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11 IN THE SUPREME COURT FOR THE
 12 FEDERATED STATES OF MICRONESIA
 13 TRIAL DIVISION - STATE OF POHNPEI

15	STATE OF CHUUK, et al.,)	CIVIL ACTION No. 1995-085
16)	
17	Plaintiffs,)	DEFENDANTS' NOTICE OF MOTION
18)	AND MOTION TO DISMISS
19	vs.)	AMENDED COMPLAINT
20)	
21	THE SECRETARY OF THE)	
22	DEPARTMENT OF FINANCE, et al.,)	
23)	
24	Defendants.)	

26
 27
 28 To: Plaintiffs, by and through their joint counsel of record, Andrea Hillyer

29
 30 Please take notice that at a date and time to be determined by the Court, a hearing
 31
 32 will be held before the FSM Supreme Court on the following motion. The Federated
 33
 34 States of Micronesia and the Secretary of the Department of Finance jointly move to
 35
 36 dismiss Plaintiffs' Amended Complaint. The grounds for this motion are (1) lack of
 37
 38 jurisdiction and (2) failure to state a justiciable claim. This motion is based upon FSM
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 40 Civil Rule 12(b), the accompanying memorandum of points and authorities and the
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 42 Amended Complaint on file with this Court.
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Dated this 19th day of September, 1995.

FEDERATED STATES OF MICRONESIA
CAMILLO NOKET, ATTORNEY GENERAL

By: Carole Rafferty
Carole Rafferty
Assistant Attorney General

Certificate of Service

Pursuant to agreement with counsel for plaintiffs, two copies of this notice of motion and motion and the accompanying memorandum of points and authorities were on will be served on September 19, 1995 by hand delivery to the office of counsel listed below.

Hand Delivery:

Andrea Hillyer
Office of the Attorney General
State of Pohnpei
Kolonia, Pohnpei 96941

Carole Rafferty

FILED

DATE 9/19/95

BY [Signature]

CLERK, FSM SUPREME COURT

POHNPEI

TRIAL DIVISION

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 12 IN THE SUPREME COURT OF THE
 13 FEDERATED STATES OF MICRONESIA
 14 TRIAL DIVISION - STATE OF POHNPEI

16 STATE OF CHUUK, et al.,) CIVIL ACTION No. 1995-085
 17)
 18 Plaintiffs,) MEMORANDUM OF POINTS AND
 19) AUTHORITIES IN SUPPORT OF
 20 vs.) MOTION TO DISMISS AMENDED
 21) COMPLAINT
 22 SECRETARY OF DEPARTMENT OF)
 23 FINANCE, et al.,)
 24)
 25 Defendants.)

26
 27 Defendants Federated States of Micronesia ("FSM") and the Secretary of the
 28 Department of Finance (the "Secretary") (collectively, "Defendants") submit this
 29 memorandum of points and authorities in support of their joint motion to dismiss the
 30 Amended Complaint.
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I. INTRODUCTION

One of the attributes of being a sovereign nation is immunity from suit. In the absence of a waiver of sovereign immunity, the FSM Supreme Court has no jurisdiction to entertain a suit against the FSM. The limited waiver of sovereign immunity provided under FSM law does not include suits for declaratory judgment, which is all that this action seeks. Because the FSM has not waived its sovereign immunity from this action, it must be dismissed for lack of subject matter jurisdiction.

In addition to lack of subject matter jurisdiction, this action must be dismissed because it is not justiciable. The FSM Constitution vests the FSM Supreme Court with the power to review government actions and laws to determine whether they are consistent with the Constitution. Here, however, the Court is not being asked to review either a government action or a law, but rather it is being asked to review government inaction. Specifically, the plaintiff States are asking this Court to declare that the FSM is violating the Constitution because it has not allocated to the States all (or, alternatively, 50 percent) of the revenues received from the licensing of vessels to fish in the FSM exclusive economic zone.

