

INTERNATIONAL LAW COMMISSION

**PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS**

COMMENTS FROM THE GOVERNMENT OF  
THE FEDERATED STATES OF MICRONESIA

29 JANUARY 2016

1. The Government of the Federated States of Micronesia (FSM) welcomes the opportunity to present Comments to the International Law Commission on the topic of the protection of the environment in relation to armed conflicts. The hundreds of islands that make up the FSM have a long history of being theaters of war and staging grounds for military activities, particularly in the prelude to and during World War II. The islands of the FSM have also been sites of occupation and colonization by a series of world powers, from the Spanish during much of the 19<sup>th</sup> century, the Germans in the late 1800s, the Japanese in the first part of the 20<sup>th</sup> century, and the United States of America in the post-World War II era. Colonial administration, military occupation, and war altered much of the pristine and diverse natural environment of the FSM, with forests felled, shorelines reshaped, coral reefs uprooted, and sea beds dredged in order to meet the administrative and military objectives of foreign powers. Wrecks of military ships and aircraft, as well as hulking weaponry and unexploded ordnances, litter the land and sea of the FSM, remnants of intense fighting during World War II and the massive buildup that preceded combat activities. In the Chuuk Lagoon, the former headquarters of the Japanese naval fleet in the Pacific prior to and during World War II, there are over 60 military wrecks in an area of only 40 miles wide. The wrecks retain large caches of oil that have reportedly begun leaking into the waters of the Chuuk Lagoon. In Ulithi Atoll, a US military vessel sunk during World War II has already leaked into the water space of the Atoll, resulting in millions of dollars of environmental damage and disrupting the maritime food supply of the inhabitants of Ulithi. The wounds of war continue to fester in the FSM, with the most potent threats directed at the FSM's fragile natural environment and the indigenous population that depends on the environment for sustenance, shelter, economic gain, and cultural life. The FSM therefore has a keen interest in the Commission's consideration of the topic of the protection of the environment in relation to armed conflicts.
2. As a preliminary matter, the FSM supports the plan by Special Rapporteur Marie G. Jacobsson (as reflected in the first set of draft principles provisionally adopted by the Drafting Committee) to analyze the topic in three phases: preparations for potential armed conflict; the conduct of armed conflict; and post-conflict measures in relation to environmental damage, including reparations. An armed conflict does not occur in a vacuum. The planning for a conflict often inflicts stark harm to natural environments, as potential belligerents alter landscapes and marine areas to safeguard their positions, marshal natural resources, and prepare for launching offensives. Similarly, the post-conflict period is usually not devoid of negative consequences for the environment, as the conflict's victor alters the territory that it won and now occupies, and as the damage wrought during hostilities remains—if not worsens—without redress. The obligations of belligerents—potential and actual—under international law in relation to the protection of the environment span all three phases identified by Special Rapporteur Jacobsson. The FSM's Comments will address elements that arise in and across all three phases.
3. As another preliminary matter, the FSM supports Ms. Jacobsson's use of working definitions for "armed conflict" and "environment" for the duration of the Commission's analysis of the topic, bearing in mind that such definitions are without prejudice to definitions codified and/or adopted in existing treaties, case law, and other sources of international law.

4. As a further preliminary matter, the FSM accepts the current preference of Ms. Jacobsson to not focus on the use of specific weapons and their impacts on the environment, with the understanding that the Commission's consideration of the topic of the protection of the environment in relation to armed conflicts necessarily encompasses any and all types of weapons that may be utilized in an armed conflict, whether such weapons are permitted or prohibited by international law.
5. As a final preliminary matter, the FSM strongly stresses the need for the Commission to consider the connections between the protection of the environment and the safeguarding of cultural heritage, particularly that of indigenous peoples. As the Inter-American Court of Human Rights noted in *Río Negro Massacres v Guatemala*:

The culture of the members of the indigenous communities corresponds to a specific way of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they constitute an integral component of their cosmovision, religious beliefs and, consequently, their cultural identity.<sup>1</sup>

The indigenous population of the FSM—over 100,000 inhabitants of 600-plus islands—shares this view of the interlinkages between cultural integrity and the environment and understands the need to protect the environment as a vital component of cultural life and identity. Insofar as belligerents have legal obligations to protect the environment in relation to their armed conflict, so too must those belligerents have legal obligations to ensure that they protect all the facets of life that depend on the environment, including cultural heritage and practice.

6. The following Comments are submitted in response to the call of the Commission in paragraphs 27 and 28 of its report on the work of its sixty-seventh session for feedback on a number of elements. Specifically, the Comments highlight treaties and national legislation ratified and implemented by the FSM and considered applicable in relation to armed conflicts. The Comments also discuss a number of other instruments—including, but not limited to, environmental management policies, regulations, and Rules of Engagement for military forces—that aim to protect the environment in relation to armed conflicts, including through the use of preventive and remedial measures.

