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# The State as DSM Regulator

Offshore and Deep Sea Mining Conference, London  
28 November 2016

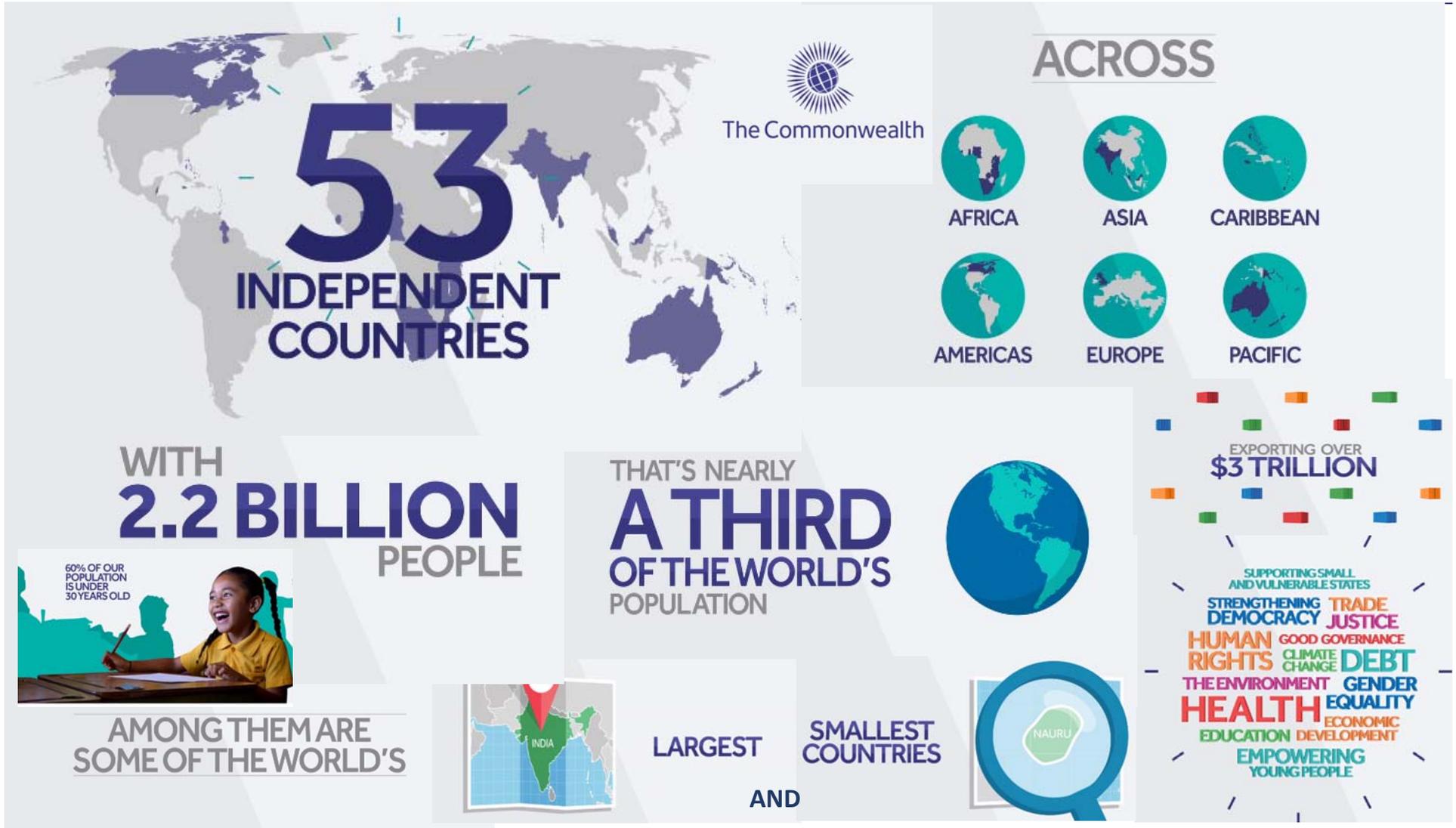


**Hannah Lily**

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Commonwealth Secretariat, London



**53**  
INDEPENDENT COUNTRIES

ACROSS

- AFRICA
- ASIA
- CARIBBEAN
- AMERICAS
- EUROPE
- PACIFIC

WITH **2.2 BILLION** PEOPLE

60% OF OUR POPULATION IS UNDER 30 YEARS OLD

THAT'S NEARLY **A THIRD** OF THE WORLD'S POPULATION

AMONG THEM ARE SOME OF THE WORLD'S **LARGEST** AND **SMALLEST** COUNTRIES

EXPORTING OVER **\$3 TRILLION**

SUPPORTING SMALL AND VULNERABLE STATES

- STRENGTHENING DEMOCRACY
- TRADE JUSTICE
- HUMAN RIGHTS
- GOOD GOVERNANCE
- CLIMATE CHANGE
- DEBT
- THE ENVIRONMENT
- GENDER EQUALITY
- HEALTH
- ECONOMIC DEVELOPMENT
- EMPOWERING YOUNG PEOPLE

INDIA

NAURU

# THE COMMONWEALTH OF NATIONS



# Key Policy Issues

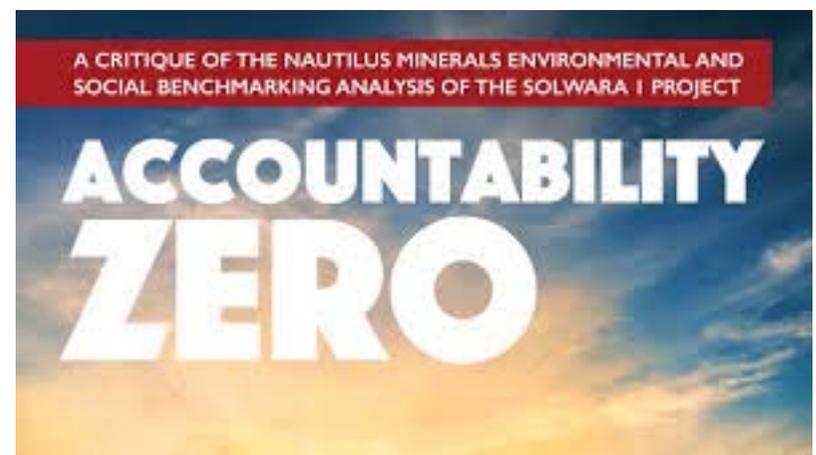
- 1) To mine or not to mine?
- 2) Who owns the minerals?
- 3) Which part of Government is in charge?
- 4) Do the public get a say?
- 5) Environmental permit
- 6) Security of tenure
- 7) Enforcement regime