An examination of the Constitution reveals, however, that nothing in it requires the FSM to allocate to the States any of the revenues it receives from the granting of fishing licenses. The Constitution gives Congress the exclusive power to regulate the offshore resources within the FSM EEZ. It also requires the FSM to deposit all revenues it receives from offshore resources in the General Fund, which may not be withdrawn

1 except as provided by law. Under the separation of powers doctrine, the Court has no
2
3 power to tell Congress how it should appropriate money from the General Fund, nor can
4
5 it compel the executive, through the Secretary, to allocate money from the General fund
6
7 to the States where no law exists permitting the Secretary to do so. The determination of
8
9 how revenues paid into the General Fund should be appropriated is a political decision for
10
11 Congress to make (subject to the President's veto power, which can be overridden by
12
13 Congress), which is beyond the jurisdiction of the FSM Supreme Court to resolve. In
14
15 short, the Supreme Court is not the forum for determining matters of public policy, which
16
17 includes how revenues received by the FSM National government should be spent.

18
19 Finally, the States lack standing to assert either of their claims because even if the
20
21 Court grants the declaratory judgment the States seek, such judgment will not result in the
22
23 payment of any money to the States or otherwise effectively redress their alleged injury.

24
25 Thus, this action is also not justiciable on standing grounds.

26 27 28 II. CLAIMS ALLEGED

29
30 Plaintiffs, all four states of the FSM, filed this action against Defendants seeking

31 declaratory relief under one of two alternative claims. The States' primary claim is:

32
33 1. that each of them is the owner of the living resources in their respective marine
34
35 boundaries (which they define as extending 200 miles from the appropriate baselines);

1 FSM Intrm. 388, 390 (Pon. 1993); Faw v. FSM, 6-FSM Intrm. 33, 37 (Yap 1993). "If it
 2
 3 appears to a certainty that no relief can be granted under any state of facts which could be
 4
 5 proven in support of the claim", the motion should be granted and the claim dismissed.
 6
 7 Jano v. King, 5 FSM Intrm. at 390.

8
 9 Accordingly, for purposes of deciding this motion, the Court must assume that the
 10
 11 States' factual allegations are true. Even with the benefit of such assumptions, however,
 12
 13 the relief that the States' seek under either their ownership or alternative tax claim is not
 14
 15 available to them as a matter of law, thus the Amended Complaint should be dismissed.
 16
 17

18 **B. Declaratory Judgment Is A Form Of Relief, Not A Substantive Right.**

19
 20 The States' are seeking declaratory relief pursuant to FSM Rule of Civil
 21
 22 Procedure 57, which states in part:

23
 24 In a case of actual controversy within its jurisdiction, the court, upon the
 25
 26 filing of an appropriate pleading, may declare the right and other legal
 27
 28 relations of any interested party seeking such declaration, whether or not
 29
 30 further relief is or could be sought. Any such declaration shall have the
 31
 32 force and effect of a final judgment or decree and shall be reviewable as
 33
 34 such.

35 "[Rule 57] does not broaden the jurisdiction of federal courts nor bring non-
 36
 37 judicial issues within their jurisdiction." 6A Moore's Federal Practice para. 57.14 (2d ed.
 38
 39 1989) (discussing U.S. Federal Declaratory Judgment Act).¹ By its language, the rule

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1 FSM Civil Rule 57 is nearly identical to the United States Federal Declaratory Judgment Act (28 USC sec. 2201), which states in relevant part:
 In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or

1 limits the court's jurisdiction over declaratory relief actions to actions involving "a case
2 of actual controversy" which means "a case within the meaning of Article XI, sec. 6(b)"
3 of the FSM Constitution. Ponape Chamber of Commerce v. Nett Municipal Government,
4 I FSM Intrm. 389, 400 (Pon. 1984).
5
6

7
8
9 Consequently, if the Court does not have jurisdiction or the action does not
10 present a "case", the Court may not grant declaratory relief. Here, the Court does not
11 have subject matter jurisdiction over this action because Defendants have sovereign
12 immunity, which has not been waived. This issue is addressed first. In addition to the
13 lack of jurisdiction, the States' ownership claim must be dismissed because it presents a
14 political question, which is not justiciable. Finally, both claims must also be dismissed
15 for lack of standing, because granting the declaratory relief sought will not entitle the
16 States to any further relief.
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26 **C. Defendants Have Sovereign Immunity From Suits Seeking Declaratory**
27 **Relief, And Thus The Amended Complaint Must Be Dismissed.**
28

29 As a sovereign nation, the FSM has the right to determine "whether, how, when,
30 and under what circumstances civil actions of any nature may be brought against it." 6
31 FSMC 701. Waiver of sovereign immunity is a question relating to a court's subject
32 matter jurisdiction. McCarthy v. United States, 850 F.2d 558 (9th Cir. 1988), cert.
33 denied 489 U.S. 1052, 109 S. Ct. 1312, 103 L. Ed. 2d 581 (1989). The FSM has waived
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42 not further relief is or could be sought. Any such declaration shall have the
43 force and effect of a final judgment or decree and shall be reviewable as such.