### **Multilateral treaties with universal application**

7. The FSM is a Party to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I). Article 35 of Additional Protocol I states:

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<sup>1</sup> *Río Negro Massacres v Guatemala*, Judgment (Preliminary Objection, Merits, Reparations and Costs), Case No C-250, 4 September 2012, para 177 n 266

3. It is prohibited to employ methods or means of warfare which are intended, or maybe expected, to cause widespread, long-term and severe damage to the natural environment.<sup>2</sup>

Article 55 of Additional Protocol I states:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited<sup>3</sup>

The FSM subscribes fully to the prohibitions in Articles 35 and 55 of Additional Protocol I. The intentional destruction of the natural environment for military gain is a type of total warfare that is abhorrent under international law, particularly in situations where populations depend on that natural environment for survival. Article 55, para 1 highlights the critical connection between the protection of the natural environment and the maintenance of the health and survival of the population that lives in and/or depends on the environment.

8. The FSM is a Party to the following disarmament treaties that (at least indirectly) protect the environment in relation to armed conflicts: the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT); and the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC). The FSM is also a Party to the 1996 Comprehensive Nuclear Test Ban Treaty (CTBT). Although the CTBT has not entered into force due to the non-ratification of eight key States, over 160 States have ratified the CTBT, which the FSM considers to be evidence of the prevailing sentiment of the international community in favor of banning nuclear weapons tests. All three instruments underscore the environmentally destructive nature of certain types of weapons, whether they are deployed in armed conflict or tested as deterrents to potential belligerents. Insofar as the obligation to protect the environment in relation to armed conflicts encompasses multiple temporal phases (including the period prior to the commencement of actual hostilities), the FSM views the testing, proliferation, and deployment of the weapons covered under the NPT, CWC, and CTBT as violations of those obligations
9. The FSM is a Party to a number of multilateral environmental agreements—both universal and regional—that provide for their application in relation to armed conflicts, whether directly or indirectly. The agreements are: the 1982 United Nations Convention on the Law of the Sea (UNCLOS); the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea Convention), as well as two of its Protocols—the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping, and the Protocol Concerning Co-

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<sup>2</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art 35(3), June 8, 1977, 1125 U N T S 3

<sup>3</sup> Id., art 55

operation in Combating Pollution Emergencies in the South Pacific Region (Pollution Emergencies Protocol); the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention); the 1992 Convention on Biological Diversity (CBD); the 1993 Agreement Establishing the South Pacific Regional Environment Programme (later called the Secretariat of the Pacific Regional Environment Programme, or SPREP) (SPREP Agreement); the 1995 Convention to Ban the importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (Waigani Convention); and the 2001 Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention).

10. UNCLOS establishes a multi-zonal system of regimes for maritime areas, including territorial seas, exclusive economic zones, and the high seas. Each coastal State has sovereignty and/or jurisdiction over, *inter alia*, its territorial sea and exclusive economic zone, while all States enjoy the regime of the freedom of the high seas. All States that interact with a coastal State's territorial sea and exclusive economic zone must show due regard to the rights and duties of the coastal State to protect and preserve the natural environment in those maritime zones, including from harmful military activities. This applies even to warships or other government ships operated for non-commercial purposes and flagged by States. A coastal State can require such ships to depart its maritime areas if the ships violate the coastal State's laws and regulations regarding passage through the coastal State's waters, including laws and regulations that aim to protect the coastal State's marine environment. Similarly, each State that enjoys the freedom of the high seas must show due regard to the enjoyment of that same freedom by other States. Military activities are permissible on the high seas, as long as they are for peaceful purposes. Assuming that a State engages in activities on the high seas (e.g., scientific research) that promote the protection and sustainable management of the natural environment in the high seas, all other States must show due regard to such activities when they conduct their own activities in the high seas, including military activities. The FSM fully subscribes to these understandings of the maritime regimes under UNCLOS.<sup>4</sup>
11. Primary objectives of the Basel Convention include the placement of conditions on the import, export, and other transboundary movements of certain "hazardous wastes" by Parties to the Convention, with a general prohibition on the transboundary movements of hazardous wastes between Parties and non-Parties. Parties to the Convention are obligated to minimize the generation of hazardous wastes, as well as to ensure that if such wastes are imported or exported, then such transboundary movements must be "conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement."<sup>5</sup> Parties are also obligated to ensure that the persons who manage hazardous wastes within their jurisdictions shall

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<sup>4</sup> For further elaboration on these understandings, *see* United Nations Convention on the Law of the Sea arts 17-21, Dec 10, 1982, 1833 U N T S 3 (on innocent passage and the laws and regulations of coastal States relating thereto), *id*, arts 30-31 (on the authority of a coastal State to compel departure from its territorial sea of a warship that does not comply with the coastal State's laws and regulations regarding innocent passage in its territorial sea), *id*, arts 55-56 (on the rights, jurisdiction, and duties of a coastal States in its exclusive economic zone), *id*, art 58 (on the rights and duties of other States in the exclusive economic zone of a coastal State), and *id*, arts 86-88 (on the regime of the freedom of the high seas and the reservation of the high seas for peaceful purposes)