*Pentecost Island, Vanuatu*

## (1) To mine or not to mine?

- Some civil society criticism:
  - that national policy discussions start with *'how we will engage with deep-sea mining'*, rather than *'should we engage...?'*
  - presumption that increased national revenue / GDP is a meaningful goal in the Pacific.
- Lack of public confidence that Government will convert minerals to long-term sustainable benefit for all citizens.
- Some Pacific Islands:
  - are better-off,
  - have more revenue-generating options,
  - have less capacity to manage an extractive industry.
- Need to balance competing interests and assess State capacity to:
  - attract investment,
  - maximise benefit to citizens,
  - implement environmental protection,
  - manage economic benefits sustainably,
  - minimise social impacts,
  - avoid adverse impact on other industries and sea uses.



## (2) Who owns the minerals?

- Would presume it's the State, but...
- ...check the Constitution: Pacific Islands may have unusual customary ownership, and strong indigenous rights
- Local perception may also differ from the letter of the law!
- Also local government issues (arising often in island states)
- Free, prior and informed consent?
  - *Are there communities who are likely to be directly adversely affected by DSM activities?*
    - Tonga example
- Community Development Agreements?
  - *Is there a 'local community' to DSM sites?*
    - Papua New Guinea example



### (3) Which part of Government is in charge?

- Various functions, and degree of separation, required:
  - cadastral (geological database, mapping the seabed, registering tenements),
  - regulatory (mining right issue, inspectorate, enforcement),
  - environmental (permitting, monitoring, enforcement),
  - financial (tax and royalty collection)
- New DSM agency, or existing agency?
- Supervisory or advisory body?
- What appellate authority?





## (4) Do the public get a say?

- Public participation in DSM decisions may help avoid opposition or conflict at a later stage, and indeed is arguably a legal requirement as a matter of international law.
- However the DSM licensing and regulatory process also needs to be reasonably streamlined, predictable and efficient to be manageable for Government, and attractive to investors.

*FSM*



*Solomon Islands*



*Fiji*

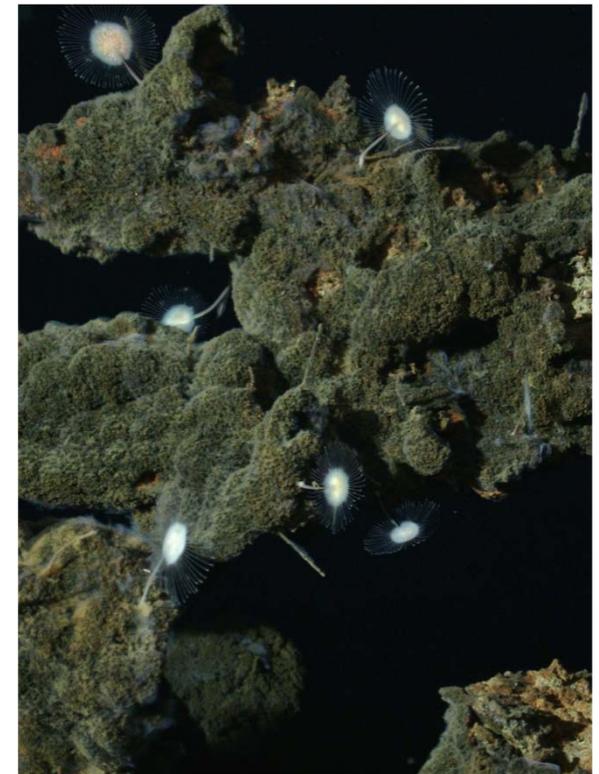


- One model is to consult with the public / interested stakeholders:
  - On the drafting / review of national policy and law;
  - During national strategic environmental assessment / marine spatial planning procedures; and
  - During any individual DSM project EIA.
- Citizens Advisory Council?

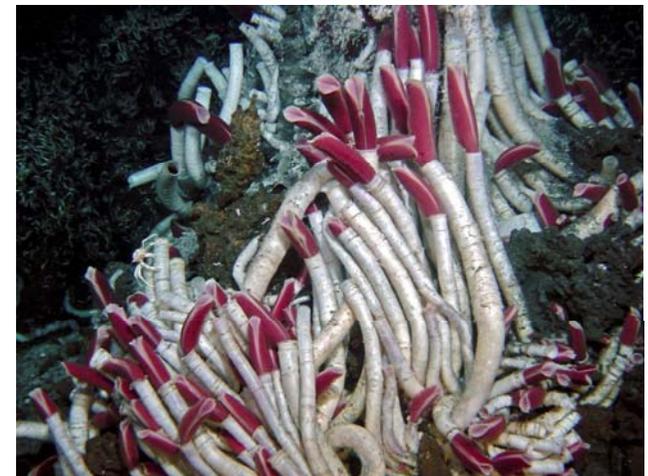


## (5) Environmental permit

*Photos: SPC / UNEP Grid Arendal*



- Inter-relation with mining right?
- Existing regime adequate?
- Monitoring and enforcement?