1 its sovereign immunity from civil suit for only five specified types of claims: (1)
2
3 recovery of taxes erroneously or illegally collected; (2) damages, injunction or mandamus
4
5 for improper administration of FSM statutes or regulations; (3) contracts with the FSM;
6
7 (4) tort claims arising from acts of national government employees acting within the
8
9 scope of their employment; and (5) injuries for violation of an individual's constitutional
10
11 civil rights.

12
13 This action, which seeks only declaratory relief, does not fall within any of the
14
15 defined categories of claims for which the FSM has waived its sovereign immunity. The
16
17 States' claims are based on their alleged ownership of the marine resources under
18
19 Micronesian custom and tradition, and their alleged right to receive either all or 50
20
21 percent of fees paid to the FSM in exchange for the right to conduct fishing operations in
22
23 the FSM exclusive economic zone ("EEZ").² No matter how broadly the States' claims
24
25 may be construed, they cannot be construed as (1) claims for recovery of any taxes the
26
27 States paid to the FSM; (2) contract claims; (3) tort claims; or (4) civil rights claims. Nor
28
29 are the States' claims based on the alleged improper administration of any FSM statute or
30
31 regulation, but rather are alleged to be based on Micronesian custom and tradition and the
32
33 FSM Constitution. Accordingly, the waiver of sovereign immunity with respect to
34
35 improper administration of FSM statutes or regulations is not applicable, even if such
36
37 waiver included claims for declaratory relief (which it does not).

38
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40
41
42 ² See 18 FSMC 104 for the definition of the FSM EEZ.

1 The States cannot avoid the sovereign immunity bar to their action by naming the
2
3 Secretary as a party. As there are no reported FSM cases on this point, it is appropriate to
4
5 look to court decisions from the United States for guidance, because although the doctrine
6
7 of sovereign immunity is a universal one, the FSM's form of government is patterned
8
9 very closely after that of the United States. See Etpison v. Perman, 1 FSM Intrm. 405,
10
11 414 (Pon. 1984).

12
13 It is well settled that the United States retains its sovereign immunity from
14
15 suit unless it has expressly waived such immunity and that the application
16
17 of this doctrine cannot be avoided simply by naming agencies of the
18
19 federal government or their individual officers and employees.

20 National Commodity and Barter Ass'n, National Commodity Exch. v. Gibbs, 886 F.2d
21
22 1240, 1245-46 (10th Cir. 1989); see also Hagemeier v. Block, 806 F.2d 197, 202 (8th Cir.
23
24 1986), ~~cert. denied~~ 481 U.S. 1054, 107 S. Ct. 2192, 95 L. Ed. 2d 847 (1987) ("Sovereign
25
26 immunity bars claims against federal officials in their official capacities unless a waiver
27
28 of sovereign immunity is 'unequivocally expressed.'" (quoting United States v. King, 395
29
30 U.S. 1, 4, 89 S. Ct. 1501, 1502, 23 L. Ed 2d 52 (1969))).

31 The same principle should be applied to the States' claims against the Secretary.
32
33 The Amended Complaint alleges that the Secretary is a party solely because he is charged
34
35 with "the ministerial responsibility to distribute the revenues collected by the Federated
36
37 States of Micronesia." Amended Complaint, para. 7. The States do not name the
38
39 Secretary individually, nor do they make any allegations against the Secretary in an
40
41 individual capacity, but rather name only the office of the Secretary. Because the
42
43

1 Secretary was sued as an agent of the FSM government, and not because of any actions
2
3 taken (or more precisely, not taken) in an individual capacity, the Secretary is entitled to
4
5 the protection of sovereign immunity afforded to the FSM.

6
7 Because the FSM and the Secretary have sovereign immunity against suits
8
9 seeking declaratory relief, the FSM Supreme Court does not have subject matter
10
11 jurisdiction over this action, and thus it must be dismissed.³

12
13
14 **D. The States' Ownership Claim Presents A Political Question, Which Is Not**
15 **Justiciable, And Thus It Must Be Dismissed.**

16
17 Even if Defendants have waived their sovereign immunity against declaratory
18
19 judgment actions (which they have not), the first claim must still be dismissed because it
20
21 is not justiciable.