<sup>5</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 4 2(d), Mar. 22, 1989, 1673 U N T S 126

“take such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and the environment”<sup>6</sup> Parties are additionally obligated to “co-operate with each other in order to improve and achieve environmentally sound management of hazardous wastes and other wastes.”<sup>7</sup>

International co-operation includes the active “transfer of technology and management systems related to the environmentally sound management of hazardous wastes and other wastes,”<sup>8</sup> particularly from developed country Parties to developing country Parties. It is the FSM’s view that “hazardous wastes” produced by military activities of Parties (e.g., military vessels with intact and flammable fuel caches that are decommissioned and subject to scrapping) are subject to the conditions and obligations of the Convention, whether such wastes are produced before, during, or after armed hostilities. Parties must take appropriate measures to minimize the harmful consequences to the environment arising from the generation, management, and transboundary movement of hazardous wastes, including through international transfers of technology and systems to manage hazardous wastes.

12. One of the core principles of the CBD is that its Contracting Parties have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”<sup>9</sup> It is the FSM’s view that this no-harm principle applies in armed conflict, including during the build-up to actual military hostilities and after those hostilities end.<sup>10</sup> Contracting Parties to the CBD can honor and implement this principle by, *inter alia*, designating protected areas or areas where special measures must be taken to conserve biological diversity, prior to the commencement of armed

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<sup>6</sup> Id., art. 4.2(c)

<sup>7</sup> Id., art. 10.1

<sup>8</sup> Id., art. 10.2(d)

<sup>9</sup> Convention on Biological Diversity art. 3, June 5, 1992, 1760 U.N.T.S. 79 (hereinafter “CBD”)

<sup>10</sup> The “no harm” principle is well-established in international law. For example, the preamble to the 1992 United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S., recalls that

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction

The roots of this enunciation of the “no harm” principle can be traced to the famed 1941 Trail Smelter Arbitration between the United States of America and Canada, *Trail Smelter Arbitral Tribunal (US v. Can.)*, 35 Am. J. Int’l L. 684, 716 (1941), which involved a Canadian smelter that emitted sulfur dioxide causing harm to landowners downwind in the United States, as well as through the adoptions of Principle 21 of the Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/Conf.48/14/Rev., and Principle 2 of the Rio Declaration on Environment and Development, June 13, 1992, U.N. Doc. A/CONF.151/26 (vol. I) (hereinafter “Rio Declaration”). Additionally, the international community has increasingly viewed climate change as having serious implications for international security and other cross-border affairs, with significant linkages to armed conflicts and military defense objectives. The anthropogenic degradation of the natural environment and the resultant climate change effects can arguably be linked to the outbreak and persistence of armed conflicts, especially those involving scarce natural resources. *See, e.g.*, Statement by the President of the United Nations Security Council, 6587th meeting, July 20, 2011, U.N. Doc. S/PRST/2011/15 (expressing the Security Council’s “concern that possible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace and security”)

hostilities.<sup>11</sup> Contracting Parties to the CBD can also rehabilitate and restore ecosystems degraded by armed conflict<sup>12</sup>. Additionally, the CBD obligates each Contracting Party, when its activities or other actions under its jurisdiction or control pose “imminent or grave danger or damage . . . to biological diversity” in the jurisdiction of another State, to “initiate action to prevent or minimize such danger.”<sup>13</sup> The FSM notes that the CBD states that the provisions of the CBD shall not affect the existing rights and obligations of Contracting Parties under other international agreements, “except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.”<sup>14</sup> In the FSM’s view, this prioritization of the CBD persists during armed conflict, including the build-up to and aftermath of actual hostilities.

13. The primary objective of the Stockholm Convention is to “protect human health and the environment from persistent organic pollutants [i.e., POPs],”<sup>15</sup> which are highly toxic chemicals that resist natural degradation and accumulate in biospheres, and which can be transported through air, water, and migratory species across international boundaries and into human populations that are not responsible for their production or use, especially indigenous communities whose traditional foods are sensitive to such contamination.<sup>16</sup> To meet that objective, the Convention obligates its Parties to eliminate or restrict the production and use of POPs listed in the Annexes to the Convention.<sup>17</sup> Parties can produce or use some (but not all) regulated POPs for limited, exempted purposes, primarily as insecticides or pesticides. Such production or use must be “carried out in a manner that prevents or minimizes human exposure and release into the environment,”<sup>18</sup> and Parties must manage stockpiles of such POPs “in a safe, efficient and environmentally sound manner.”<sup>19</sup> Parties must dispose of POPs in their jurisdictions that are not covered by exemptions by either ensuring that the POPs are “destroyed or irreversibly transformed so that they do not exhibit the characteristics of [POPs],” or by disposing them “in an environmentally sound manner when destruction or irreversible transformation does not represent the environmentally preferable option.”<sup>20</sup> It is the FSM’s view that the Convention’s obligations persist for its Parties during all temporal phases of an armed conflict—i.e., during actual armed hostilities as well as in the build-up to and aftermath of those hostilities. A Party to the Convention that participates in an armed conflict is obligated to refrain from producing or using any of the POPs during the phases of an armed conflict except for limited,

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<sup>11</sup> See CBD, *supra* note 9, art 8(a)

<sup>12</sup> See *id.*, art 8(f)

<sup>13</sup> *Id.*, art 14(d)

<sup>14</sup> *Id.*, art 22.

