JON M. VAN DYKE
2515 Dole Street
Honolulu, Hawai'i 96822
Tel.: 808-956-8509
Fax No.: 808-956-5569

ANDREA HILLYER
P.O. Box Drawer D
Pohnpei, FM 96941
Tel.: 691-320-6400

CYPRIAN MANMAW
Attorney General, State of Yap
P.O. Box 435
Colonia, Yap 96943
Tel. No.: 691-350-2105

RICHARD C. MARTIN
Attorney General, State of Kosrae
P.O. Box 1301
Kosrae State Government
Tofol, Kosrae 96944
Tel. No.: 691-370-3043

MAKETO ROBERT
Attorney General, State of Chuuk
P.O. Box 645
Weno, Chuuk 96942
Tel. No.: 691-330-2397

Attorneys for Plaintiffs

SUPREME COURT OF THE
FEDERATED STATES OF MICRONESIA
TRIAL DIVISION - STATE OF POHNPEI

STATE OF CHUUK, STATE OF KOSRAE, STATE OF POHNPEI, AND STATE OF YAP Plaintiffs, vs. SECRETARY OF DEPARTMENT OF FINANCE, FSM, and the National Government of the FEDERATED STATE OF MICRONESIA, Defendants.	**CIVIL ACTION NO. 1995-085** PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF MOTION; AFFIDAVITS OF GERSON JACKSON, FREDRICK RAMP, AND JON M. VAN DYKE; EXHIBITS A-X; CERTIFICATE OF SERVICE

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby move for summary judgment to request this Honorable Court to issue a declaratory judgment and injunction and award appropriate damages in favor of the Plaintiffs on two separate grounds: (1) that the four Plaintiff States are the underlying owners of the living resources in the waters offshore from their land areas and thus that they are entitled to the revenues the National Government has received from fishing licenses minus the administrative costs necessary to service and monitor these licences, and (2) that the permit fees received by the National Government from fishing licenses are taxes and thus that at least 50% of these revenues must be distributed to the four Plaintiff States.

Dated: Honolulu, Hawaii _____.

_____
JON M. VAN DYKE
ANDREA HILLYER
CYPRIAN MANMAW
RICHARD C. MARTIN
MAKETO ROBERT
Attorneys for Plaintiffs

SUPREME COURT OF THE
FEDERATED STATES OF MICRONESIA
TRIAL DIVISION - STATE OF POHNPEI

STATE OF CHUUK, STATE OF KOSRAE, STATE OF POHNPEI, AND STATE OF YAP Plaintiffs, vs. SECRETARY OF DEPARTMENT OF FINANCE, et al., Defendants.	**CIVIL ACTION NO. 1995-085** PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION

TABLE OF CONTENTS

Exhibit X - Difficult-to-find judicial opinions:

TABLE OF AUTHORITIES

Case Law

Other

Treaties

Attorney General Opinions

Treatises, Books & Articles

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This case has been brought by the four Plaintiff States to obtain their fair share of the permit fees collected by the National Government pursuant to fishing licenses issued to fishing companies harvesting in the 200-nautical-mile Exclusive Economic Zone (EEZ) that surrounds the islands in the Federated States of Micronesia.[1] Plaintiffs' Motion is supported by two separate grounds, both based on the Constitution of the Federated States of Micronesia and the customs, practices, and geography of this nation. This Honorable Court accurately summarized these positions in its Order issued August 30, 1996, pages 1-2:

> In support of their claims, [1] the States assert that traditional and customary practices of the Micronesian people vest ownership of off-shore fishing resources in the island community adjacent to those waters. The States further contend that their right to ownership of these marine resources is supported by Article I, Section 1 of the FSM Constitution, which defines the marine boundaries of each state, and by Article I, Section 2 of the Constitution, which establishes the principle of equidistance by which the boundaries between adjacent states are determined. [2] Even if the FSM is found to have control over marine resources in the EEZ, the States argue that they are still entitled to 50% of the FSM's licensing fee revenues, because these revenues are taxes, and under Article IX, Section 5 of the FSM Constitution, not less than 50% of the revenue from national taxes is to be paid into the treasury of the state where collected.

In its Order of August 30, 1996, this Honorable Court denied the

---

[1] The EEZ is defined as the body of water extending from the border of the territorial sea out to a distance 200 nautical miles from the island land areas. 18 F.S.M.C. 104. The EEZ surrounding the islands of the FSM covers an area of about 900,000 square miles. Micronesian Maritime Authority, 1994 Annual Report 2.

Exhibit B).

The revenues charged for each fishing license agreement are based on a percentage of the value of the expected tonnage of fish caught. The contracts in the early 1990s stated explicitly that the permit fee was "based upon five percent (5%) of the weighted average of the estimated landed value of the estimated catch." See 1991-92 contract with the Tuna Boat Owners Association of Australia, attached as Exhibit C. The more recent contracts usually say simply that the fee "is based upon the size and capacity of the vessels." The negotiators for the Micronesian Maritime Authority still seek a revenue stream based on a specific percentage of the value of the catch, however, as illustrated by the 1994-95 and 1995-96 contracts with the Union Corporation, attached hereto as Exhibits D and E. The 1994-95 contract uses the phrasing that the "fee is based upon five percent (5%) of the weighted average of the estimated landed value of the estimated catch," adding "with discount considerations applied." The agreement permitted the company to use five long-line vessels, and charged $15,000 per vessel. In the 1995-96 contract, the phrasing is changed to say that the fee "is based upon the size and capacity of the longline fishing vessels," but the per-vessel fee remains the same--$15,000 per vessel. All these license agreements are thus based on the estimated catch to be harvested by the vessels, or as a report of the Micronesian Maritime Authority put it, "on certain agreed formulae which determine the fee levels by gear types on a monthly basis." Two Year Report of the Micronesian

Maritime Authority 1992-1993 at 5; see also Affidavits of Gerson Jackson and Frederick Ramp, attached hereto. Also attached as Exhibit F is the August 13, 1990 letter from Peter Sitan, Executive Director of the Micronesian Maritime Authority to the Honorable Feliciano M. Perman, Pohnpei State Legislature, which explains the procedures for determining license fees in some detail. "The fee," he says, "is set on a projected estimate of how well the vessel will perform taking into consideration its prior year's performance, fish market prices, number of trips per period, catch per trip, steaming time to the fishing grounds, target species and other factors." Id. at 2. Although the computation may be complicated, as with other taxing situations, the goal is clear--to charge the licensees "about 5% of the total estimated value of the estimated catch as its minimum acceptable fee after due consideration to the factors stated in item 2 above." Id. Sometimes rebates are provided "based on other benefit consideration," id., i.e., as an incentive to new entrants or fishing companies with substantial Micronesian ties, or in exchange for agreements to offload catch at FSM ports (and thus create local jobs), just as tax concessions are given in other parts of the world to encourage investment or local job-creation. But the texts of these agreements shows that they are revenue-generating arrangements based on the estimated value of the fish expected to be harvested by each vessel allowed to fish in the EEZ surrounding the islands of the FSM. Exhibit G is a chart that lists and describes all the fishing agreements made available to the

Plaintiff States for the 1990-96 period. The column in the far right lists the basis for the assessment collected for each agreement, illustrating the consistent use of a percentage of the value of the expected catch.