22
23 A case must be one "appropriate for judicial determination", that is, a
24 "justiciable controversy", as distinguished from a "difference or dispute of
25 a hypothetical or abstract character", or one that is "academic or moot".
26 The controversy must be "definite and concrete, touching the legal
27 relations of parties having adverse legal interests."

28
29 Ponape Chamber of Commerce v. Nett Municipal Government, 1 FSM Intrm. 389, 401
30
31 (Pon. 1984), quoting Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 57
32
33 S. Ct. 461, 91 L. Ed. 2d 617 (1937). See also Innocenti v. Wainit, 2 FSM Intrm. 173
34
35
36
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38
39 ³ FSM law is consistent with United States law on this issue. The United States government may
40 bring a declaratory judgment action under the Federal Declaratory Judgment Act, but the
41 doctrine of sovereign immunity prevents a declaratory judgment action from being brought
42 against the United States, except where such immunity may be waived. 22A Am. Jur. 2d
43 Declaratory Judgments sec. 213 (1988).

1 (App. 1986) (discussion re "cases" and "disputes" requirement of FSM Const. art. XI,
2
3 sec. 6); 6A Moore's Federal Practice para. 57.14 (2d ed. 1989).
4

5 The FSM Supreme Court has addressed the "cases" or "disputes" jurisdictional
6
7 limitation of Article XI, sec. 6 stating:
8

9 While the judiciary must resolve disputes legitimately placed before it, it
10 may not usurp legislative functions by making declarations of policy or
11 law beyond those necessary to resolve disputes nor undertake
12 administrative functions of the kind normally consigned to the Executive
13 Branch where this is not necessary to carry out the judicial function.
14

15 In re Sproat, 2 FSM Intrm. 1, 4 (Pon. 1985).
16

17 A "political question" is not justiciable, and an action presenting such a question
18
19 must be dismissed. Aten v. National Election Commissioner (III), 6 FSM Intrm. 143,
20
21 145 (App. 1993). A political question "is a case where there is found a textually
22
23 demonstrable constitutional commitment of the issue to a coordinate political
24
25 department." Aten v. National Election Commissioner (III), 6 FSM Intrm. 143, 145
26
27 (App. 1993) (citations omitted).
28

29 In Aten the Court was faced with the question of whether it had jurisdiction to
30
31 decide an issue relating to a Court ordered revote for election of a member of Congress
32
33 after Congress had unconditionally seated a member for the seat at issue. The Court
34
35 determined that the matter was not justiciable because under the FSM Constitution,
36
37 Congress was the sole judge of the election of its members. Id., citing FSM Const. art.
38
39 IX, sec. 17(a).
40
41
42
43

1 In Baker v. Carr, the United States Supreme Court set forth several factors for
2
3 determining whether a case involves a political question. Baker v. Carr, 369 U.S. 186,
4
5 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663, 686 (1962) (cited by the FSM Supreme Court,
6
7 appellate division in Aten (III)). The United States Supreme Court stated:

8
9 Prominent on the surface of any case held to involve a political question is
10 found a textually demonstrable constitutional commitment of the issue to a
11 coordinate political department; or a lack of judicially discoverable and
12 manageable standards for resolving it; or the impossibility of deciding
13 without an initial policy determination of a kind clearly for nonjudicial
14 discretion; or the impossibility of a court's undertaking independent
15 resolution without expressing lack of the respect due coordinate branches
16 of government; or an unusual need for unquestioning adherence to a
17 political decision already made; or the potentiality of embarrassment from
18 multifarious pronouncements by various departments on one question.

19
20 Baker v. Carr, 82 S. Ct. at 710. If any one of these factors is inextricable from the case
21
22 before the court, then the case should be dismissed for nonjusticiability on the ground of
23
24 political question. Id.

25
26 Here, at least two of these factors are inextricable from the States' ownership
27
28 claim: a textually demonstrable commitment of the issue to Congress and impossibility
29
30 of deciding the case without making an initial policy determination.

31
32
33 **1. The Power To Regulate The Ownership, Exploration And**
34 **Exploitation Of The Marine Resources In The FSM EEZ**
35 **And To Control The Revenues Received From The Same**
36 **Is A National Power That Rests Exclusively With Congress.**

37
38 The determination of the existence of a "textually demonstrable constitutional
39
40 commitment of the issue to a coordinate political department" first requires an
41
42
43

1 examination of the constitutional provisions relating to the powers in question.