## (6) Security of tenure

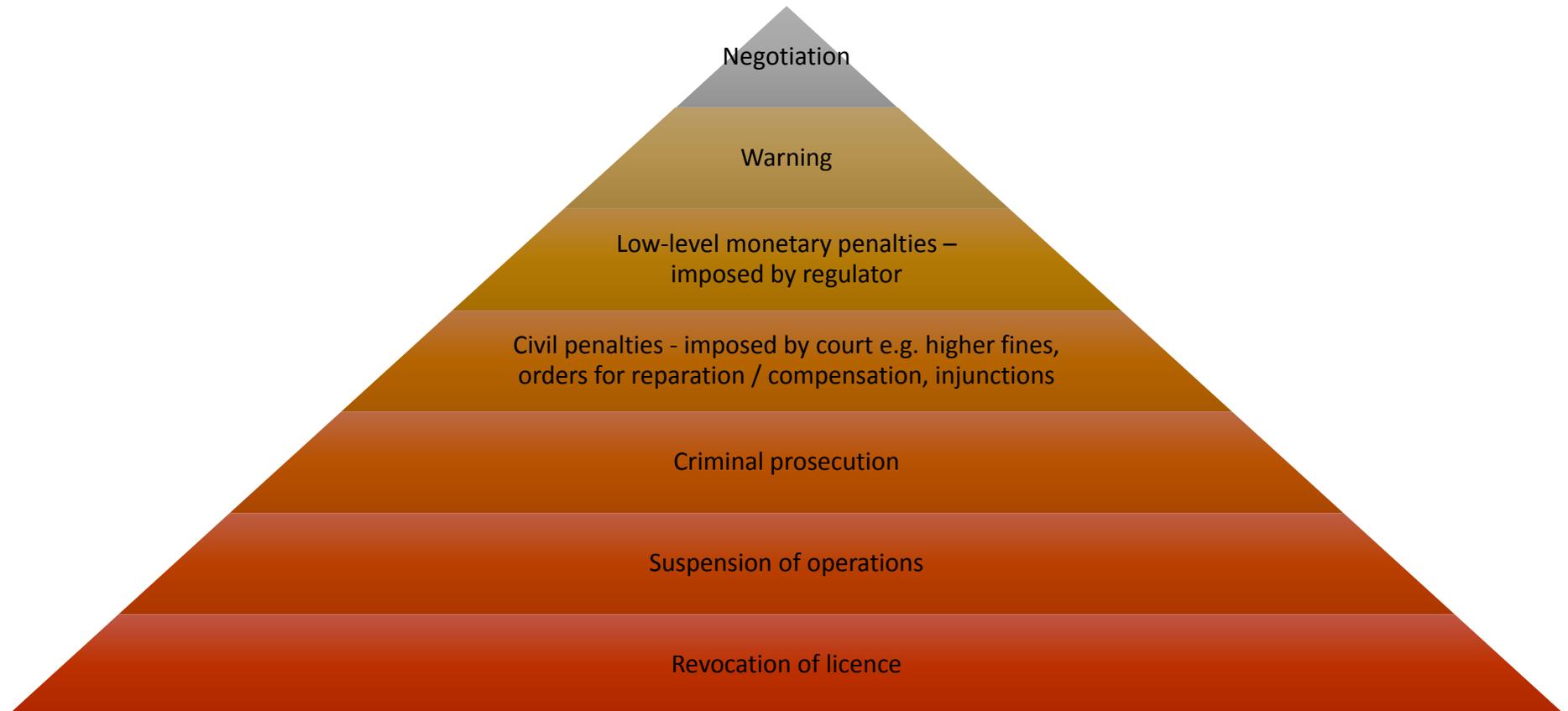
- Length of licence term, renewal, and termination
- Balance between:
  - providing a predictable and secure operating environment for the permit-holder that will incentivise DSM research; and



- not giving a third party too much freedom to operate within a national jurisdiction without regular checks and approvals, to maintain effective State control and regulation.

## (7) Enforcement regime

- To be effective, a regulatory regime must have ‘teeth’, to incentivise compliance, and penalise non-compliance.
- A range of enforcement options are available, and can be tailored to the nature of the infringement: ‘the enforcement pyramid’.