<sup>15</sup> Stockholm Convention on Persistent Organic Pollutants art 1, May 22, 2001, 2256 U N T S 119 (hereinafter “Stockholm Convention”)

<sup>16</sup> *Id.*, preamble

<sup>17</sup> *Id.*, art 3 In 2009, 2011, and 2013, the Conference of Parties to the Stockholm Convention adopted amendments to Annexes A, B, and C of the Convention to include new POPs in addition to the 12 POPs originally regulated by the Convention. On 20 November 2015, the Congress of the FSM adopted a resolution that ratified the three sets of amendments, but the FSM has not yet formally submitted its instrument of ratification for those amendments to the depositary of the Convention. For the text of the resolution, see C R No 19-63, available at <http://fsmcongress.fm/pdf%20documents/19th%20Congress/RESOLUTIONS/CR%2019-63.pdf> (last accessed Jan 24, 2016)

<sup>18</sup> Stockholm Convention, *supra* note 15, art 3(6)

<sup>19</sup> *Id.*, art 6(c)

<sup>20</sup> *Id.*, art 6(d)(ii)

exempted purposes and uses and in an environmentally sound manner that protects human health and the natural environment. For example, a Party can use a POP as a pesticide or insecticide in a military staging ground to protect its food crops and its troops if its use as a pesticide or insecticide is exempt under the Convention, but the Party cannot use that POP or other POPs in a non-exempt manner—including as a weapon of war—and the Party must make sure that its handling of any POP is environmentally sound and respectful of human health, including that of an opposing belligerent.

### **Multilateral treaties with regional/limited application**

#### 14. The Noumea Convention obligates its Parties to:

endeavour, either individually or jointly, to take all appropriate measures in conformity with international law and in accordance with this Convention and those Protocols in force to which they are party to prevent, reduce and control pollution of the Convention Area, from any source, and to ensure sound environmental management and development of natural resources, using for this purpose the best practicable means at their disposal, and in accordance with their capabilities.<sup>21</sup>

The Convention further obligates its Parties to

co-operate with competent global regional and sub-regional organisations to establish and adopt recommended practices, procedures and measures to prevent, reduce and control pollution from all sources and to promote sustained resource management and to ensure the sound development of natural resources in conformity with the objectives of this Convention and its Protocols, and to assist each other in fulfilling their obligations under this Convention and its Protocols.<sup>22</sup>

The Convention obligates its Parties to, *inter alia*, “take all appropriate measures to prevent, reduce and control pollution in the Convention Area caused by discharges from vessels.”<sup>23</sup> The Convention defines “vessels” as any “waterborne . . . craft of any type whatsoever,”<sup>24</sup> while it defines pollution as

the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.<sup>25</sup>

The Convention additionally obligates its Parties to:

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<sup>21</sup> Convention for the Protection of Natural Resources and Environment of the South Pacific Region art 5 1, Nov 25, 1986, 26 I L M 38

<sup>22</sup> Id , art 5 4

<sup>23</sup> Id , art 6

<sup>24</sup> Id , art 2(e)

<sup>25</sup> Id , art 2(f)

co-operate, directly and when appropriate through the competent global, regional and sub-regional organisations, in the provision to other Parties of technical and other assistance in fields relating to pollution and sound environmental management of the Convention Area, taking into account the special needs of the island developing countries and territories.<sup>26</sup>

The obligation to co-operate is particularly pronounced in cases of emergency pollution. Specifically, the Convention obligates its Parties to.

co-operate in taking all necessary measures to deal with pollution emergencies in the Convention Area, whatever the cause of such emergencies, and to prevent, reduce and control pollution or the threat of pollution resulting therefrom. To this end, the Parties shall develop and promote individual contingency plans and joint contingency plans for responding to incidents involving pollution or the threat thereof in the Convention Area.<sup>27</sup>

It is the FSM's view that this series of obligations under the Noumea Convention applies to the discharge of pollutants from or by military vessels in the Convention Area, whether during, prior to, or in the aftermath of actual military hostilities, including pollution emergencies in the Convention Area.