2
3 Goldwater v. Carter, 444 U.S. 996, 998, 100 S. Ct. 533, 534, 62 L. Ed. 2d 428 (1979).

4
5 As the States concede in their Amended Complaint; the Constitution grants to Congress
6
7 the express power

8
9 to regulate the ownership, exploration, and exploitation of natural
10 resources within the marine space of the Federated States of Micronesia
11 beyond 12 miles from island baselines.

12
13 FSM Const. art. IX, sec. 2(m); see also FSM v. Kotobuki Maru No. 23 (I), 6 FSM Intrm.
14
15 65, 69-70 (Pon. 1993) (power to regulate offshore resources beyond 12 mile territorial
16
17 zone is an exclusive power of the national government and by statute, regulation of the
18
19 EEZ rests exclusively with the Micronesian Maritime Authority); Wainit v. Truk (II), 2
20
21 FSM Intrm. 86, 88 (Chuuk 1985) (nature of expressly delegated powers under Article IX,
22
23 sec. 2 suggests that powers are intended to be exclusive with the national government).

24
25 No ownership power over the natural resources within the EEZ was reserved or
26
27 granted to the States. Accordingly, even if under Micronesian tradition and custom the
28
29 States did own the marine resources within the FSM EEZ,⁴ the States gave up their
30
31 ownership rights when they adopted the FSM Constitution under which the States granted

32
33
34
35
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37
38 ⁴ Although Defendants dispute the States' claim that the States own the marine resources within
39 the FSM EEZ under Micronesian tradition and custom, for purposes of this motion to dismiss,
40 Defendants assume that the States are the owners. Defendants, however, expressly reserve the
41 right to refute the claim in further proceedings, if any, in this action, including a motion to
42 dismiss for failure to join indispensable parties.

43

1 Congress the exclusive power to regulate the ownership, exploration and exploitation of
2
3 the marine resources.⁵

4
5 The only constitutional limitation on Congress' power over the natural resources
6
7 within the EEZ is that

8
9 [n]et revenue derived from ocean floor mineral resources exploited under
10 Section 2(m), shall be divided equally between the national government
11 and the appropriate state government.

12
13 FSM Const. art. IX, sec. 6. Here, however, the issue is not revenue received from the
14
15 exploitation of ocean floor mineral resources, but rather revenue from the granting of
16
17 licenses to vessels to fish in the EEZ. The phrase "ocean floor mineral resources" is not
18
19 ambiguous and cannot rationally be construed as including fish or other marine resources.

20
21 The Constitution is also explicit about what the FSM is required to do with money
22
23 it receives, which would include fees received from the licensing of vessels to fish in
24
25 EEZ.

26
27 Public money raised or received by the national government shall be
28 deposited in a General Fund or special funds within the National Treasury.
29 Money may not be withdrawn from the General Fund or special funds
30 except by law.

31
32
33
34
35 ⁵ The FSM Constitution is the supreme law of the FSM. FSM Const. art. II, sec. 1; see also
36 SCREP No. 16 (Sept. 27, 1975). The supremacy of the FSM Constitution over all other laws in
37 the FSM, including the Constitutions of the constituent states, cannot be overstated. Without
38 such supremacy, the FSM Constitution could easily become eviscerated by contrary provisions
39 in State Constitutions, or national or state laws, and eventually become meaningless. To the
40 extent the States are relying on their respective Constitutions for their claim that they did not
41 give up their ownership rights to the marine resources in the EEZ, such reliance is misplaced
42 because those provisions are invalid due to their conflict with the FSM Constitution.

1 FSM Const. art. XII, sec. 1(a). Thus, unless there is a provision in the Constitution or an
2
3 FSM statute specifically relating to revenue the FSM receives from the "ownership,
4
5 exploration or exploitation" of marine resources in the EEZ, the revenue from fishing
6
7 licenses must be paid into the General Fund or special funds and may only be disbursed
8
9 according to law. The States, however, do not rely on any provision in the Constitution
10
11 or FSM law that specifically addresses revenue received from the licensing of fishing
12
13 vessels or requires the FSM, through the Secretary, to pay over any portion of such
14
15 revenues to the States.

16
17 Because the Constitution expressly commits to Congress exclusive power over the
18
19 marine resources of the EEZ and the power to decide how to allocate revenues it receives
20
21 from the regulation of such resources, this action must be dismissed on the ground of
22
23 political question.