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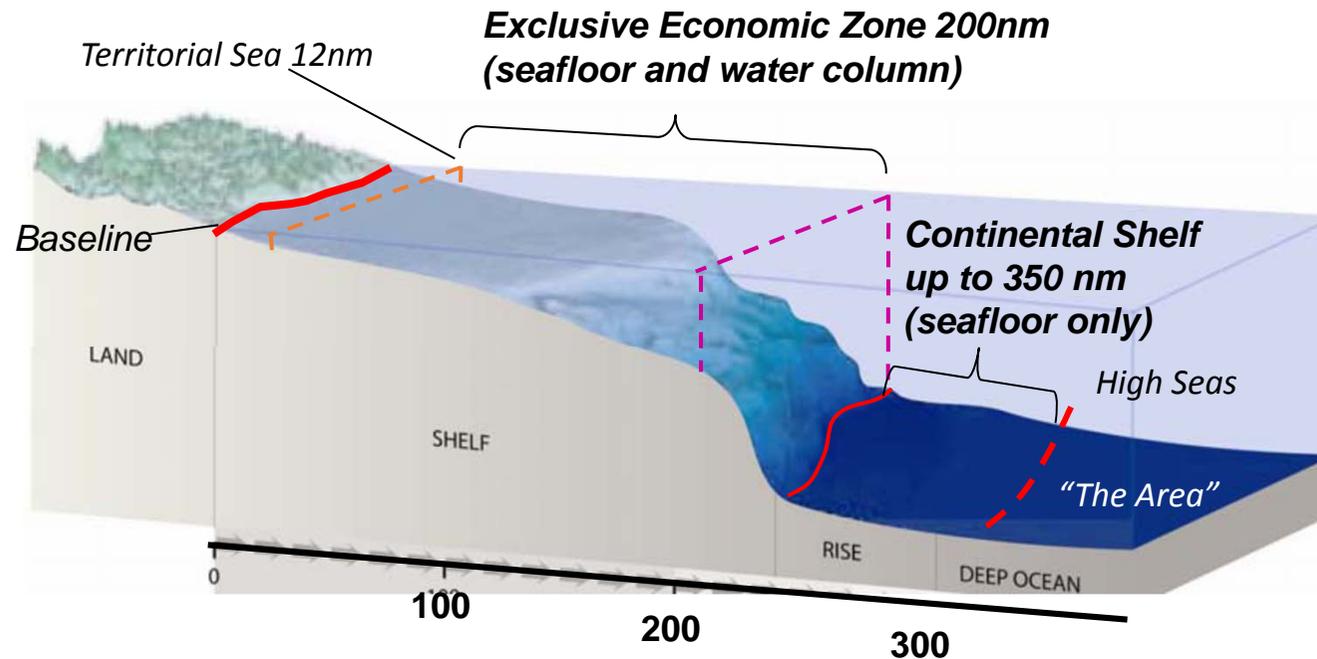
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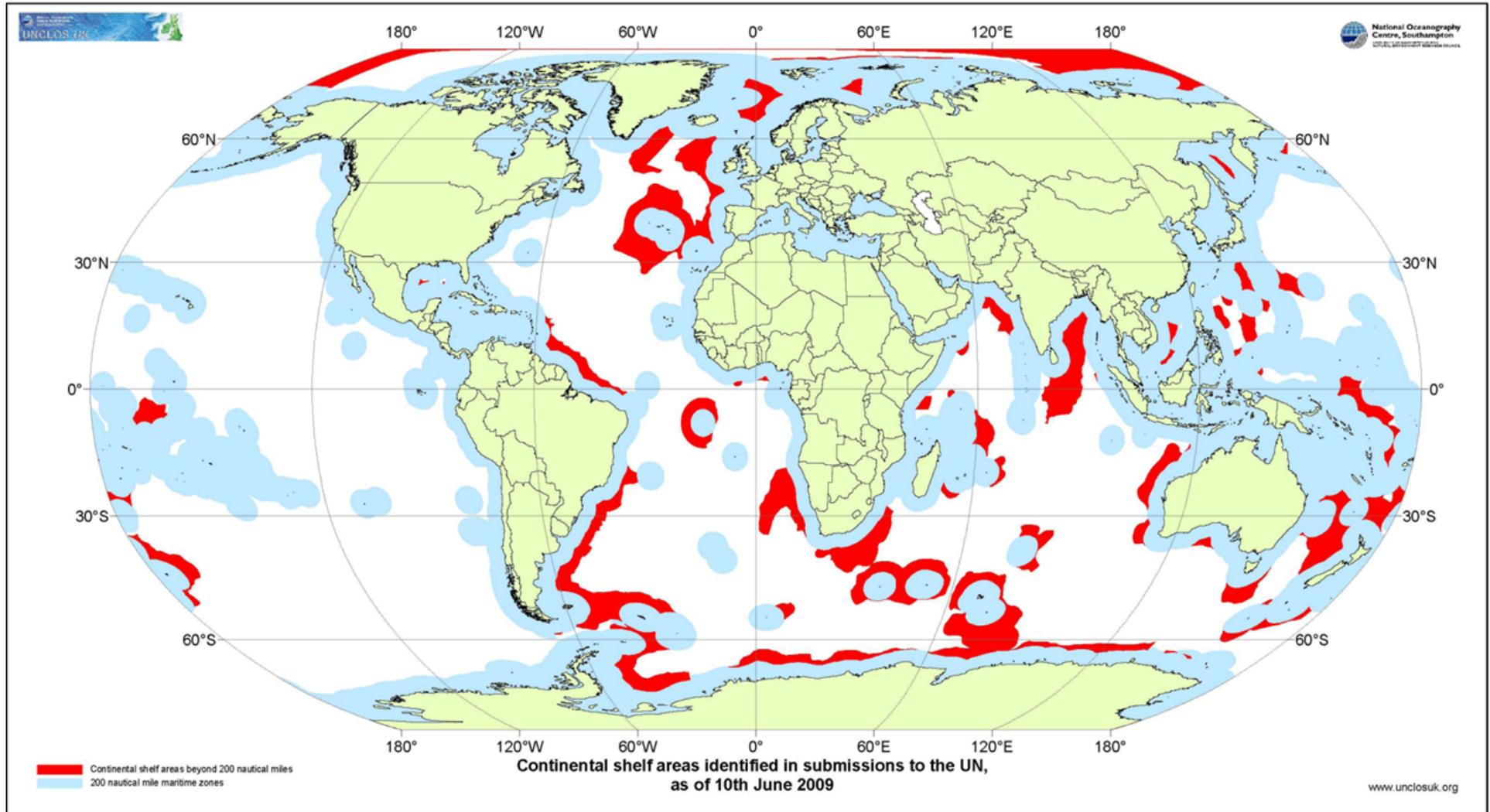
November 2016



## UN Convention on the Law of the Sea ('UNCLOS'): National and International Jurisdiction



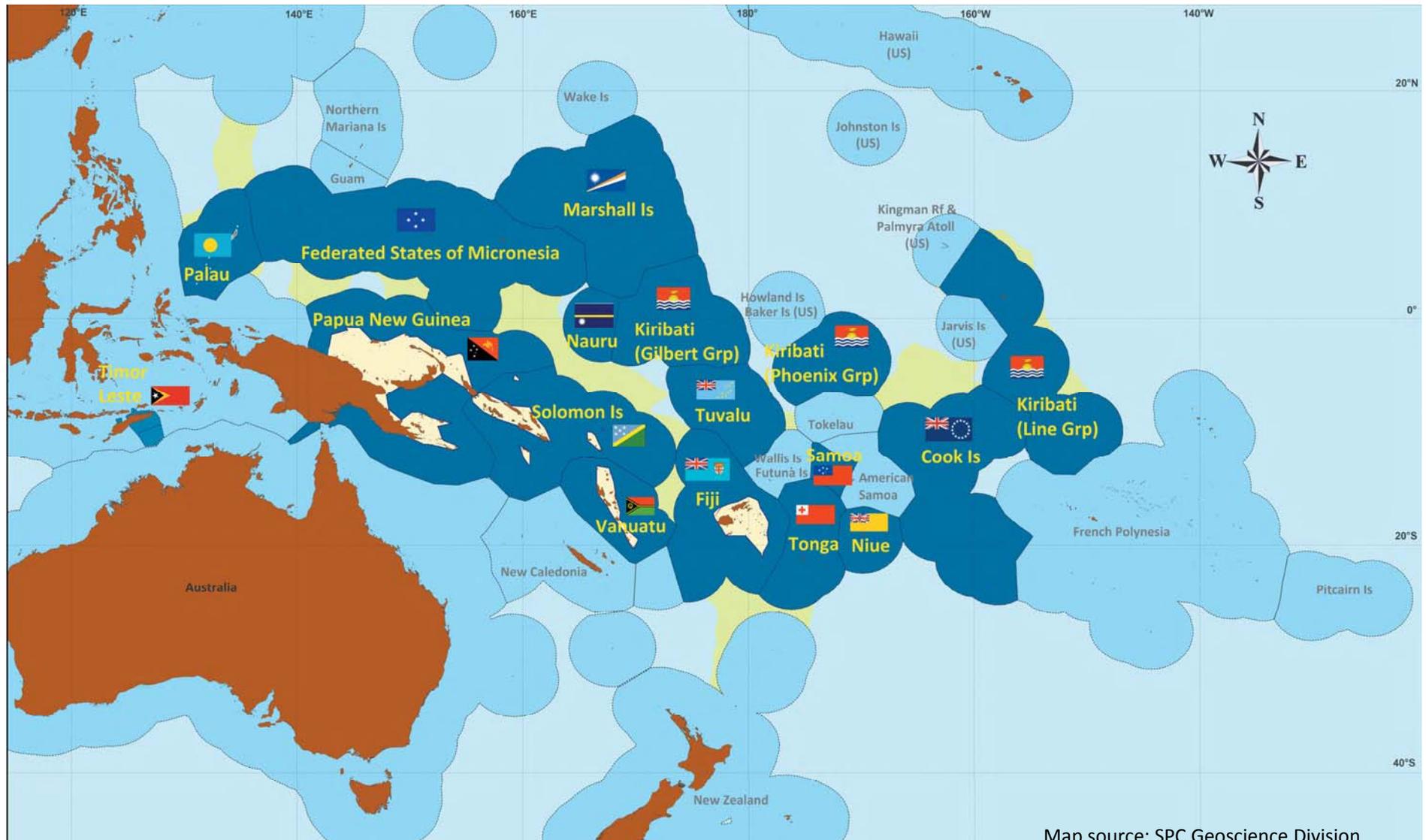
Coastal States have sovereign rights to explore and exploit the mineral resources within national jurisdiction (including EEZ and Continental Shelf)



