Standing Committee Report No: CC-SCR-04-06

DATE: March 11, 2020

Re: CC-PR-04-10

The Honorable Redley Killion
President
Fourth Constitutional Convention of the
Federated States of Micronesia
Palikir, Pohnpei 96941

Dear Mr. President:

Your Committee on Public Finance and Revenue to which was referred Delegate Proposal No. CC-PR-4-10, entitled:

"A PROPOSAL TO AMEND ARTICLE IX, SECTION 6 OF THE CONSTITUTION OF THE FEDERATED STATES OF MICRONESIA FOR THE PURPOSE OF ALTERING THE DISTRIBUTION OF NET REVENUE DERIVED FROM SEABED AND SUBSOIL MINERAL AND OTHER NON-LIVING RESOURCES EXPLOITED FROM THE JURISDICTION OF THE FEDERATED STATES OF MICRONESIA BEYOND 12 MILES FROM ISLAND BASELINES."

Article IX, Section 6 of the FSM Constitution currently provides that:

"Net revenue derived from ocean floor mineral resources exploited under Section 2(m) shall be divided equally between the national government and the appropriate state government."

The intent and purpose of the proposal is to (a) adjust the division of net revenue from the exploitation of minerals and non-living resources within the jurisdiction of the of the Federated States of Micronesia beyond the 12 miles from island baseline, and also to include the exploitation of seabed and subsoil mineral resources under Section 2(m) of Article IX of the Constitution of the Federated States of Micronesia, including the minerals and other non-living resources within the Extended Continental Shelf within the jurisdiction of the Federated States of Micronesia pursuant to international law and treaties; (b) in exploiting the natural resources beyond the 12 miles from island baselines, revenue collected from mining exploitation shall be 60% for the appropriate State,

and the remaining to the National Government; and (c) when two or more State governments have a claim to the revenues, each State shall be entitled to an equal percentage.

The proposal is intended to replace the term "ocean floor" with "seabed and subsoil" because the latter term reflects the language of the FSM Constitution, as well as the language of the United Nations Convention on the Law of the Sea of 1982 (UNCLOS) (including applicable international treaties) which delimit the FSM Exclusive Economic Zone (EEZ) oceanic jurisdiction. The term "non-living resources" is also a preferred term in the proposal, because it includes mineral resources, as well as petroleum resources and non-living resources that are not considered mineral resources as used in Article IX, Section 2(m) of the Constitution.

Your Committee also discussed the legal principles and elements in connection to seabed minerals in relation to the Continental Shelf Extension Doctrine. The roles, responsibilities, obligations, and objectives of UNCLOS was also articulated by the originator of the proposal to enable the Committee to understand the scope, content, and depth of the proposal. The question of who owns the minerals in the EEZ and the Continental Shelf Extension Zone was discussed. In addition, your Committee discussed the following questions: At what point can a state claim shared revenue from minerals mined in certain marine zones based on the concepts of "geomorphological", "geophysical", and "geological" definitional issues as defined by UNCLOS (and relevant treaties) and the jurisdictional boundaries established by the FSM Constitution? Should a State have the legal right to claim revenues mined in a zone that is technically part of its territorial zone when applying the three concepts of "geomorphological", "geophysical", and "geological"? If so, can that State share the revenue with other States and the national government to honor the idea of maintaining unity?

The FSM has already claimed certain areas outside its EEZ based on the extended continental shelf doctrine, for example, with Papua New Guinea and the Solomon Islands. Other FSM States stand to benefit from the new technical definitions which allows claims to territory that in turn would allow a State to claim revenues in certain areas of the maritime zones especially with regard to the continental shelf extension. It was expressed in your Committee that the FSM Congress has the power to regulate mining in FSM waters to the extent to which UNCLOS allows oceanic nation-states to claim economic resources and thus, associated revenue. Your Committee is in agreement that the Constitution should recognize the States that are situated at the point of the relevant geological marine zones to claim certain revenues from mining exploitation should be entitled to those revenues.

Your Committee incorporates in full the attached briefing paper (Attachment A) as a part of the this Committee Report.