The arrangements with the United States are somewhat different, because they are based on a multilateral treaty negotiated through the Forum Fisheries Agency (FFA). The moneys received are nonetheless still payments for the resources owned by the States, as explained below, and must still be characterized as taxes because they are paid primarily based on the volume of catch taken from the waters in the EEZ surrounding the islands of the FSM. Under the treaty between the FFA and the United States, 15% of the revenues received by the FFA is distributed equally among the members of the FFA and the other 85% is "allocated proportionately based on the volume of catch taken in each party's EEZ." Micronesian Maritime Authority, 1994 Annual Report 14.

The agreements with the Japanese fishing companies are also somewhat different, as explained in Mr. Sitan's letter, Exhibit F at 2. In paragraph 20 of their Answer, dated September 30, 1996, the Defendants "[a]dmit that the foreign fishing fees paid by fishing vessels licensed under MMA's agreement with the Japanese is based on an agreed formulae..."

Under the FSM Constitution, the four States have responsibilities to fund the health, education, social welfare, and criminal justice programs for the residents of their islands, but their revenue sources are limited and each state is experiencing

substantial financial difficulty. The fishing permit fees provide a considerable revenue stream that the Plaintiff States are constitutionally entitled to.

III. THE PLAINTIFF STATES ARE THE UNDERLYING OWNERS OF THE LIVING RESOURCES OF THE OFFSHORE OCEAN AREAS ACCORDING TO THE CONSTITUTION OF THE FEDERATED STATES OF MICRONESIA, AND ACCORDING TO MICRONESIAN TRADITION, CUSTOM, AND CONCEPTS OF OWNERSHIP.

A. The Territory of Each State Extends to the "Marine Boundary" Established by the "Principle of Equidistance" as Stated in Article I, Section 2 of the FSM Constitution.

The language in the Constitution of the Federated States of Micronesia is clear in describing the process to be used to delineate the "marine boundary" that separates the States from each other. Article I, Section 2 says that this boundary must be determined by "applying the principle of equidistance." This principle is well-known in international law and involves drawing the boundary at the half-way mark between two opposite land areas. See, e.g., Article 6 of the Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S.No. 5578, 499 U.N.T.S. 205; and Article 12 of the Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

Once such a "marine boundary" is drawn, it naturally follows that the waters and resources on one side of the line will belong to the State whose islands are on that side, and that the waters and resources on the other side of the line will belong to the State whose islands are on the other side. It is the ordinary and

inevitable meaning of the word "boundary"[3] that it divides ownership between the two political units that lie on the two sides of the boundary line. See, e.g., Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38; Continental Shelf (Libya/Malta), 1985 I.C.J. 13; North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 1. The Plaintiff States are thus "owners" of these resources in the sense that they have sovereign power over them (even though they have delegated regulatory authority over the area beyond 12 miles to the National Government in Article IX, Section 2(m) of the FSM Constitution). Other claims of ownership of the offshore resources by municipalities or clans may also exist based on historical usage of specific offshore areas.

B. The Language of Article I, Section 1 Confirms That the Waters and Resources Are Owned by the Adjacent State Because It Refers to the Waters Connecting the Micronesian Archipelago as "Internal Waters Regardless of Dimensions."[4]

---

[3] "Constitutional interpretation must start and end with the words of the provision when the words themselves plainly and unmistakably provide the answer to the issue posed." Ponape Federation of Cooperative Assns. v. FSM, 2 FSM Intrm. 124, 126 (Pon. 1985)(citing FSM v. Tipen, 1 FSM Intrm. 79, 82 (Pon. 1982)).

[4] Article I, Section 1 of the FSM Constitution contains the following language: "...Unless limited by international treaty obligations assumed by the Federated States of Micronesia, or by its own act, the waters connecting the islands of the archipelago are internal waters regardless of dimensions, and jurisdiction extends to a marine space of 200 miles measured outward from appropriate baselines, the seabed, subsoil, water column, insular or continental shelves, airspace over land and water, and any other territory or waters belonging to Micronesia by historic right, custom, or legal title." (Emphasis added.)

The term "internal waters" is a well-known term used by international lawyers to refer to the waters that are wholly within the boundaries of a country, such as lakes, rivers, and bays, and that are completely subject to its jurisdiction without any rights of international passage. See, e.g., Barry E. Carter and Phillip R. Trimble, International Law 989 (2d ed. 1995). As an unambiguous term, it must be interpreted according to its plain meaning.[5] Although the status of the waters between the islands of the FSM may have been modified for international purposes when the FSM became a party to the United Nations Law of the Sea Convention, Dec. 10, 1982, 21 I.L.M. 1261 (1982), which defines these waters differently in Article 8, the use of the term "internal waters" in the FSM Constitution certainly remains important and instructive in confirming ownership rights for domestic purposes. The use of the term "internal waters" can mean only that these waters and their resources are subject to the greatest possible sovereign ownership by the residents of the adjacent State, and that they are owned by these States and their residents in the same sovereign sense that lakes, ponds, rivers, and streams, and their resources, are owned by the residents of the State in which they are found.

C. Micronesian Custom and Traditional Practice Confirms that the Adjacent State Owns the Offshore Fishing Resources.

In 1973, the Joint Committee on the Law of the Sea for the Congress of Micronesia wrote that:

---

[5] See quote from Ponape Federation of Cooperative Assns v. FSM in footnote 3 supra.

> Because of the absence of comprehensive anthropological work, we are unable to document traditional concepts of ownership of the sea at great distances from our islands. However, it is known that in the Marshall Islands, Truk, Yap, and Palau Districts there are shallow water areas, some more than one hundred miles from the nearest island or reef, where traditional ownership and use rights are recognized and respected.

Joint Committee on the Law of the Sea, Law of the Sea: The Preliminary Micronesian Position 25 (5th Cong. Of Micronesia, Saipan, May 14, 1973)(attached hereto as Exhibit H). This report articulated how the "sea is an integral part of the life of the islanders," and explained that the sea "provides us with our primary source of food" and "our primary means of transportation." Id. Because of these links, "the Micronesian concept of real property includes both land and sea," and "[i]slanders have rights in and own the sea in much the same way they have rights in and own land." Id.

These views were developed in further detail in a document prepared by Masao Nakayama and Fredrick L. Ramp entitled Micronesian Navigation, Island Empires and Traditional Concepts of Ownership of the Sea, which was submitted to the Fifth Congress of Micronesia in Saipan on June 14, 1974. (Chapter IV which is entitled "Traditional Micronesian Concepts of Ownership of the Sea" is attached hereto as Exhibit I.) This book-length manuscript emphasizes at page 78 that "all over Micronesia there are submerged reefs capping seamounts just below the surface of the ocean," and notes that "[m]any of these are more than 100 miles from the nearest dry land." The report then states that "Each is named and exclusively owned by a particular family, clan, municipality,

island, group of islands or atoll. Ownership rights in these reefs are apparently quite well respected and little poaching by Micronesians is believed to occur." Id. (emphasis added).