Red = Extended Continental Shelf Claims  
Blue = Exclusive Economic Zones

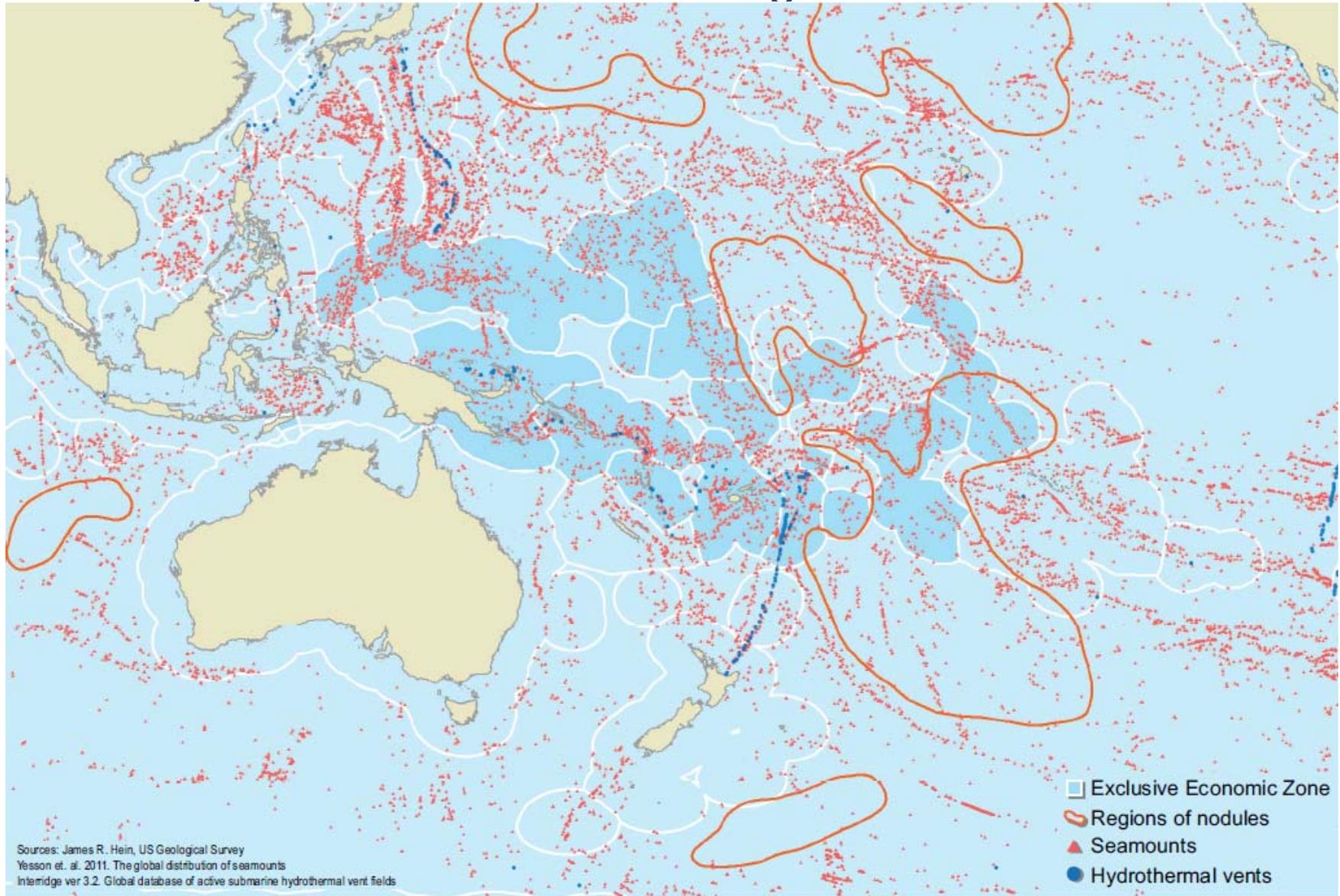
} National Jurisdiction

# Pacific Islands: Marine National Jurisdiction



Map source: SPC Geoscience Division

## DSM Deposits in the Pacific Region





The Commonwealth

# Pacific Small Island Developing States

- Small populations
- Many living in poverty
- Small land mass
- Huge ocean space
- Limited economic resources
- Limited human and technical capacity
- New to extractive industries
- Some unstable governments
- Strong indigenous rights...
- ... yet reluctance to challenge authority
- Transparency mechanisms relatively new