For the reasons stated herein, your Committee on Civil Liberties and Traditions is in accord with the intent and purpose of the committee proposal attached hereto and recommends its passage on First Reading, and that it be placed on the Calendar for Second Reading for review by your Committee of the Whole, then placed on the Calendar for Final Reading after review by your Committee on Style and Arrangement.

Respectfully submitted,

Chairman Peter Sitan

Vice Chairman Tendy Tesiwo Liwy

Delegate Jack S. Fritz

Delegate Myron I. Hashiguchi

Delegate Cindy ~~S Mori~~ SIREN MORI

Delegate Camillo Noket _

Canney L. Palsis

Delegate Johnson A. Asher

Delegate Berney Martin

Delegate Ricky F. Cantero

Delegate Akillino H. Susaia

Delegate Andy P. Choor

Delegate Andrew R. Yatilman

ATTACHMENT A
STANDING COMMITTEE REPORT NO. 04-06

I. Introduction

This briefing paper discusses several major elements pertaining to Proposal No. CC-PR-4-10 to amend Article IX, section 6, of the Constitution of the Federated States of Micronesia, regarding the distribution of net revenue from the exploitation of seabed and subsoil mineral and other non-living resources within the jurisdiction of the Federated States of Micronesia beyond 12 miles from island baselines, as introduced to the Fourth Constitutional Convention of the Federated States of Micronesia.[1] Specifically, this paper focuses on the major elements of "jurisdiction," the composition of the "ocean floor," the types of resources to be exploited, and how a state government qualifies as an "appropriate" state government for the purpose of distributing net revenue under the proposed amendment, particularly as those elements pertain to international law. This briefing paper is in the form of a set of FAQs addressing those elements.

II. FAQs

- Under the Constitution of the Federated States of Micronesia ("FSM"), what is the territorial jurisdiction of the FSM?
    - According to Article I, section 1, of the FSM Constitution, the territorial jurisdiction of the FSM includes the "waters connecting the islands of the archipelago [i.e., the landmasses of the FSM]"—which the Constitution calls "internal waters"—and "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." However, per the same section 1, this territorial jurisdiction is "limited by the international treaty obligations assumed by the Federated States of Micronesia." The FSM is currently a State Party to, among other things, the 1982 United Nations Convention on the Law of the Sea ("UNCLOS") — informally considered by the international community as the "constitution for the Ocean" and containing detailed provisions on the description and delineation of maritime zones—as well as several bilateral maritime delimitation treaties with neighboring countries, all of which potentially limit the FSM's territorial jurisdiction, as appropriate.
    - UNCLOS confers onto each State Party a number of entitlements to maritime zones and spaces generated by each State Party. Specifically, each State Party has

---

[1] The text of the amendment proposal is as follows:

> Section 6. Net revenue derived from ~~ocean floor~~ seabed and subsoil mineral and other non-living resources exploited from the jurisdiction of the Federated States of Micronesia beyond 12 miles from island baselines ~~under Section 2(m)~~ shall be divided ~~equally~~ between the national government and the appropriate state government or state governments. Where only one state government is entitled to such net revenue, the state government shall be entitled to no less than sixty percent (60%) of the revenue. Where two or more state governments are entitled to such net revenue, such state governments shall be entitled to no less than sixty percent (60%) of the revenue, divided equally among them. Congress shall give effect to this provision by statute in a manner consistent with the international treaty obligations of the Federated States of Micronesia.

sovereignty over its territorial sea (i.e., a belt of sea up to 12 nautical miles measured from the baselines of the State Party determined in accordance with UNCLOS) and its internal waters (i.e., waters on the landward side of the baselines of the State Party); ***sovereign rights*** for specific purposes over its contiguous zone (i.e., a marine space up to 24 nautical miles measured from the baselines of the State Party determined in accordance with UNCLOS — essentially, the territorial sea plus an additional 12 nautical miles), its exclusive economic zone (i.e., a marine space up to 200 nautical miles from the baselines of the State Party determined in accordance with UNCLOS), and its continental shelf (see discussion below, including on an "extended continental shelf"), with such sovereign rights falling short of conferring full sovereignty onto the coastal State for those maritime zones; and ***jurisdiction*** over all the above-mentioned maritime zones and spaces.