15. The Pollution Emergencies Protocol to the Noumea Convention applies to “pollution incidents” in the Convention Area. The Protocol defines a “pollution incident” as:

a discharge or significant threat of a discharge of oil or other hazardous substance, however caused, resulting in pollution or an imminent threat of pollution to the marine and coastal environment or which adversely affects the related interests of one or more of the Parties and of a magnitude that requires emergency action or other immediate response for the purpose of minimizing its effects or eliminating its threat.<sup>28</sup>

“Related interests” include, *inter alia*:

- (i) maritime, coastal, port, or estuarine activities;
- (ii) fishing activities and the management and conservation of living and non-living marine resources, including coastal ecosystems,
- (iii) the cultural value of the area concerned and the exercise of traditional customary rights therein;
- (iv) the health of the coastal population;
- (v) tourist and recreational activities;<sup>29</sup>

The Protocol specifically obligates its Parties to “co-operate in taking all necessary measures for the protection of the South Pacific Region from the threat and effects of

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<sup>26</sup> Id , art 18

<sup>27</sup> Id , art 15 1

<sup>28</sup> Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region art 1(d), Nov 25, 1986, 26 I L M 38

<sup>29</sup> Id , art 1(c)

pollution incidents.”<sup>30</sup> The Protocol further obligates its Parties to, upon request, provide assistance to each other for dealing with pollution incidents.<sup>31</sup> According to the Protocol, “Parties whose assistance is requested under [Article 6] shall, within their capabilities, provide this assistance based on an agreement with the requesting Party or Parties”<sup>32</sup> The Protocol further obligates its Parties to carry out a number of operational measures to respond to pollution incidents, including

- (a) make a preliminary assessment of the incident, including the type and extent of existing or likely pollution effects,
- (b) promptly communicate information concerning the situation to other Parties and the Organisation pursuant to article 5,
- (c) promptly determine its ability to take effective measures to respond to the pollution incident and the assistance that might be required and to communicate any request for such assistance to the Party or Parties concerned or the Organisation in accordance with article 6;
- (d) consult, as appropriate, with other affected or concerned Parties or the Organisation in determining the necessary response to a pollution incident;
- (e) carry out the necessary measures to prevent, eliminate or control the effects of the pollution incident, including surveillance and monitoring of the situation.<sup>33</sup>

It is the FSM’s view that the Pollution Emergencies Protocol applies to pollution incidents involving military vessels and military activities in the Convention Area, whether prior to, during, or in the aftermath of actual military hostilities. The provisions of the Pollution Emergencies Protocol regarding mutual assistance and operational measures are particularly germane for reparations and other remedial measures that should be contemplated in relation to the effects of armed conflicts on environments in the Convention Area

16. The SPREP Agreement established an international organization—SPREP—whose major purposes are to “promote co-operation in the South Pacific region and to provide assistance in order to protect and improve its environment and to ensure sustainable development for present and future generations.”<sup>34</sup> The Parties to the Agreement—as members of SPREP—strive to achieve these purposes through an “Action Plan” that involves, *inter alia*:

- (a) co-ordinating regional activities addressing the environment,
- (b) monitoring and assessing the state of the environment in the region including the impacts of human activities on the ecosystems of the region and encouraging development undertaken to be directed towards maintaining or enhancing environmental qualities,
- (c) promoting and developing programmes, including research programmes, to protect the atmosphere and terrestrial, freshwater, coastal and marine ecosystems and species, while ensuring ecologically sustainable utilisation of resources,

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<sup>30</sup> Id , art 3 1

<sup>31</sup> Id , art 6 1

<sup>32</sup> Id

<sup>33</sup> Id , art 7

<sup>34</sup> Agreement Establishing the South Pacific Regional Environment Programme art 2 1, June 16, 1993, 1995 ATS No 24

- (d) reducing, through prevention and management, atmospheric, land based, freshwater and marine pollution;
- (e) strengthening national and regional capabilities and institutional arrangements,
- (f) increasing and improving training, educational and public awareness activities; and
- (g) promoting integrated legal, planning and management mechanisms<sup>35</sup>

It is the FSM's view that the Parties to the SPREP Agreement are obligated to work through SPREP—which is also the Secretariat for the Noumea Convention and its Protocols—to address the impacts of military activities on the environments covered by the Agreement, including taking measures to manage and/or prevent various types of pollution in those environments stemming from discharges by military vessels. Such impacts can arise prior to, during, and in the aftermath of any actual military hostilities. In this regard, SPREP has undertaken preliminary research for a “Regional Strategy to Address Marine Pollution from World War II Ships,” which aims to assess and define the precise environmental risks posed by each World War II military ship sunk in waters covered by the SPREP Agreement in order to aid relevant States in addressing those risks.<sup>36</sup> More work remains to be done to complete the Regional Strategy and apply it to discrete locations and jurisdictions in the Pacific. International cooperation can greatly assist in this effort.