*Burebesaga  
Chiefs,  
Suva, Fiji*



*Funafuti,  
Tuvalu*



*Port Vila,  
Vanuatu*

Photo credit: Care International



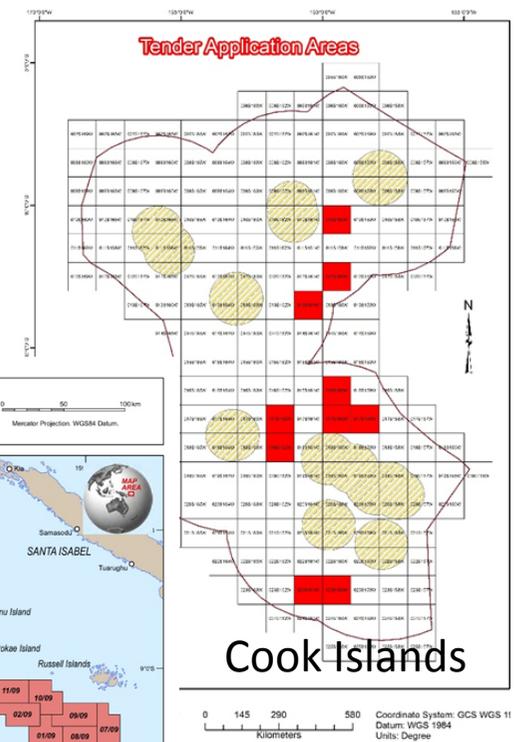
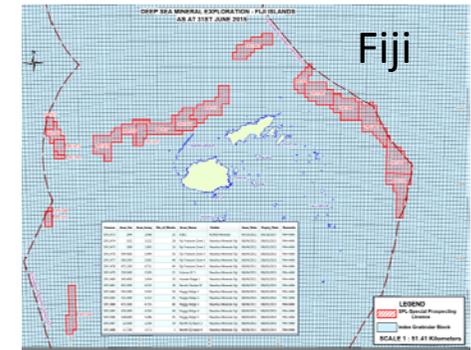
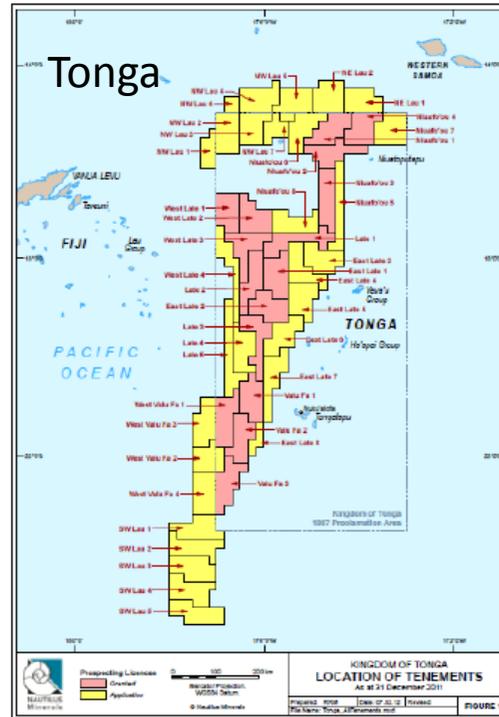
*Betio,  
Kiribati*

Photo credit: Radio NZ

# DSM Activity in Pacific Islands' National Jurisdiction

## A: Exploration

- (i) Papua New Guinea
  - (ii) Solomon Islands
  - (iii) Vanuatu
  - (iv) Fiji
  - (v) Tonga
- } SMS

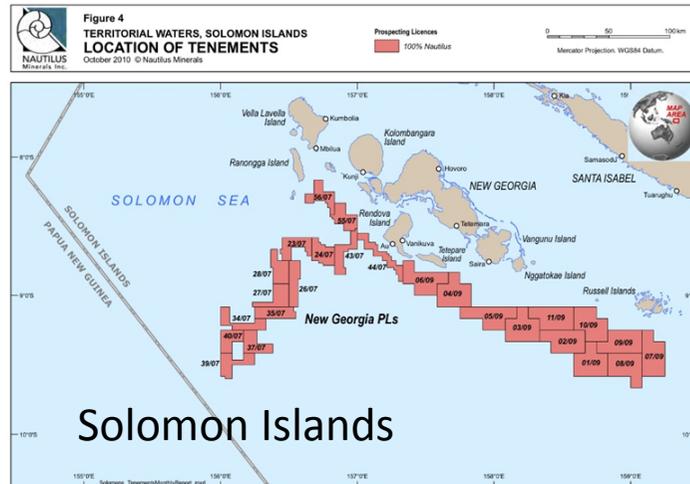


## Future Activity?

- (i) Cook Islands?
  - (ii) Kiribati?
  - (iii) Fed. States of Micronesia? - SMS
- } Nodules