- In light of the foregoing, it is more appropriate for the proposed amendment to reference the ***jurisdiction*** of the FSM rather than, for example, the ***waters*** of the FSM, as the latter could be interpreted to be limited to just the water column over which the FSM has sovereignty/sovereign rights/jurisdiction and thus exclude solid features of the marine space of the FSM, whereas the former applies to all of the FSM's marine spaces, liquid and solid, including the continental shelf beyond 200 nautical miles from the baselines of the FSM (i.e., the so-called "extended continental shelf," as discussed below).
- The proposed amendment is limited to the seabed and subsoil of the FSM beyond 12 miles from island baselines—i.e., beyond the territorial sea. Article IX, section 2(m) of the Constitution expressly delegates to the FSM Congress the power 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." The Constitution is silent on the power to regulate similar such ownership, exploration, and exploitation of natural resources within 12 miles from island baselines of the FSM, so such power rests with the respective state governments.
- It bears mentioning that UNCLOS uses "nautical miles" when measuring maritime spaces, whereas the FSM Constitution uses "miles" in the same context. A nautical mile is slightly longer than a mile—i.e., a nautical mile is 1.151 miles. However, it is not necessary to use nautical miles in the Constitution in this context or in the amendment proposal, because Article I, section 1 of the Constitution already qualifies the territorial jurisdiction of the FSM by the FSM's international treaty obligations. Thus, to the extent that the Constitution and amendments thereto pertain to the measurement of marine spaces already defined by UNCLOS, it is appropriate to read the term "nautical miles" into the Constitution's usage of "miles," where applicable. Similarly, in this briefing paper, the term "miles" (when referenced by itself) should be read as "nautical miles."

- What is the composition of the "ocean floor" of the FSM under relevant law, including the international treaty obligations of the FSM?
    - The current language in Article IX, section 6 of the FSM Constitution references the "ocean floor." However, the Constitution does not define "ocean floor." The term could be deemed to be self-explanatory and not needing interpretation. However, there are references elsewhere in the Constitution to geological features that arguably

constitute elements of the "ocean floor." Article I, section 1 of the FSM Constitution identifies various elements of the marine space that are part of the FSM's territorial jurisdiction, including the seabed, subsoil, and continental shelves of the FSM.

- Although the three elements of seabed, subsoil, and continental shelves are presented in the Constitution as if separate and distinct, under article 76 of UNCLOS, a continental shelf of a coastal State[2] is comprised of "***the seabed and subsoil*** of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." (Emphasis added.) While somewhat complicated, the UNCLOS definition makes clear that a continental shelf need not be distinct from the seabed and subsoil but can instead be comprised of the latter two. It is also possible for the seabed and subsoil to be present in the absence of a continental shelf—for example, a land mass generates an exclusive economic zone but not a qualified submarine area that extends beyond its territorial sea (at least in a manner for which "natural prolongation" can be demonstrated in accordance with UNCLOS), in which case, the Ocean floor beyond the territorial sea would qualify as seabed/subsoil but not a continental shelf. Additionally, article 76 of UNCLOS exempts the "deep ocean floor" from its definition of the continental shelf. Thus, any seabed and subsoil situated under the exclusive economic zone generated by a land mass of the Federated States of Micronesia will not qualify as part of the continental shelf of the Federated States of Micronesia under article 76 of UNCLOS if the seabed and subsoil are sufficiently deep to be part of the "deep ocean floor."
- Considering the foregoing, it is more accurate to say "seabed and subsoil" rather than just "ocean floor," as the term "seabed and subsoil" more accurately reflects relevant usage in domestic and international law, including the FSM's National Seabed Resources Act of 2014.[3] "Seabed and subsoil" is also a better formulation than just "continental shelf," as a coastal State does not always generate the latter, whereas a coastal State's jurisdiction almost always includes seabed and subsoil.