17. The Waigani Convention, in the spirit of the Basel Convention, prohibits the export of certain specifically defined and designated hazardous or radioactive wastes by Australia, New Zealand, and any duly designated “Other Party” to countries that are members of the Pacific Islands Forum (PIF) (with the exception of Australia and New Zealand)<sup>37</sup>; as well as the import of such wastes from outside the Convention Area by the members of PIF (with the exception of Australia and New Zealand).<sup>38</sup> The Convention also obligates each Party to minimize or otherwise manage hazardous wastes in its jurisdiction. Specifically, each Party shall, *inter alia*:

- (a) Ensure that within the area under its jurisdiction, the generation of hazardous wastes is reduced at its source to a minimum taking into account social, technological and economic needs;
- (b) Take appropriate legal, administrative and other measures to ensure that within the area under its jurisdiction, all transboundary movements of hazardous wastes generated within the Convention Area are carried out in accordance with the provisions of this Convention;
- (c) Ensure the availability of adequate treatment and disposal facilities for the environmentally sound management of hazardous wastes, which shall be located, to the extent practicable, within areas under its jurisdiction, taking into account social, technological and economic considerations. However, where Parties are for geographic, social or economic reasons unable to dispose safely of hazardous

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<sup>35</sup> Id.

<sup>36</sup> See “A Regional Strategy to Address Marine Pollution from World War II Wrecks,” *endorsed* at 13th SPREP Meeting, July 2002, available at [https://www.sprep.org/attachments/Regional\\_Strategy\\_WWII\\_Wrecks.pdf](https://www.sprep.org/attachments/Regional_Strategy_WWII_Wrecks.pdf) (last accessed Jan 24, 2016) (hereinafter “SPREP Regional Strategy”)

<sup>37</sup> Convention to Ban the Importation into Forum Island Countries of Hazardous and Radio Active Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region art 4 1(b), Sept 16, 1995, 2161 U N T S 91

<sup>38</sup> Id , art 4 1(a).

wastes within those areas, cooperation should take place as provided for under Article 10 of this Convention;

(d) In cooperation with SPREP, participate in the development of programmes to manage and simplify the transboundary movement of hazardous wastes which cannot be disposed of in an environmentally sound manner in the countries in which they are located.<sup>39</sup>

The Convention further obligates its Parties to “cooperate with one another, non-Parties and relevant regional and international organisations, to facilitate the availability of adequate treatment and disposal facilities and to improve and achieve the environmentally sound management of hazardous wastes.”<sup>40</sup> The Convention defines “environmentally sound management of hazardous wastes” to mean “taking all practicable steps to ensure that hazardous wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes”<sup>41</sup> To achieve such management, the Convention obligates its Parties to:

- (a) Upon request, make information available, whether on a bilateral or regional basis, with a view to promoting the environmentally sound management of hazardous wastes, including harmonisation of relevant technical standards and practices;
- (b) Cooperate in monitoring the effects of hazardous wastes and their management on human health and the environment;
- (c) Cooperate, subject to their national laws and policies, in the development and implementation of new environmentally sound and cleaner production technologies and the improvement of existing technologies. Such cooperation shall be with a view to eliminating, as far as practicable, the generation of hazardous wastes and achieving more effective and efficient methods of ensuring their management in an environmentally sound manner, including the study of the economic, social and environmental impacts of the adoption of such new and improved technologies;
- (d) Cooperate, subject to their national laws and policies, actively in the transfer of technology and management systems related to the environmentally sound management of hazardous wastes. They shall also cooperate in developing the technical capacity and infrastructure of Parties, especially those which may need and request technical assistance in this field; and
- (e) Cooperate in developing appropriate technical guidelines and/or codes of practice.<sup>42</sup>

The Convention additionally obligates SPREP to:

encourage Other Parties [i.e., Australia, New Zealand, and other States properly designated] and other concerned developed countries to take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to Pacific Island Developing Parties [i.e., members of PIF, except for Australia and New Zealand], to enable

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<sup>39</sup> Id., art. 4.4

<sup>40</sup> Id., art. 10.1

<sup>41</sup> Id., art. 1

<sup>42</sup> Id., art. 10.2

them to implement the provisions of this Convention. Other Parties undertake to cooperate with [SPREP] in this regard.<sup>43</sup>

It is the FSM's view that the obligations to, *inter alia*, soundly manage hazardous wastes, including through international cooperation, apply to hazardous wastes discharged by military vessels and military activities into the environments covered by the Convention Area, including discharges that occur prior to, during, and in the aftermath of actual military hostilities.