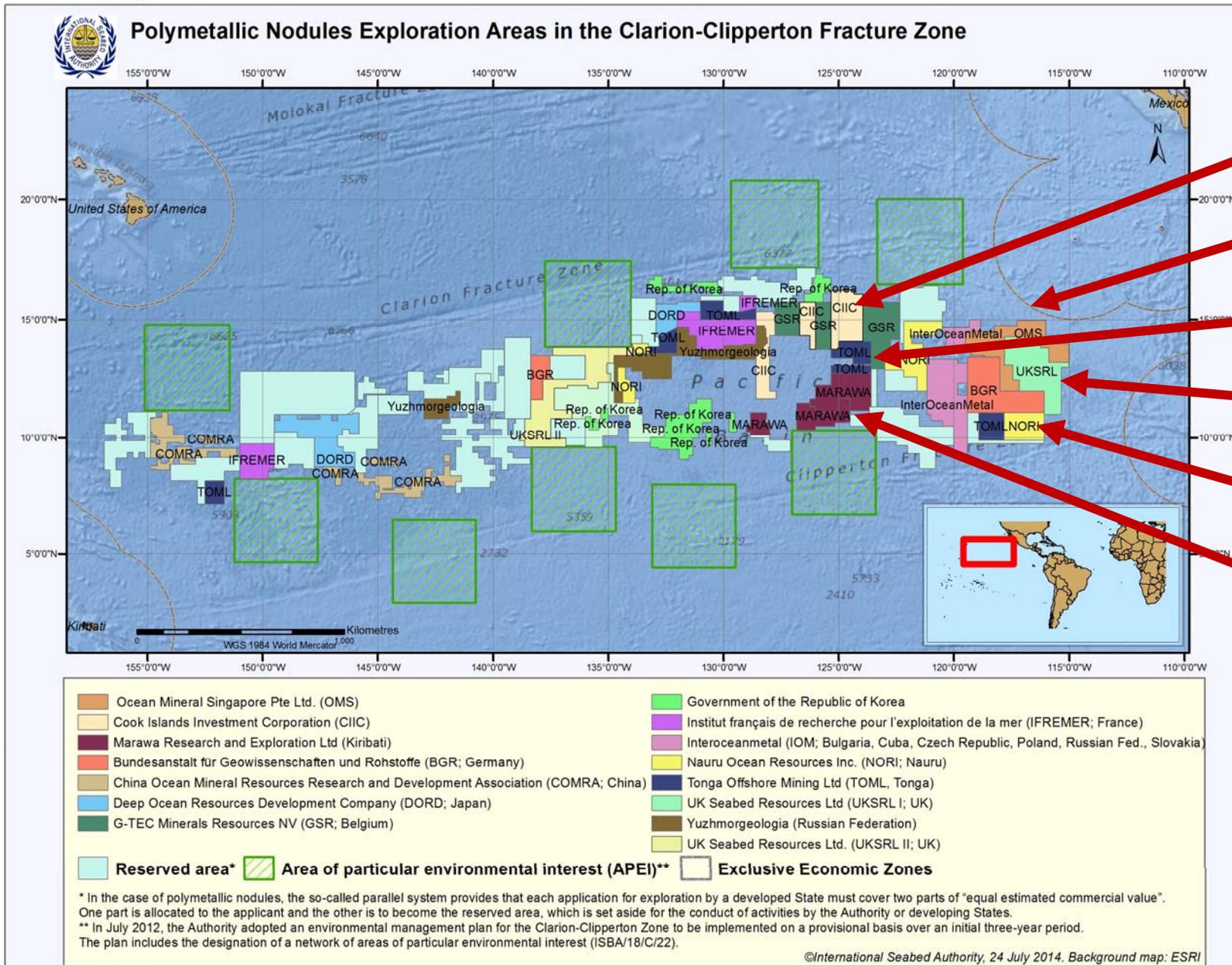
## B: Mining

- (i) Papua New Guinea - Solwara 1





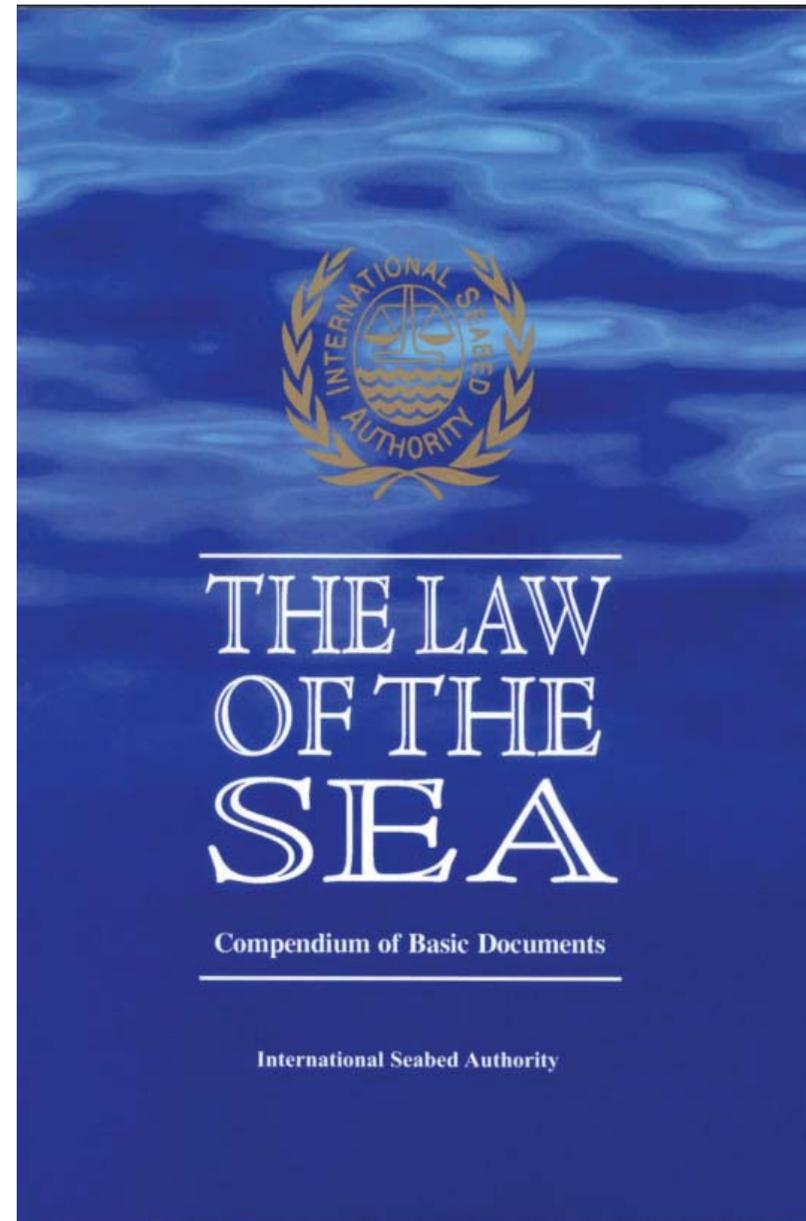
# Commonwealth ISA Sponsoring States



- Cook Islands
- Singapore
- Tonga
- UK
- Nauru
- Kiribati

# 1982 UN Convention on the Law of the Sea

- Coastal States have sovereign rights to explore and exploit marine mineral resources within national maritime jurisdiction.
- These rights are subject to: other international commitments, which include environmental obligations.
- The State will be held responsible for the management of seabed mineral activities within its national jurisdiction.
- State will want to complement existing ocean uses.
- National regulatory law is essential.
- Law should be preceded by written Government policy.



## UN Convention on the Law of the Sea - obligations as well as rights:

- Protect and preserve the marine environment and rare or fragile ecosystems,
- Prior Environmental Impact Assessment (EIA),
- Monitor risks/impact to the marine environment,
- Minimise the likelihood of pollution and accidents.

## Convention on Biological Diversity

- Conserve biodiversity
- Protect ecosystems *in situ* (e.g. marine protected areas)

## International Maritime Organisation Conventions - because DSM activities use ships:

- Prevent pollution/dumping,
- Control hazardous materials,
- Prevent collisions and accidents at-sea.