- What types of resources are subject to exploitation under the proposed amendment?
  - The proposed amendment addresses the exploitation of "mineral and other non-living resources." The current language in Article IX, section 6 of the FSM Constitution addresses the exploitation of "mineral resources." The Constitution does not define "mineral resources." Similarly, the FSM National Seabed Resources Act of 2014 — which is the primary statutory mechanism by which the FSM regulates the exploitation of mineral resources on the seabed and subsoil of the FSM's marine spaces — does not define mineral resources, except that it does exclude from the Act's scope (in relevant part) the "exploration for or recovery of petroleum." Conversely, article 77 of UNCLOS, on the rights of the coastal State over the continental shelf, recognizes the sovereign right of the coastal State to explore and

---

[2] The capitalized form of "State" in this paper to refer to countries, as is the practice in international law, and the lower-case form to refer to one of the four states of the FSM.

[3] For a copy of the Act (Public Law No. 20-102), see http://cfsm.gov.fm/ifile/20%20congress/LAWS/PUBLIC_LAW_20-102.pdf.

exploit the "natural resources" of its continental shelf and defines "natural resources" to include "the mineral and ***other non-living resources*** of the seabed and subsoil" (along with certain living resources). (Emphasis added.) Therefore, in order to be as comprehensive as possible, in line with UNCLOS, the proposed amendment references the more expansive formulation of "mineral and other non-living resources," which should capture petroleum and other non-living resources that might not be deemed to be "mineral" resources.

- It bears mentioning that minerals can take liquid and gaseous forms as well as solid forms, and petroleum arguably qualifies as a liquid mineral. Nevertheless, for the avoidance of doubt as well as to future-proof the proposed amendment, the more expansive formulation of "mineral and other non-living resources" is preferable.
- It also bears mentioning that under the FSM's National Seabed Resources Act of 2014 as well as UNCLOS (as pertaining to the Area, i.e., the seabed and subsoil of the Ocean floor beyond the jurisdiction of coastal States), the process of exploitation is essentially the final stage of a multi-stage process. The first stage is the prospecting stage, where interested entities survey the seabed and subsoil in limited ways, with minimal or non-existent extraction. The second stage is the exploration stage, where some minimally disruptive extraction might take place solely for initial scientific examination of the quality and value of the extracted resource. Exploitation—i.e., full-blown extraction—is the third stage.

- How does an FSM state government qualify as an "appropriate state government" under the amendment proposal, in line with the international treaty obligations of the FSM?
  - A state government qualifies as an "appropriate state government" if the government passes one of two tests:
    - ***Test 1***: the exploitation of the relevant resource takes place in the seabed and subsoil of the marine space that both falls within the official boundaries of the state and is beyond 12 miles from the island baselines of that state;
      - Under Test 1, the proposed amendment envisions a state government being an "appropriate one" if the exploitation of the resource occurs within the marine space contained in the official boundaries of the state (as recognized by the FSM's own official charts/maps/lists of geographical coordinates of points in accordance with Article I, Section 2, of the FSM Constitution) and beyond the territorial sea generated by the land territory of the state. This is the case even if the resource being exploited is part of a resource "bed" that crosses the official boundary between multiple states. It is the point of extraction that matters for the purpose of distribution of net revenue under the proposed amendment.
    - ***Test 2***: the exploitation of the relevant resource takes place in the seabed and subsoil of the continental shelf of the Federated States of Micronesia beyond 200 miles from the island baselines of that state, as long as the state government can demonstrate the geomorphological, geophysical, and geological continuity between the land territory of that state and the continental shelf area beyond 200 miles from the island baselines of that state, in accordance with the international treaty obligations of the Federated States

of Micronesia, including the provisions in UNCLOS on what is informally called an "extended continental shelf."