24
25
26 **2. It is Impossible to Decide this Action without**
27 **Making Initial Policy Decisions.**
28

29 It is precisely because there is no provision in the Constitution or law directing the
30
31 FSM or the Secretary to allocate revenue from the fishing license fees to the States that
32
33 the States are requesting this Court to declare that they have a right to such revenues.⁶
34
35 The lack of law currently highlights why this case is not justiciable: the States cannot
36
37 obtain the relief they ultimately seek (all or part of the fishing license revenues) unless
38
39
40

41
42 ⁶ If there were such a law, the States would be required to exhaust their administrative remedies
43 against the Secretary under Title 17 before they could come to the Court for relief.

1 there is a law allocating or appropriating such revenues to the States. The States cannot
2
3 avoid that dilemma by asking this Court to make such a law through the issuance of a
4
5 declaratory judgment.

6
7 The decision whether to enact a law and what that law will provide for involves
8
9 considerations of policy that are reserved exclusively to the legislature (subject to the
10
11 executive's veto power). The judiciary's role with respect to the enactment of law is
12
13 limited to determining, when the issue is properly presented to it, whether a law or action
14
15 taken pursuant to such law after it has been enacted violates or is otherwise inconsistent
16
17 with the Constitution. The judiciary has no power to make a policy decision about what
18
19 laws should be enacted and then direct the legislature to enact such a law. As stated by
20
21 the FSM Supreme Court in the Aten case, "it is inappropriate for a court even to intimate
22
23 how Congress ought to [decide]." Aten V. National Election Commissioner (III), 6 FSM
24
25 Intrm. 143, 146 (App. 1993).

26
27 Furthermore, a declaratory judgment from this Court that the States have the right
28
29 to receive the revenues from the licensing fees would not end the matter. A declaratory
30
31 judgment in the form the States seek, without more, would not provide any guidance to
32
33 the Secretary on how to implement the judgment. Should the "state where collected"
34
35 standard of Article IX, sec. 5 be followed? If so, then all of the revenue would be paid to
36
37 the State of Pohnpei because MMA is located in Pohnpei and the fees are paid there.
38
39 Should an allocation based on where a particular vessel catches its fish be used? If so, if
40
41
42
43

1 a vessel pays its permit fee but does not catch any fish, for whatever reason, which State
2
3 or States gets the fee, and how much does each get?
4

5 The States ask the Court to declare their right to receive the licensing revenues
6
7 "minus reasonable administrative costs." Amended Complaint, para. 1, 17 and prayer
8
9 for relief. Who determines what is "reasonable"? Who determines what is an
10
11 "administrative cost"? Are the costs of the crew and maintenance of the FSM patrol
12
13 boats reasonable administrative costs, for example? How are such costs to be allocated
14
15 among the States? These questions can be decided only after certain policy decisions are
16
17 made. The making of policy decisions is entirely within the province of the legislature
18
19 and executive, not the judiciary.
20

21 "The purpose of the [declaratory judgments] is to settle actual controversies
22
23 before they ripen into violations of law or a breach of a duty by providing an immediate
24
25 forum for an adjudication of rights and obligations in an actual controversy where such
26
27 controversy may be settled in its entirety and with expediency and economy." 22A Am.
28
29 Jur. 2d Declaratory Judgments sec. 14 (2d ed. 1988). As the above discussion illustrates,
30
31 the primary declaratory judgment that the States seek will not accomplish the purposes
32
33 for which declaratory relief was established, but rather will simply increase the level of
34
35 litigation and controversy. Consequently, the primary claim should be dismissed.
36
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1 **E. The States' Lack Standing To Seek The Relief Sought Under Either**
2 **Of Their Claims, Thus This Action Should Be Dismissed.**

3
4 Standing is another aspect of the "case or dispute" constitutional requirement for
5
6 determining whether an action is justiciable. It focuses on the party seeking relief rather
7
8 than the claim itself. Standing has three elements: (1) the plaintiff must have suffered an
9
10 injury in fact (2) caused by the challenged actions of the defendant (3) that the court can
11
12 remedy in a manner that will personally benefit the plaintiff. See 13 Wright, Miller and
13
14 Cooper Federal Practice and Procedure: Jurisdiction 2d, sec. 3531.4 (2d ed. 1984); 32A
15
16 Am. Jur. 2d Federal Practice and Procedure sec. 1238 (1982).