Ownership of these fertile fishing grounds was known to adhere to the residents of the nearest island: "The overriding principle for defining rights to the sea is that proximity determines ownership. That is, paramount rights in the sea and its resources generally belong to the nearest island or atoll." Id. (emphasis added). "[S]ubmerged reef areas remain the exclusive property of an island or atoll regardless of their distance from land." Id. at 78-79 (emphasis added). The resources in waters unconnected to a submerged reef are still owned by the nearest island, although the rights to these resources are described as "dominant" rather than "exclusive." Id. at 79. "[T]he fish caught are clearly the property of the nearest island," but a small amount may be given as a gift to an intruder from elsewhere. Id. at 81 (emphasis added). "Among the Central Carolinians the degree of rights within the nonexclusive zone seems to gradually fade as one moves outward toward the next island, until at some point the rights of the next island become primary." Id. at 79. "[T]he Yapese consider their nonexclusive zone to include at least all of the sea around the outer islands of Yap District." Id. at 80. The Ponapeans "view the area to a great distance beyond the reefs as a nonexclusive zone owned by the nearest island." Id. (emphasis added). "Property ownership of the Central Carolinians includes all of the sea between islands as well as the lagoon and submerged

reef areas." Id. at 90. Specific ownership of specific submerged reef areas has been documented:

> In Truk district: About 75 miles south of Pulusuk is a shallow area named "Remanuou" (called Helene Shoal on most maps) which is owned by Pulusuk; Pulusuk also owns the "Rmanulong" which is called Lady Elgin Bank on maps; about 50 miles east of Puluwat is a reef called "Apinalei" belonging to Puluwat as does the reef "Chuat" (the Gray Feather Bank) northwest of Puluwat. In Yap District: About 50 miles east of Faraulep is a reef (called Tarang Bank on maps) which belongs to the people of Faraulep and is called "Chimuelwelpuguu"; Elato owns the reef "Ocheirukulong" located about 125 miles southwest of the island and called Ianth Shoal on maps; and the McLaughlin Bank located northwest of Ulul is called "Ochenimwar" by the Central Carolinians and is owned by Satawal.

Id. at 89 (emphasis added).

> Property ownership in Yap includes the lagoons and submerged reefs both near and far. For example, about 30 miles north of the Yap complex is a reef called "Sepin" owned by a particular municipality on Yap as is another reef located about half way between Yap and Sepin called "Paguruch". The deep sea area around Yap Island complex and throughout the district is considered owned by the Yapese.

Id. at 93 (emphasis added). This report concludes by saying that "Micronesians know that they own the sea surrounding their islands. To them any other conclusion is totally incomprehensible." Id. at 102 (emphasis added). And it would also be totally incomprehensible to imagine that the residents of the Plaintiff States would somehow cede ownership of these important resources to the National Government without any explicit language in the Constitution that addresses the ownership issue.

Other authors have also documented the extensive and wide-ranging fishing practices of the Micronesians and their sense of ownership over their distant resources. In Tomoya Akimichi,

Conservation of the Sea: Satawal, Micronesia, in Traditional Fishing in the Pacific 15-16 (Pacific Anthropological Records No. 37, Bishop Museum, Honolulu, Atholl Anderson ed., 1986), the author documents the practice of the Satawal islanders and their neighbors to utilize fishing areas "130 km to the north and northeast, 70-150 km to the west, and 20 km to the south," an area that forms their "nenien yattow `areas for marine exploitation.'" Although these zones are not "exclusively owned by any particular island," they are viewed as the collective property of Satawal and its neighboring atolls. Robert Johannes, in The Role of Marine Resource Tenure Systems (TURFS) in Sustainable Nearshore Marine Resource Development and Management in U.S.-Affiliated Tropical Pacific Islands 4 (U.S. Congress Office of Technology Assessment, 1986), notes that a "comprehensive study of Yapese fishing rights would probably take several years and fill a large book." He also mentions that in the vicinity of Satawal, "men who wish to visit uninhabited islands or remote reefs must obtain prior approval from the Chief of the Sea," who "has proprietary rights to certain species in these areas as well as the authority to determine how and when fishing shall be carried out." Id. at 13 (citing K. Sudo, Social Organization and Types of Sea Tenure in Micronesia, 17 Senri Ethnology Studies 203-230 (1984)).

These studies provide ample evidence of the Micronesian understanding that offshore ocean resources substantial distances away were owned by the residents of the adjacent island or group of neighboring islands. Nothing in the FSM Constitution challenges or

changes that important concept of ownership.

D. The Four Plaintiff States Each Had the Right to Become Separate Political Entities. They Entered into the FSM in Order to Promote Micronesian Unity and Prosperity, But Never Gave Up Their Sovereign Ownership of Their Offshore Resources.

Six separate and distinct groups of islands (the Marshalls, the Northern Marianas, Palau (Belau), Ponape (Pohnpei), Truk (Chuuk), and Yap) were combined together after World War II to become the Trust Territory of the Pacific. In 1975, during their self-determination process, delegates from these island groups met together to draft a Constitution, but then three of these units--the Northern Marianas, the Marshall Islands, and Palau--broke from the others to chart their own paths toward self-determination. The Northern Marianas became a Commonwealth of the United States, and the Marshalls and Palau became separate Republics that are now freely associated with the United States. The other three units (Truk (Chuuk), Ponape (Pohnpei), and Yap) could have gone their separate ways as well, but they decided to join together under the 1975 Constitution to form the Federated States of Micronesia. Kosrae then separated from Pohnpei to become the fourth State of the FSM.

Because each of these units had its own independent right to self-determination under Article 76 of the United Nations Charter and under the Trusteeship Agreement, each also had rights over its own adjacent offshore resources. These units came together pursuant to the carefully-drafted language of the 1975

Constitution. This Constitution created a National Government of enumerated powers. The National Government has only those rights and powers assigned to it, and the States retain all other rights and powers. Con Con Committee Report SCREP No. 33 is explicit in saying that because the nation being created lacks "the bond of common cultural origin" and "the advantage of compact geography," it "must permit local autonomy in order to have efficient government and to avoid the destructive consequences, real or imagined, of domination by one group over another." SCREP No. 33, 2 J. of Micro. Con Con 813, quoted in FSM v. Kotobuki Maru No. 23 (I), 6 FSM Intrm. 65 (Pon. 1993).

E. The Legislative History of the Relevant Statutes Demonstrates that the FSM Legislators Recognized the Underlying Ownership of the Fishery Resources by the States and their Residents.

One example of the early recognition that the ocean resources belong to the separate States is found in Public Law 7-71, enacted by the Congress of Micronesia in August 1977 and signed into law by the High Commissioner of the Trust Territory on October 18, 1977, attached hereto as Exhibit J. This important statute defined the fishery zone jurisdictions of Micronesia, establishing a "territorial sea" that extended three nautical miles from the land baselines (Section 52), an "exclusive fishery zone" that covered the three-to-twelve nautical mile area from each baseline (Section 53), and an "extended fishery zone" that covered the area between twelve and 200 nautical miles from each baseline (Section 54). This act also established the Micronesian Maritime Authority (Section 101)

and authorized it to regulate fishing and negotiate agreements with foreign fishing companies.

