaging in communications, attending the conference, and providing the Project with perspectives from in-country stakeholders.

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<sup>4</sup> The next Project Steering Committee meeting will take place during the first SPC / SOPAC Division Heads of Geoscience meeting in Rarotonga on 15-21 October 2011.

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### APPENDIX 1: List of non-State Project Partners

International, regional and national agencies:

- Commonwealth Secretariat,
- Duke University,
- European Union,
- IFM-GEOMAR,
- International Seabed Authority,
- International Union for Conservation of Nature (IUCN),
- Korea Ocean Research and Development Institute (KORDI),
- National Institute of Water and Atmospheric Research (NIWA),
- Pacific Islands Forum Secretariat (PIFS),
- Pennsylvania State University,
- Secretariat of the Pacific Regional Environment Programme (SPREP),
- UNEP/GRID-Arendal,
- United States Geological Survey (USGS),
- World Bank.

Private sector and civil society entities:

- Anindilyakwa Land Council,
- BECA International Limited, Centre for Environmental Law and Community Rights Inc,
- Eco-Strategic Consultants,
- Envi-Green Pacific Consultancy Limited,
- Fiji Environmental Law Association,
- GeoPacific Limited,
- Greenpeace Australia Pacific,
- Kontiki Capital,
- Minerals Policy Institute,
- MUSKITS Law,
- Nauru Ocean Resources Inc (NORI),
- Nautilus Minerals Inc
- North-South Environmental Law,
- World Wildlife Fund (WWF).