- Test 2 involves what is informally called an "extended continental shelf," as defined by UNCLOS. Specifically, under article 76 of UNCLOS, the continental shelf of a coastal State is comprised of "the seabed and subsoil of the submarine areas that extend beyond its territorial sea ***throughout the natural prolongation of its land territory to the outer edge of the continental margin***, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." (Emphasis added.) If the "outer edge of the continental margin" is more than 200 nautical miles from the baselines of the coastal State, and if there is a "natural prolongation" between the coastal State's land territory to that outer edge, then that marine space is informally called an "extended continental shelf." (UNCLOS does not actually use the phrase "extended continental shelf," but it is common shorthand for the concept among law of the sea experts and practitioners.) The coastal State has jurisdiction over such an "extended continental shelf," as discussed above.
- Determining the "outer edge of the continental margin" when there is an "extended continental shelf" is a technical exercise that is beyond the scope of this briefing paper to discuss in detail. Essentially, according to article 76 of UNCLOS, if a continental shelf extends more than 200 nautical miles from the baselines of the coastal State, then the coastal State establishes the outer edge of the continental margin by marking fixed points and drawing lines between them in reference to certain features and/or distances in connection to the "foot of the continental slope" (which is also defined in article 76). Additionally, the fixed points comprising the outer limits must not exceed either 350 nautical miles from the baselines of the coastal State or 100 nautical miles from the 2,500 metre "isobath," which article 76 defines as a "line connecting the depth of 2,500 metres." It is possible for the outer limits to be more than 350 nautical miles from the baselines, using the "isobath" constraint.
- For an "extended continental shelf" under UNCLOS, in addition to determining the "outer edge of the continental margin," the coastal State must also demonstrate the "natural prolongation" of its land territory all the way to that "outer edge." The standards by which a coastal State demonstrates such "natural prolongation" have been established by the Commission on the Limits of the Continental Shelf ("CLCS"). Per article 76 of UNCLOS, the CLCS is a body created by UNCLOS to "make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding." According to

the CLCS, the primary way for a coastal State to demonstrate "natural prolongation" is by demonstrating (typically through surveys, mapping exercises, and similar scientific and technical studies) the geomorphological, geophysical, and geological continuity between the land territory of the coastal State and the continental shelf that the coastal State is claiming as falling under the coastal State's jurisdiction, including beyond 200 nautical miles from the coastal State's baselines. If the coastal State claims an "extended continental shelf" but is unable to demonstrate that its land territory continues without a relevant "break" until the outer edge of the claimed "extended continental shelf," then the claim will likely not be recognized by the CLCS. A "break" can occur when, for example, the seabed and subsoil appear to dip significantly as they progress outward from the land territory and either remain dipped or eventually rise; the seabed and subsoil beyond the dip would no longer be part of the coastal State's "extended continental shelf."

- With regard to multiple "appropriate" state governments under the proposed amendment, it is possible for the land territories of two or more states of the Federated States of Micronesia to generate the same continental shelf that extends beyond 200 miles from their island baselines, in accordance with UNCLOS and other international treaty obligations of the Federated States of Micronesia. If the exploitation of resources under the proposed amendment takes place in that "extended continental shelf," and if multiple state governments demonstrate geomorphological, geophysical, and geological continuity (per CLCS standards) between the land territories of their states and that "extended continental shelf" in accordance with UNCLOS and other international treaty obligations of the Federated States of Micronesia, then those state governments qualify as "appropriate" under the proposed amendment.

Committee Proposal No. **04-06**
Committee on Public on Public Finance and Revenue
Standing Committee Report No. **CC-SCR-04-06**

Relating to the distribution of net revenue derived from seabed and subsoil mineral and other non-living resources exploited from the jurisdiction of the Federated States of Micronesia beyond 12 miles from island baselines.
RESOLVED, that the following be agreed upon as an amendment to the Constitution:

ARTICLE IX

Section 6. Net revenue derived from ~~ocean floor~~ seabed and subsoil mineral and other non-living resources exploited from the jurisdiction of the Federated States of Micronesia beyond 12 miles from island baselines ~~under Section 2(m)~~ shall be divided ~~equally~~ between the national government and the appropriate state government or state governments. Where only one state government is entitled to such net revenue, the state government shall be entitled to no less than sixty percent (60%) of the revenue. Where two or more state governments are entitled to such net revenue, such state governments shall be entitled to no less than sixty percent (60%) of the revenue, divided equally among them. Congress shall give effect to this provision by statute in a manner consistent with the international treaty obligations of the Federated States of Micronesia.

Date: March 11, 2020 Offered by: Committee on Public Finance and Revenue