Most significantly, Section 58 of Public Law 7-71 recognized the right of any district to "remove itself from the application of this act" and to establish its own laws to govern fishing in its waters, even if the district remains a part of the FSM. This section also declares that "[i]t is self-evident that any island or group of islands which achieves separate sovereignty through political separation from the remaining districts of Micronesia will thereby attain sovereign rights to its sea area." It was thus clear to the drafters of this legislation, who were acting only two years after the 1975 Constitution had been written, that the Constitution recognized the rights of each State (then called districts) to full sovereign ownership over all the ocean resources within its district boundaries.

This recognition is also found in Section 206 of Public Law 7-71, which says that all fees collected by the Micronesian Maritime Authority (MMA) from foreign fishing operations "shall be returned to each district in proportion to the catch harvested by foreign fisherman in that district," after "the payment of the operating and other expenses of the Authority." A final provision acknowledging the underlying ownership of the fishery resources by adjacent island communities is found in Section 56, which says that "[t]raditionally recognized fishing rights in submerged reef areas" throughout the 200-nautical-mile extended fishery zone "shall be preserved and respected."

The report filed on this bill by the Committee on Judiciary and Governmental Relations (SCREP. No. 7-132, Aug. 3, 1977)(attached as Exhibit K) says that the decisions to divide revenues "in accordance with the percentage of the total catch taken in a particular district" and to confirm that any district leaving the federation could "take its 200-mile economic zone with it" came from the recommendations of Micronesia's Law of the Sea Delegation. The language in this Act recognizing the separate rights of each island group to its surrounding fishing resources provides a definitive view of how the first leaders of this country interpreted the relevant constitutional sections.

Some of the provisions in Public Law 7-71 were amended the following year (1978) in Public Law IC-3 (attached as Exhibit L), when it became clear that the Marshalls, the Northern Marianas, and Palau would not remain within the FSM and some consolidation of resources and management authority was needed to ensure the proper launch of the new nation and to limit bureaucratic overlap. The revenues received from foreign fishing licenses remained quite modest at that time, and they were not then the significant part of the country's income that they are now.

Section 206 was amended to say that fees from foreign fishing licenses attributable to fish caught within the first twelve nautical miles from the coastal baselines would go to the states, but that the revenues attributable to fish caught beyond twelve miles would be deposited in the General Fund of the National Government. This amendment was not, however, supposed to lead to

a situation whereby the National Government would keep all these revenues. The committee report of the Committee on Resources and Development, SCREP No. IC-12 (Nov. 9, 1978), said that the change was designed to produce "a more equitable formula for division between the Authority and the state concerned of the fees charged on the foreign catch," and that "the division shall be as mutually determined by the Micronesian Maritime Authority and the state involved." Id. at 272(emphasis in original)(attached as Exhibit M). It was not foreseen, therefore, that the National Government would keep all the revenues deposited in the General Fund, but rather that for reasons of fiscal accountability the revenues would be deposited there and then distributed to the states according to a formula that would be negotiated. A second amendment contained in IC-3 confirmed the continuing recognition that the states were the underlying owners of the fishery resources: Section 205 was amended to say that "All fines and proceeds of sale of all forfeitures collected pursuant to the provisions of this Title shall be divided on a 50/50 basis between the state affected and the [Micronesian Maritime] Authority." This amendment leaves no doubt that the States have rights to the resources throughout the 200-nautical-mile extended resource zone.

Section 205 was amended one more time in 1981 in Public Law 2-28 to say that the money received from fines and forfeitures should first be deposited in the General Fund of the National Government and then that 50 percent of these revenues shall "be distributed to

the State affected."[6] The discussion at the time of passage of this amendment indicated that the members of Congress anticipated and favored a continued close relationship between the States and the National Government with regard to surveillance and enforcement of the fishing laws, and that the division of the revenues was necessary because of the States' important role in helping to manage these fishery resources. The amendment requiring that the funds be first deposited in the General Fund was designed to conform this procedure to the requirements of Article XII, Section 1 of the FSM Constitution, which requires that all moneys received by the National Government be first deposited in the General Fund. But, according to the statement of Floor Leader Tman, the language of Section 205 should act to constitute an automatic appropriation of half these funds to the affected State. See discussion of C.B. No. 2-127 in Congressional Journal for October 28, 1981, at 82-83 and for October 29, 1981, at 90-94 (attached hereto as Exhibit N).[7]

---

[6] The amendment as adopted in Public Law 2-28 (1981) changes the language of Section 205 to read as follows:

> Revenue from fines and forfeitures. All fines and the proceeds of sale of all forfeitures collected pursuant to the provisions of this title shall be deposited into the General Fund of the Federated States of Micronesia. Fifty percent of these revenues from fines and forfeitures shall then be distributed to the State affected.

[7] Floor Leader Tman stated:

> By our previous acceptance of the existing law, we have acquiesced to the fact that we should operate on a 50/50 basis [dividing the revenues between the States and the National Government]. That is a standing appropriation already. So there is no violation if the 50 percent does not come into the General Fund, because actually when it

F. The Four Plaintiff States Have Continually Asserted Their Claims to the Ocean Area and the Ocean Resources Within Their Boundaries.

The four Plaintiff States have been careful to retain and reassert their sovereign ownership rights over their offshore ocean resources whenever possible. Article I, Section 1 of the Chuuk State Constitution says, for instance, that:

> The territory of the State of Chuuk includes the islands, reefs, shoals, banks, sands, oceans, and other natural landmarks bearing names or identities known in any of the dialects of the State, and any other territory or water belonging to the State by historic right, custom, or legal title. Unless limited by law, this territory shall also include a marine space of 200 nautical miles measure from appropriate baselines, as well as related seabed, subsoil, and water column, insular and continental shelves, and airspace over land and water. (Emphasis added.)

The language in the Pohnpei Constitution, Article I, Sections 1 and 2, is similar:

> Section 1. Territory. The territory of Pohnpei comprises the islands and reefs of Pohnpei, a marine space of two hundred nautical miles measured outward from appropriate baselines, the sea bed, subsoil, water column, insular and continental shelves, and any other territory and waters belonging to any island of Pohnpei by historical right, custom, or legal title.
>
> Section 2. Jurisdiction. Unless limited by obligations assumed by Pohnpei, or by its unilateral act, the waters connecting the islands and reefs of Pohnpei are internal waters, regardless of dimension, and the jurisdiction of Pohnpei extends to the entire territory of Pohnpei including its marine space, the seabed,

---

> comes in, it comes to the General Fund and then we reimburse or rebate it to the State. The existing law itself is a standing appropriation, and Congress is empowered to appropriate. If we go along with the existing law, that is, in essence, an appropriation law itself giving 50 percent to the State.

Congressional Journal for Oct. 29, 1981, at 93 (emphasis added).

> subsoil, water column, insular and continental shelves, and the airspace over lands and waters. (Emphasis added.)

Article XIII, Section 5 of the Yap State Constitution recognizes "traditional rights and ownership of natural resources and areas within the marine space of the State, within and beyond 12 miles from island baselines" (emphasis added), and Article XIII, Section 6 prohibits foreign fishing from "the marine space of the State, except as may be permitted by the appropriate persons who exercise traditional rights and ownership and by statute." Article XI, Section 4 of the Kosrae State Constitution recognizes the "public" nature of "waters, land, and natural resources within the marine space of the State." These constitutional statements are designed to protect the rights of sovereign ownership that the residents of these island communities have traditionally understood and accepted as being part of their legal system.