17
18 Where the plaintiff seeks an award of damages, there can be little doubt that the
19
20 plaintiff will receive a personal benefit from a judgment.

21
22 If potential remedies are limited to declaratory, injunctive, or other
23 specific decrees, however, it may seem important to ask whether any
24 remedy is in fact appropriate. Should the court not be prepared to do
25 anything more than decide the merits, decision may seem inappropriate. A
26 plaintiff who stands to gain no more than abstract vindication may lack the
27 adversary ardor of a plaintiff who stands to gain some more tangible
28 benefit. Perhaps more important, there seems to be little justification for
29 deciding. An abstract decision without remedial consequence seems
30 merely advisory, an unnecessary expenditure of judicial resources that
31 burdens the adversary and carries all the traditional risks of making bad
32 law and trespassing on the provinces of the executive and legislature.

33
34 13 Wright, Miller and Cooper Federal Practice and Procedure: Jurisdiction 2d, sec.
35
36 3531.6 (2d ed. 1984).

1 **1. The States' lack Standing to Assert their Ownership Claim.**

2
3 As the immediately preceding section illustrates, a declaratory judgment from this
4
5 Court regarding the States' alleged constitutional right to receive the revenues from the
6
7 licensing of fishing vessels will not provide an effective remedy to the States.

8
9 Accordingly, any decision from this Court on the merits of the States' claim would be
10
11 nothing more than an advisory opinion. As the FSM Supreme Court has frequently
12
13 stated, decisions on constitutional matters should be avoided where not necessary to
14
15 resolve the issue before the Court. See e.g., Suldan v. FSM (I), 1 FSM Intrm. 201, 205
16
17 (Pon. 1982); Suldan v. FSM (II), 1 FSM Intrm. 339, 357 (Pon. 1983); Michelsen v. FSM,
18
19 3 FSM Intrm. 416, 419 (Pon. 1988).

20
21
22 **2. The States' Alternative Tax Claim must also be Dismissed**
23 **for Lack of Standing.**

24
25 The States' alternative claim for relief must also be dismissed because if the
26
27 licensing of vessels to fish in the FSM is a form of "tax" (as the States claim), then it is
28
29 probably an unconstitutional tax, and thus neither the FSM nor the States have the right to
30
31 the revenues received therefrom.⁷

32
33 The Constitution gives Congress the express power to impose only two types of
34
35 taxes: on imports and income. FSM Const. art. IX, sec. 2(d) and (e). If the collecting of
36
37

38
39 ⁷ This motion does not seek a judicial determination of the merits of the States' claim that the
40 licensing fees are a form of tax. The FSM specifically denies that the licensing fees are a tax,
41 and does not waive its right to present evidence and legal argument on this issue in further
42 proceedings, if necessary.

1 revenues in exchange for the granting of a license to fish in the EEZ is a tax (which the
2
3 FSM disputes), it cannot be an import tax. The fish are already in the FSM; they are not
4
5 being imported. Nor can it be considered an income tax, because the licensing fee is not
6
7 based on income. The fee is payable irrespective of whether any fish are either caught or
8
9 sold. In addition, unlike an income tax, the licensing fees are negotiated, may be paid as
10
11 goods and services rather than in money, and are paid before the license is issued. 24
12
13 FSMC 107 and 114.

14
15 Furthermore, Article IX, sec. 5 of the FSM Constitution mandates that "National
16
17 taxes shall be imposed uniformly." The licensing fees are not uniform. Consequently, if
18
19 the licensing fees are a tax, then they do not comply with the constitution. If a tax is
20
21 unconstitutional, then neither the FSM nor the States have any right to the revenues
22
23 collected.

24
25 Because the Court cannot declare that as a matter of constitutional law the States
26
27 have the right to receive at least 50 percent of the licensing fees if the Court determines
28
29 that the fees are a tax, the alternative claim must be dismissed. In addition, the economic
30
31 and political turmoil that would result from such a determination, which would harm
32
33 rather than benefit both the FSM and the States, counsels strongly against making such a
34
35 determination, particularly since there is no reason for doing so.

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IV. CONCLUSION

For the reasons set forth above, the Amended Complaint should be dismissed in its entirety.

Dated this 19th day of September, 1995.

FEDERATED STATES OF MICRONESIA
CAMILLO NOKET, ATTORNEY GENERAL

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