## Rio Declaration on the Environment and Development

- Precautionary approach,
- Participation of citizens in decision-making process



1. MARITIME ZONE DELINEATION

2. DECLARATION OF MINERAL RIGHTS

3. REGULATORY INSTITUTION(S)

4. POWERS AND PROCESSES FOR ISSUE OF MINERAL RIGHTS

5. POWERS AND PROCESSES FOR ISSUE OF ENVIRONMENTAL PERMIT

6. MONITORING AND ENFORCEMENT OF COMPLIANCE WITH (i) RIGHT AND (ii) PERMIT

7. OCCUPATIONAL HEALTH AND SAFETY

8. PROTECTING RIGHTS OF OTHER SEA USERS

9. FISCAL REGIME

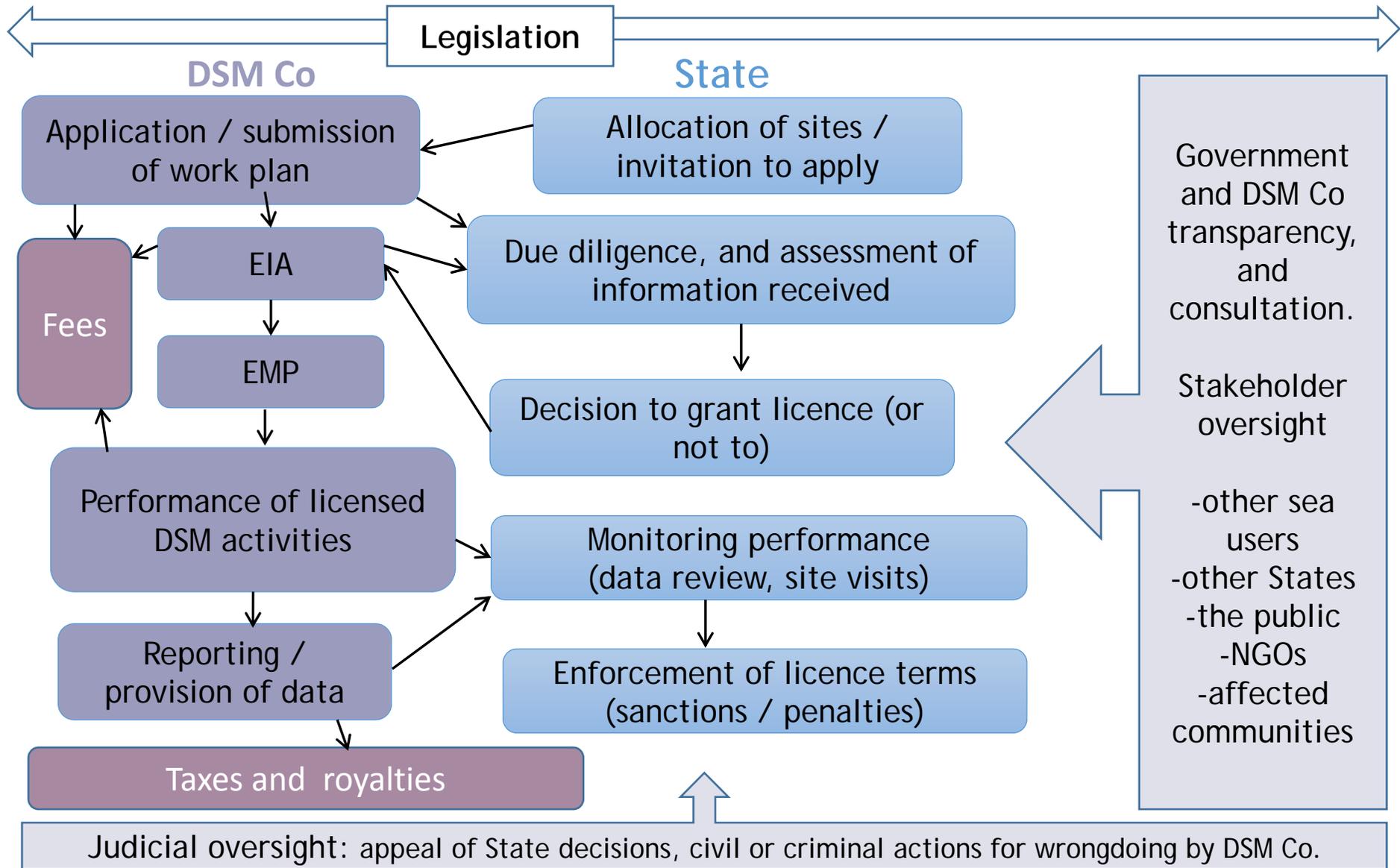
10. REVENUE MANAGEMENT

INCORPORATION OF INTERNATIONAL LEGAL OBLIGATIONS

(UN Convention on the Law of the Sea, Convention on Biological Diversity, Human Rights, Conventions administered by the International Maritime Organisation)

1. Objects of Act and Jurisdiction
  2. Establishment of Seabed Minerals Authority
    - Objectives, functions, duties, powers, information management
  3. Establishment of Advisory Council
    - Composition and role (varies from country to country), procedural rules
  4. Designation of Seabed 'Blocks'
    - Cadastre, register
  5. General Obligations on Title Holders
  6. Prospecting
  7. Exploration
  8. Mining
- Application, decision-making, consultation, Title issue
  - Specific Title terms
  - Review, renewal, termination, liability,
  - Inter-play with environment law, EIS template
9. Sponsorship of Activities in the Area
  10. Fiscal Arrangements
    - Fees, taxes, royalties
    - Security, sovereign wealth fund
  11. Other
    - Vessel standards, safety zones, other sea users
    - Conflict of interest
    - Regulations, consequential amendments, transitional provisions

# Regulatory Model



- **State duties:**
  - ✓ Precautionary approach
  - ✓ Establish national regulatory Authority with necessary powers and duties
  - ✓ Tender procedures for licensing
  - ✓ Participatory stakeholder consultation
  - ✓ Access relevant experts
  - ✓ Promote transparency (e.g. publish reports and decisions, public register of titles)
  - ✓ Monitoring and inspection
  - ✓ Enforcement action
  - ✓ Anti-corruption and conflict of interest measures
  - ✓ Sovereign wealth funds long-term management of revenue
- **DSM licensees' duties:**
  - ✓ Precautionary approach
  - ✓ Best environmental practice
  - ✓ Control sites, and buffer zones
  - ✓ Collection and sharing of comprehensive baseline environmental data
  - ✓ Monitoring against that data
  - ✓ Regular reporting
  - ✓ EIA before any activities that may cause significant harm
  - ✓ Environmental / performance bond
  - ✓ Incident management plan
  - ✓ Maintain insurance
  - ✓ Cooperate with State monitoring /inspections
  - ✓ Public engagement activities
  - ✓ Health and safety of workers
  - ✓ No interference with other marine users
  - ✓ Pay fees, taxes, royalties