G. Although Article IX, Section 2(m) of the FSM Constitution Grants to the FSM Congress the Power "to Regulate the Ownership, Exploration, and Exploitation of Natural Resources Within the Marine Space...Beyond 12 Miles from Island Baselines," This Provision Grants Only Regulatory Power and the States Remain the Underlying Owners of Their Adjacent Marine Resources.

The FSM Constitution explicitly assigns to the National Government the responsibility "to regulate the ownership, exploration, and exploitation of natural resources within the marine space of the Federated States of Micronesia beyond 12 miles from island baselines." This carefully chosen language was

designed to permit the National Government to develop consistent and uniform rules to regulate the offshore area because of the international implications of such regulations and the need to negotiate with other nations from a position of unity and strength. See SCREP No. 33, 2 J. of Micro. Con. Con. 813, 819, quoted in FSM v. Oliver, 3 FSM Intrm. 469, 473-74 (Pon. 1988). But the language in Article IX(2)(m) of the Constitution says only that the National Government can "regulate the ownership..." (emphasis added) of the waters beyond 12 miles from the baselines, and never claims or asserts ownership for the National Government. The language in SCREP No. 33 is similar in making a clear distinction between the power to regulate, on the one hand, and ownership, on the other: "Your committee feels that regulatory authority over both mineral and fishery resources beyond 12 miles of an island ought to rest in the national government." 2 J. of Micro Con. Con 813, 819 (emphasis added), quoted in FSM v. Kotobuki Maru No. 23 (I), 6 FSM Intrm. 65, 69 (Pon. 1993). Nothing in the FSM Constitution or in any decision of this Honorable Court is inconsistent with the view that the Plaintiff States are the underlying sovereign owners of the waters and resources surrounding their islands extending to the limits of their marine boundaries. In FSM v. Oliver, 3 FSM Intrm. 469, 479 (Pon. 1988), for instance, the Court was careful to say that "[r]egulatory power beyond twelve miles from island baselines lies with the national government. FSM Const. Art IX, secs. 2(m)" (emphasis added), and similarly in FSM v. Kotobuki Maru No. 23 (I), 6 FSM Intrm. 65 (Pon 1993), the Court said "[r]egulation of the EEZ

rests exclusively with the MMA. 24 F.S.M.C. 301-302" (emphasis added). The "power to regulate" is clearly different from "ownership," and sovereign ownership remains with the four Plaintiff States.

H. The Ownership Rights of the States Are Confirmed in 24 F.S.M.C. Sec. 510, Which Allocates 50% of the Fines and Forfeitures Collected by the National Government for Illegal Fishing "to the States Affected," and in 24 F.S.M.C. Sec. 502(5), Which Similarly Allocates 50% of the Civil Penalties Collected from Persons Who Violate the Fishing Laws of Micronesia to "the State Affected."

As explained above in Section E, 24 F.S.M.C. 510 mandates that 50% of the "fines and proceeds of sale of all forfeitures" collected by the National Government because of illegal fishing in the EEZ surrounding the islands of the FSM "shall then be distributed to the States affected." This statutory provision recognizes the underlying ownership rights of the four Plaintiff States over the resources in the EEZ, as does 24 F.S.M.C. sec. 502 (5), which says that 50% of all the civil penalties collected from persons who have violated 24 F.S.M.C. sec. 501 must be "distributed to the State affected."

Both the language and the intent behind these statutes make it clear that the revenues were to be shared whenever an illegally fishing vessel was seized in the 12- to 200-nautical-mile maritime region. One clear example illustrating that the National Government shared this interpretation is provided in the September 5, 1990 seizure of the Chinese fishing vessel Ming Feng Tsai, which

was seen fishing at Lat. 05 degrees 26.6' N, Long. 137 degrees 18.3' E., in the southwest corner of the exclusive economic zone surrounding Yap State. See Exhibit O, the Amended Civil Action for Penalties, which describes this incident. This location is considerably farther than 12 nautical miles from any land area, and thus was not within the 12-nautical-mile territorial sea regulated directly by Yap State. Nonetheless, the National Government without hesitation transferred to Yap State 50 percent of the $20,000 criminal fine and $65,000 civil payment that it accepted from the captain and crew of the vessel in settlement of the dispute (see Exhibit P), for a total of $42,500 that went to Yap State. In his December 4, 1990 letter to the FSM President describing this settlement (see Exhibit Q), David B. Webster, the Chief of the Division of Litigation in the FSM Office of the Attorney General, stated unequivocally that "Pursuant to law, one-half of this amount should be transferred to Yap State" (emphasis added). A receipt dated December 21, 1990 (see Exhibit R) indicates that the $42,500 was received by Yap State.

The National Government's statutory obligation under 24 F.S.M.C. 502 and 510 to share the revenues it receives with the affected State is clear. These statutes make sense only if they apply to seizures of vessels fishing illegally in the waters between 12 and 200 nautical miles from land, because if a vessel were to be seized within the 12-nautical-mile territorial sea all of the revenues received from fines and forfeitures must go to the State.

It has been established that because of the language in Article VIII, Section 2 and Article IX, Section 2(m), the States "control ownership and use of marine resources" within the 12-mile zone. FSM v. Oliver, 3 FSM Intrm. 469, 473 (Pon. 1988); Pohnpei v. M/V Zhong Yuan Yu #606, 6 FSM Intrm. 464, 465 (Pon. 1994). Although the National Government can assist the States with regard to enforcement, FSM v. Kotobuki Maru No. 23 (I), 6 FSM Intrm. 65, 70-73 (Pon. 1993), and can deny rights to EEZ waters based on violations of State regulations, FSM v. Hai Hsiang No. 63, 7 FSM Intrm. 114 (Chk. 1995), the resources remain under State jurisdiction and control.

The sharing requirements of 24 F.S.M.C. secs. 502 and 510 thus apply only with regard to forfeitures of vessels seized in the 12-200 nautical mile zone. Surely the States need not share with the National Government when they order the forfeitures of vessels they seize within the 12-mile area or when they impose civil penalties on such vessels. See, e.g.,the Chuuk State Fishery Zone Act of 1983, Chuuk State Law No. 5-92, signed into law April 5, 1984 (and attached hereto as Exhibit S), which says in Section 15(4) that the vessels, gear, and cargo forfeited because of illegal activity shall be sold with the proceeds deposited "in the General Fund of the State, or may be retained for use by, or at the direction of, the government of Truk, or may be distributed by the Authority to persons whose traditional fishing rights have been violated by such vessel." The use of the language "States affected" in 24 F.S.M.C. secs. 502 and 510 thus constitutes a recognition by the FSM

Congress that the States are the underlying owners of the resources even beyond the 12-nautical-mile territorial sea, into and including the 12-200 nautical mile EEZ.

I. The Structure and Composition of the Micronesian Maritime Authority Confirms That the States Are the Underlying Owners of the Ocean Resources Within Their Boundaries.

24 F.S.M.C. sec. 301 establishes the Micronesian Maritime Authority with five members, four of whom are "representatives" of the four States.[8] This structure clearly demonstrates the recognition that the States are the underlying owner of the affected resources and thus must play the dominant role in determining how the resources should be managed and how fishing licenses should be granted and administered.

J. Conclusion.

The entire statutory scheme established to govern offshore fishery resources illustrates and confirms the provisions in the FSM Constitution that establish broad boundaries for the states that include all the ocean space of the country and thus recognize

---

[8] Section 301. Micronesian Maritime Authority - Established.
(1) There is established a Micronesian Maritime Authority composed of five members appointed as follows:
(a) One representative of each State appointed by the President of the Federated States of Micronesia, in consultation with the Governor and Congressional Delegation of the affected State; PROVIDED, however, that no such representative shall also serve as a member of the Board of Directors of the National Fisheries corporation of the Federated States of Micronesia, or any subsidiary or affiliate thereof, during the term of his membership on the authority; and
(B) One at-large member appointed by the President of the Federated States of Micronesia.

the underlying ownership by the States of these resources. Four out of the five members of the Micronesian Maritime Authority are "representatives of the states." Half of the fines and forfeitures of all seized vessels must go to "the affected state." The original legislation allowed the districts to establish their own maritime authorities and govern their fishery resources directly. Traditional and customary Micronesian practices recognize and respect the ownership rights of adjacent islanders over ocean resources, even extending to great distances, and the four States have been consistent in claiming ownership of these resources on behalf of their residents. Although the National Government has the power to "regulate" the resources between 12 and 200 nautical miles from shore, the title and ownership to the resources remains with the States and their residents.

IV. THE PERMIT FEES RECEIVED BY THE NATIONAL GOVERNMENT FROM FISHING LICENSES ARE TAXES, AND ARTICLE IX, SECTION 5 OF THE FSM CONSTITUTION REQUIRES THE NATIONAL GOVERNMENT TO DISTRIBUTE AT LEAST 50 PERCENT OF THESE REVENUES TO THE FOUR PLAINTIFF STATES.

A. "Taxes" Are Funds Collected Through a Procedure Designed to Raise Revenue.

Like all governments, the National and State Governments of the FSM must raise revenue to pay for their responsibilities. A primary method of raising revenue has been to collect permit fees from the fishing companies seeking to harvest fish from the EEZ surrounding the islands of the FSM. These permit fees are based on a percentage of the estimated landed catch, which in turn is based on the size and capacity of the vessels being used by the

companies. The revenues raised from these permit fees far exceed the cost of administering the permitting system and are, in fact, the largest single sources of revenue received by the FSM National Government to support general governmental expenditures. These revenues are, by their very nature and effect, "taxes."

The term "taxation" generally includes "all the various...methods and devices by which revenue is exacted from persons and property for public purposes." 71 American Jurisprudence 2d, State and Local Taxation, Sec. 1, n.1, at 342 (1973)(citing Milwaukee v. Milwaukee & Suburban Transport Corp., 6 Wis. 2d 299, 94 N.W.2d 584 (1959)). An essential element of a "tax" is that it is not a voluntary payment or donation, but is an enforced contribution of a proportionate character, payable in money, and imposed, levied, and collected for the purpose of raising revenue for public or governmental purposes, and not as payment for some special privilege granted or service rendered. 84 Corpus Juris Secundum Taxation, Section 1(b)(1), at 32-33 (1954). The word "tax" has been used to describe a wide variety of burdens, charges, exactions, impositions, or contributions, assessed in accordance with some reasonable rule of apportionment, and collected by the sovereign to defray the necessary expenses of government. A tax is thus any revenue-raising device that apportions the costs of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Welch v. Henry, 305 U.S. 134 (1938); Carmichael v. Southern Coal & Coke Co., 301 U.S 495 (1937); Wainit v. Weno Municipality, 7 FSM

Intrm. 121, 123 (Chk.S.Ct.Tr.1995)(characterizing a license fee as a tax because "the primary purpose of the ordinance is to raise revenue").

When defining the term "tax" under the U.S. Bankruptcy Act, sec. 64(a), the U.S. Court of Appeals for the Ninth Circuit ruled that an assessment was to be characterized as a "tax" if it involved:

> 1. an involuntary pecuniary burden, regardless of name, laid upon individuals or property;
>
> 2. imposed by, or under the authority, of the legislature;
>
> 3. for public purposes, including the purpose of defraying expenses of government or undertakings authorized by it;
>
> 4. under the police or taxing power of the state.

In re Lorber Industries of California, Inc., 675 F.2d 1062, 1066 (9th Cir. 1982). An assessment can thus still be included in the category of a "tax" even if the payer does receive a special benefit, if the moneys received support general governmental responsibilities rather than the specific program that the payer is participating in. See, e.g., Stinnett v. Weno, 6 FSM Intrm. 312 (Chk. 1994)(striking down a license fee imposed on travel agents as an unconstitutional "tax" in violation of Article VIII, Section 3 of the FSM Constitution, which prohibits states from imposing taxes that restrict interstate commerce).

A government can raise general revenue using numerous different forms of assessments that can be characterized as taxes, even if not so named. Taxes can be levied on income, consumption, property, extraction and usage privileges, and licenses, among other things. Taxes can be direct or indirect, specific or ad valorem, general or specific. Assessments recognized as "taxes" in the FSM include taxes on gross income, 54 F.S.M.C. 111 et seq., see Kolonia Consumers' Cooperative Assn. v. Tuuth, 5 FSM Intrm. 68 (Pon. 1991), and Ponape Federation of Cooperative Assns. v. FSM, 2 FSM Intrm. 124 (Pon. 1985); import taxes, 54 F.S.M.C. secs. 201-03, see Gimnang v. Yap, 4 FSM Intrm. 212 (Yap 1990), and Wainit v. Truk State Government, 2 FSM Intrm. 81 (Truk 1985), aff'd, Innocenti v. Wainit, 2 FSM Intrm. 173 (App. 1986); license fees, see Stinnett v. Weno, 6 FSM Intrm. 312 (Chk. 1994), and Actouka v. Kolonia Town Municipality, 5 FSM Intrm. 121 (Pon. 1991); and sales taxes, see Truk Continental Hotel v. Chuuk, 7 FSM Intrm. 117 (App. 1995).

This Honorable Court has struck down assessments enacted by State and municipal governments that have been deemed to be "taxes" and thus in violation of Article VIII, Section 3; Article IX, Section 2(d); Article IX, Section 2(e); or Article IX, Section 2(g) of the FSM Constitution. See Truk Continental Hotel, Inc. v. Chuuk, supra; Stinnett v. Weno, supra; Actouka v. Kolonia Town Municipality, supra; Gimnang v. Yap, supra; and Innocenti v. Wainit, supra.

The broad definition given to the category of a "tax" has also been recognized by the FSM Office of the Attorney General in an

important Opinion Letter issued on February 16, 1989 on the nature of the $5 airport departure fee mandated by the Pohnpei State Legislature, which is attached hereto as Exhibit T. This Opinion Letter discusses whether diplomats must pay this assessment, which the Pohnpei Legislature characterized as a "utilization fee," in light of the exemption from taxes accorded to international diplomats by custom, treaties, and statutes. After discussing the difference between a "tax" and "fee," the Opinion Letter concludes that this assessment is a "tax," because it is designed to raise money and not just to maintain the airport, and hence that diplomats are exempt from payment.

The Opinion Letter of the FSM AG follows the reasoning of cases and commentaries described above and concludes that the essential difference between a "tax" and a "fee" is that "a `tax' is an enforced contribution exacted pursuant to legislative authority for purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or service rendered by a public officer, which is a `fee.'" Opinion letter at 3. Because the primary purpose of the departure "utilization fee" was to support the upkeep of the airport terminal, "which...is obviously a governmental function," it constitutes "a forced contribution of wealth from the general public to fund the needs or functions of the government" and "is another method of taxing the public." Id. at 4. For these reasons, the Opinion Letter's conclusion is that the "utilization fee" is a "tax" and that diplomats are exempt from paying it. Applying the reasoning of

this Opinion Letter to the present case leads to the unmistakable conclusion that the fishing permit fees are also "taxes."

The permit fees received from fishing licenses are best characterized as "excise taxes." These taxes are also known as "privileges taxes," because the taxpayer must obtain a necessary payment in order to be allowed to do something regulated by the government. Excise taxes include charges imposed for engaging in occupations or upon corporate privileges, duties laid upon licensees authorized to pursue certain trades or occupations, and assessments on certain official privileges. 71 Am Jur 2d State and Local Taxation sec. 28 at 361 (1973). A fee does not have to be an obligatory burden to be classified as a "tax." It can be a payment made in exchange for a privilege or the ability to engage in an economic activity. The taxpayer is only obligated to pay if the taxpayer desires to take part in the act or enjoy the privilege taxed.

Sometimes excise taxes charged for the extraction of natural resources are called "severance taxes." In Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), the U.S. Supreme Court upheld the Montana Supreme Court's ruling that the state's exaction of a percentage of the value of coal extracted in the state constituted such a tax. Even though the exaction was based on a substantial percentage (up to 30%) of the value of the extracted coal, it was considered to be a general revenue tax because the revenues generated were used for the general support of the government. Id. at 621. The Court said that these revenues were properly

characterized as a "tax" because they were not an assessment of benefits accruing to the extracting company, but rather constituted a means of distributing the costs of running the government. Id. at 622-23.

As the 1989 Opinion Letter of the FSM Office of the Attorney General (Exhibit T)) recognizes, courts and scholars usually draw a distinction between a "tax," which is a means to raise general revenue to run the government, and a "fee," which is an assessment designed to cover the specific administrative cost of the government performing a specific task requested or needed by the feepayer, such a duplicating court documents. Many assessments characterized as "fees" are actually "taxes." "Obviously, the name given a tax by a taxing authority is not necessarily controlling." Truk Continental Hotel, Inc. v. Chuuk, 7 FSM Intrm. 117, 119 (App. 1995). If the amount charged is revenue-raising rather than cost-reimbursing, then the real nature of the assessment is a "tax," no matter what it might be called. Smith v. Carbon County, 63 P.2d 259 (Utah 1936); see Wainit v. Weno Municipality, supra, 7 FSM Intrm. at 123 (viewing a license fee as a "tax" because "the primary purpose of the ordinance is to raise revenue").

The distinction between a "tax" and a "fee" comes up in cases involving municipalities that have the power to impose "fees" but not to raise general revenues through "taxes." The opinion in New York Telephone Co. v. City of Amsterdam, 613 N.Y.S. 2d 993 (Sup. Ct. App. 1994), explained, for instance, that:

> where a license or permit fee is imposed under the power to regulate, the amount charged cannot be greater than a

> sum reasonably necessary to cover the costs of issuance, inspection and enforcement...To the extent that the fees charged are exacted for revenue purposes or to offset the costs of general governmental functions they are invalid as an unauthorized tax.

Id. at 995 (citations omitted).

Another important illustrative case is American Trucking Assn., Inc. v. Conway, 514 F.Supp. 1341 (D.Vt. 1981), where the court ruled that a "permit fee" assessed by the state against interstate motor vehicles registered out of state was a "tax" within the meaning of a federal statute prohibiting suits in U.S. district courts for injunctive relief from state taxes. The court based its decision on the following factors: (1) the fees exceeded the administrative costs of the registration program, (2) collected fees were earmarked for the general state fund, and (3) the intent of the state legislature in assessing fees was to raise revenue.

Even more directly on point is the opinion in In re Norris, 107 B.R. 592, 598 (E.D.Tenn. Bankruptcy Ct. 1989), where the court ruled that a license fee paid for a hunting or fishing license must be classified as a "tax" under the U.S. Bankruptcy Code, because the revenues collected serve the general public purpose of wildlife management and the "hunting or fishing license bestows no special benefit except the benefit of being left alone by the government."

To summarize this section, any governmental exaction that has as its primary purpose the raising of revenue is a "tax." The central precedents from this Honorable Court to support this definition are Stinnett v. Weno, 6 FSM Intrm. 312 (Chk 1994), and Actouka v. Kolonia Town Municipality, 5 FSM Intrm. 121 (Pon. 1991),

both of which recharacterized license fees as "taxes" and rule that they violated provisions of the FSM Constitution that limit the ability of state and municipal governments to burden interstate businesses, banks, and insurance companies. Also supporting this conclusion is the decision in Wainit v. Weno Municipality, 7 FSM Intrm. 121, 123 (Chk.S.Ct.Tr.1995), where the court determined that an assessment called a license fee was really a "tax" because "the primary purpose of the ordinance is to raise revenue," and the 1989 Opinion Letter of the Office of the FSM Attorney General (Exhibit T) concluding that the airport departure fee established by the Pohnpei Legislature was actually a "tax" and that diplomats were exempt from paying it.

B. The Fishing Permit Fees Are Determined by a Set Formula Based on a Percentage of the Estimated Landed Catch.

Many cases and authors note that the amount of tax that must be paid is typically determined through a ratio or rule of apportionment, although, of course, tax codes almost always contain many exceptions, credits, and adjustments. 84 Corpus Juris Secundum Taxation sec. 1(b)(1) at 32-33 (1954)(citing Northwestern Mut. Life Ins. Co. v. State Bd. of Equalization, 166 P.2d 917 (Cal. App. 1946)). The permit fees collected from corporations receiving fishing licenses are determined based on a ratio or rule of apportionment.

This system is described in a straight-forward fashion in the Two Year Report of the Micronesian Maritime Authority--1992-1993 at

5, where the method for determining the amount to be charged for a permit fee is explained as follows: "Since 1984, most of the fees have been based on certain agreed formulae which determine the fee levels by gear types on a monthly basis" (emphasis added). As explained in the Statement of Facts, above, and as demonstrated in Exhibits C, D, E, and G, in the attached Affidavits of Gerson Jackson and Frederick L. Ramp, and in the August 13, 1990 letter from Peter Sitan, Executive Director of the MMA to the Honorable Feliciano M. Perman of the Pohnpei State Legislature attached as Exhibit F, the permit fees collected by the National Government are based on 5 percent of the estimated landed catch, which in turn is determined by the size and capacity of each fishing vessel, with minor adjustments made in certain situations pursuant to clearly articulated standards. The permit fee can thus be characterized as an excise tax, a privilege tax, a severance tax, or an extraction tax.

As Mr. Sitan's letter (Exhibit F) explains, the National Government, working through the Micronesian Maritime Authority (MMA) and subject to the approval of the FSM Congress, has the authority to exercise discretion in deciding whether to enter into a fishing license agreement and whether to rebate fees to a fishing company in appropriate circumstances. See 24 F.S.M.C. 107, 402, 404-406; Katau Corp. v. Micronesian Maritime Authority, 6 FSM Intrm. 621, 623-24 (Pon. 1994). But the term "rebate fees" (rather than, for example, "negotiate fees") was used in the relevant statutes because of the recognition that the fees in the first

instance are established by a set and automatic formula. "Rebates" are offered according to established criteria to companies that have strong ties to Micronesia (see 24 F.S.M.C. secs. 107, 114, 115, 406-07), that are expected to provide jobs for Micronesians, or that need assistance in starting their operations. See, e.g., 1991-92 Agreement with the Caroline Fishing Corporation, attached as Exhibit U, providing a 100% rebated to this company. Mr. Sitan's 1990 letter says that "Sometimes we go beyond or lower than 5% based on other benefit consideration." Exhibit F at 2. The established and mandatory rate is thus altered only if some comparable benefit is received. The rebate program cannot be arbitrary or capricious. It has been and must be based on the legislative standards laid down in Title 24 of the FSM Code and on Article IV, Section 3 of the FSM Constitution, which prohibits any governmental body from denying the "due process of law" or "equal protection" to any natural or juridical person, and any rebate must be approved by the FSM Congress, 24 F.S.M.C. 405. Taken as a whole, therefore, the payment structure of the permit fees for fishing licenses is like any other tax program--it is based on a ratio or proportionate system but includes exceptions and adjustments to promote established and well-defined governmental goals.

Another recent document confirming the proportionate nature of the permit fee is the Federated States of Micronesia Arrangement for Regional Fisheries Access, Sept. 23, 1995, reprinted in 12 Int'l J. Mar. & Coastal L. 57 (1997), and attached hereto as

Exhibit V. This agreement is designed to promote the growth of domestic tuna industries by harmonizing access requirements and giving preferential access to fishing companies that invest in local infrastructure and jobs. The current parties to this arrangement are the FSM, Kiribati, the Marshall Islands, Papua New Guinea, and the Solomon Islands. Article 4 of Annex IV, Schedule 1, entitled "Fees," says explicitly that the fee to be charged is to be a 5% proportionate share of the value of the expected landed catch: "For each size class, the formula for calculating the fee shall be: FEE=average regional catch per vessel x average price of tuna x 5%." A recent commentary on this important agreement explains it as follows:

> The fees are set at approximately 5 per cent of the value of the catch. This is calculated on the basis of the performance of the vessels in the preceding year and the average price of tuna for the preceding year. The fees are to be paid to the party in whose waters the vessels are licensed to fish. These will be apportioned according to where the fish are caught.

Transform Aqorau and Anthony Bergin, The Federated States of Micronesia Arrangement for Regional Fisheries Access, 12 Int'l J. Mar. & Coastal L. 37, 48 (1997). The 5% charge is thus a regional standard, and its use clearly confirms that the permit fee is a proportionate revenue-raising measure that falls within the category of a tax.

* * * * *

An example of a similar "tax" based on the weight of a truck and the weight of the load it is carrying (as well as the number of miles traveled) can be found in Oregon's Motor Carrier Tax, ORS

767.815 et seq., which was held to be a nondischargeable excise tax rather than a dischargeable fee in Downs v. Maudlin, 99 B.R. 51 (W.D.Wash, Bankruptcy Ct. 1987). The permit fees charged by the FSM National Government to persons receiving fishing licenses are comparable.

V. THE PLAINTIFF STATES ARE ENTITLED TO THE RELIEF REQUESTED IN THEIR COMPLAINT.

A. This Case Presents a Proper Case for the Issuance of a Declaratory Judgment Recognizing the Rights of the States.

Rule 57 of the FSM Rules of Civil Procedure authorizes the issuance of a declaratory judgment in any "case of actual controversy within its jurisdiction." In its ruling of August 30, 1996, this Honorable Court found that this case presented "a controversy which is `definite and concrete,' and which `touch[es] upon the legal relations of parties having adverse legal interests.'" Slip op. at 13 (citing Ponape Chamber of Commerce v. Nett Municipal Government, 1 FSM Intrm. 389, 400 (Pon. 1984)). In the Ponape Chamber of Commerce opinion, the Court also held that "the power to issue declaratory judgments is within the judicial power vested in this Court by Article XI, Section 1 of the Constitution," and that such a declaratory judgment is an appropriate form of judicial relief to determine "the rights or status of the parties." Id. at 398. It is thus clearly appropriate for the Court to issue a declaratory judgment in the

present case.

B. The Plaintiff States Are Entitled to an Injunction Requiring the National Government to Distribute the Permit Fees in Accordance with the Requirements of the FSM Constitution.

For the reasons explained above, the four Plaintiff States are entitled to the revenues received by the Micronesian Maritime Authority from fishing licenses (minus the administrative costs of managing the resources), and the issuance of an injunction ordering the Secretary of the Department of Finance to distribute these revenues to the four States is a proper order in this situation under Rule 65 of the FSM Rules of Civil Procedure.

C. The Plaintiff States Are Entitled to Damages Equivalent to the Amount of Revenues the States Should Have Received in Previous Years Since 1979, Plus Interest.

The Plaintiff States have been entitled to the fishing revenues, less the administrative costs incurred by the Micronesian Maritime Authority, but plus interest, since these permit fees were first received by the National Government. The States are not barred from pursuing this remedy by the passage of time, because statutes of limitation do not run against governmental bodies. See, e.g., Federated States Development Bank v. Yap Shipping Cooperative Association, 3 FSM Intrm. 84, 86 (Truk 1986), where the Court stated that "[t]he general rule is that statutes of limitation do not run against the sovereign" (citing 51 Am. Jur. 2d Limitations of Actions sec. 409 (1970)). The Court explained that "[t]he

policy behind the rule is that the public interest should not be prejudiced by the negligence of public officials." Id. (citing Guaranty Trust Co. of New York v. United States, 304 US. 126, 82 L.Ed. 1224, 1228 (1938)). In the present case, the state officials have not been negligent in asserting their rights. They have repeatedly sought to address this issue through resolutions enacted at leadership conferences and through other opportunities, and have resorted to litigation only as a last resort. See, e.g., Resolution No. 1-91-003 of the First State Legislatures Leadership Conference, Chuuk, April 24, 1991, attached hereto as Exhibit W. The rule that statutes of limitation should not run against a sovereign is thus fully applicable in this situation.

VI. CONCLUSION

For the reasons stated above, the States of Chuuk, Kosrae, Pohnpei, and Yap respectfully request this Honorable Court to grant this Motion for Summary Judgment and order the relief as requested.

Dated: Honolulu, Hawaii _____.

_____
JON M. VAN DYKE
ANDREA HILLYER
CYPRIAN MANMAW
RICHARD C. MARTIN
MAKETO ROBERT
Attorneys for Plaintiffs