### **International declarations and other high-level outcomes**

18. The FSM joined the rest of the international community in adopting the Rio Declaration on Environment and Development on 14 June 1992.<sup>44</sup> Principle 23 of the Rio Declaration states:

The environment and natural resources of people under oppression, domination and occupation shall be protected<sup>45</sup>

Similarly, Principle 24 of the Rio Declaration states:

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.<sup>46</sup>

Although the Rio Declaration is not an international treaty, it is generally considered by the international community to be the governing template for the pursuit of sustainable development, one of whose pillars is the protection of the natural environment. As a small island developing State whose economic prospects depend greatly on the sustainable use of its natural resources, the FSM is sensitive to activities that threaten its sustainable development, including warfare and its environmental aftereffects.<sup>47</sup>

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<sup>43</sup> Id , art 10 3

<sup>44</sup> Rio Declaration, *supra* note 10

<sup>45</sup> Id , Principle 23

<sup>46</sup> Id , Principle 24

<sup>47</sup> See Statement by His Excellency Mr Resio S Moses, Secretary of the Department of External Affairs of the Federated States of Micronesia, United Nations Conference on Environment and Development, June 10, 1992, available at <http://www.fsmgov.org/fsmun/unced.html> (last accessed Jan 24, 2016)

Previous generations of Micronesians subsisted well on the bounty of our islands and our oceans, in comfortable isolation from the turmoil and conflict that accompanied the progress of the outside world. We were not environmentally conscious in the modern sense, and we were not then much interested in development, but our traditions and customary practices evolved along practical lines on which respect for our environment was an essential element. Thus, the concept of "sustainability" is familiar to Micronesians today because it is deeply rooted in their history.

Not until late in the last century did the rest of the world take note of us, at which time we commenced a colonial period that brought death, destruction and war to our peaceful islands. Following those experiences, many of our people would have preferred simply to return to our former ways of life, living simply, and isolated in harmony with nature, but with the benefit of modern transportation and communications our people, particularly our young people, possessed a growing awareness of the world beyond their horizons. As a proud people, inevitably they came to want for themselves and their children a standard of living comparable with what they had seen.

19. The FSM also joined the international community in adopting outcome documents from two major international high-level meetings addressing the needs, challenges, and aspirations of small island developing States (SIDS). In 2005, the FSM joined the adoption of the Mauritius Strategy (MSI) for the further Implementation of the Barbados Programme of Action for the Sustainable Development of Small Island Developing States (BPOA). The MSI elaborates on actions and strategies in 19 priority areas that build on 14 thematic areas from the BPOA and aim to support SIDS in achieving their Millennium Development Goals and other sustainable development aspirations. Paragraph 24 of the priority area on the “Management of wastes” states the following:

Recognizing the concern that potential oil leaks from sunken State vessels have environmental implications for the marine and coastal ecosystems of small island developing States and taking into account sensitivities surrounding vessels that are marine graves, small island developing States and relevant vessel owners should continue to address the issue bilaterally on a case-by-case basis.<sup>48</sup>

In 2014, the FSM joined the international community in adopting the SIDS ACCELERATED MODALITIES OF ACTION [S.A.M.O.A.] Pathway at the Third International Conference on Small Island Developing States. The S.A.M.O.A. Pathway aims to forge genuine and durable partnerships between SIDS and their developed country partners in order to stimulate the sustainable development of SIDS. In consideration of the centrality of the Ocean to the sustainable development of SIDS, and echoing paragraph 24 of the MSI, paragraph 56 of the S.A.M.O.A. Pathway states the following:

Recognizing the concern that potential oil leaks from sunken State vessels have environmental implications for the marine and coastal ecosystems of small island developing States, and taking into account the sensitivities surrounding vessels that are marine graves, we note that small island developing States and relevant vessel owners should continue to address the issue bilaterally on a case-by-case basis.<sup>49</sup>

It is the FSM’s view that the highlighted paragraphs from the MSI and the S.A.M.O.A. Pathway strongly encourage (if not obligate) SIDS like the FSM and flag States of sunken vessels to work on bilateral bases to address oil leaks from those vessels into the marine and coastal environments of affected SIDS. Such bilateral actions potentially comport with—if not actively honor—relevant existing legal obligations under the various multilateral environmental agreements discussed above. These actions must be taken even—or perhaps especially—with regard to State military vessels sunk during armed conflict with their fuel caches intact, threatening to leak into the natural environments of SIDS after the hostilities end.

## **Bilateral treaties**

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<sup>48</sup> Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States paragraph 24, Oct 2, 2005, U N Doc A/60/401, Oct 3, 2005

<sup>49</sup> Small Island Developing States Accelerated Modalities of Action paragraph 56, U N Doc A/CONF 223/10, Sept 19, 2014

20. On a bilateral level, the FSM is party to a treaty that contains robust language regarding the protection of the environment in relation to the various temporal phases of armed conflict. On 3 November 1986, the FSM entered into a bilateral treaty with the United States of America (US) called the Compact of Free Association (Compact). In 2001, the FSM and the US began renegotiating parts of the Compact, eventually concluding and entering into an amended Compact in late 2003.<sup>50</sup> (Unless otherwise noted, these Comments' references to the Compact are to the 2003 amended Compact.) The commencement of the Compact relationship in 1986 effectively terminated the US's post-World War II administration of the FSM as a United Nations strategic trust territory and helped usher in true self-government and political independence for the FSM after more than a century of foreign rule. However, the Compact preserves certain key rights and entitlements for the US in relation to activities in the FSM. Among other things, the Compact grants the US "full authority and responsibility for security and defense matters in or relating to the Federated States of Micronesia."<sup>51</sup> This exclusive authority entails a number obligations and rights for the US, including:

- (1) the obligation to defend the Federated States of Micronesia and its people from attack or threats thereof as the United States and its citizens are defended;
- (2) the option to foreclose access to or use of the Federated States of Micronesia by military personnel or for the military purposes of any third country; and
- (3) the option to establish and use military areas and facilities in the Federated States of Micronesia, subject to the terms of the separate agreements referred to in sections 321 and 323 [of the Compact].<sup>52</sup>

The Compact further allows the US, "[s]ubject to the terms of any agreements negotiated in accordance with sections 321 and 323 [of the Compact], . . . [to] conduct within the lands, waters and airspace of the Federated States of Micronesia the activities and operations necessary for the exercise of its authority and responsibility" for the military security and defense of the FSM.<sup>53</sup>

21. Section 321 of the Compact calls for the establishment of "[s]pecific agreements for the establishment and use by the [US] of military areas and facilities in the [FSM] [as] set forth in separate agreements, which shall remain in effect in accordance with the terms of such agreements"<sup>54</sup> Section 323 of the Compact states that "military operating rights of the [US] and the legal status and contractual arrangements of the [US] Armed Forces, their members, and associated civilians, while present in the FSM are set forth in separate agreements, which shall remain in effect in accordance with the terms of such agreements."<sup>55</sup>

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<sup>50</sup> Compact of Free Association between the United States of America and Micronesia, as amended, U S -F S M , Apr 30, 2003, 117 Stat 2721, available at <http://www.uscompact.org/files/FSM%20Publications/Compact%20Documents/Amended%20Compact%20Act.pdf> (last accessed Jan 24, 2016) (hereinafter "Amended Compact")

<sup>51</sup> Id , section 311(a)

<sup>52</sup> Id , section 311(b)

<sup>53</sup> Id , section 312

<sup>54</sup> Id , section 321(a)

<sup>55</sup> Id , section 323

22 Pursuant to section 323 of the Compact, the FSM and the US entered into a Status of Forces Agreement (SOFA) on 25 June 2004.<sup>56</sup> The SOFA establishes the legal status of US Armed Forces, their members, and associated civilians while they are present in the FSM, as well as regulates a number of activities carried out by those individuals.<sup>57</sup> According to the SOFA:

- (a) All aircraft, vessels and vehicles operated by, for, or under the control of the Armed Forces of the United States or United States contractors shall enjoy freedom of movement in the Federated States of Micronesia;
- (b) Such aircraft, vessels and vehicles shall be operated in a manner which minimizes danger to persons and property and interference with trade, commerce, exploration and exploitation of living and non-living resources of the sea.<sup>58</sup>

The SOFA additionally obligates the US to:

adopt and enforce measures consistent with the Compact, as amended and this Agreement as may be necessary to ensure that United States personnel, United States contractors and third country contractor personnel respect the laws of the Federated States of Micronesia, refrain from any activity inconsistent with this Agreement, and refrain from any political activity concerning the Federated States of Micronesia.<sup>59</sup>

The SOFA contains provisions for the exclusive resolution of claims arising from the conduct of US Armed Forces in the FSM within the scope of the SOFA but not regulated by existing contracts. According to the SOFA:

2. Claims, other than claims sounding in contract . . . , shall be referred to the Government of the United States. For these claims, the Government of the United States, in accordance with U S. law regarding foreign claims and public vessels, will pay just and reasonable compensation in settlement of meritorious claims for damage, loss, personal injury or death, caused by acts or omissions of the Armed Forces of the United States, or otherwise incident to non-combat activities of the Armed Forces of the United States. The Government of the Federated States of Micronesia, as appropriate, will provide the Government of the United States with a report on the alleged damages under its laws<sup>60</sup>

23. The provisions of the Compact discussed in paragraphs 20 to 22 above provide the FSM with the ability to seek damage and other reparations from the US for the defense and security-related activities of US Armed Forces in the FSM that, in general, violate FSM laws, including activities that unduly interfere with the FSM's exploration and exploitation of its marine resources. The SOFA does limit such claims to those arising from "non-combat activities" of US Armed Forces. However, such claims arguably

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<sup>56</sup> Status of Forces Agreement between the United States of America and Micronesia concluded pursuant to Section 323 of the Compact of Free Association, as amended, U S -F S M , May 14, 2003, available at <http://www.state.gov/documents/organization/174116.pdf> (last accessed Jan 24, 2016)

<sup>57</sup> The SOFA defines "Armed Forces of the United States" as "the land, sea and air armed forces of the United States, including the Coast Guard" Id , art I 2(a)

<sup>58</sup> Id , art II 1

<sup>59</sup> Id , art XIV

<sup>60</sup> Id , art XV.

apply to military activities conducted in preparation for, and/or in the aftermath of, actual combat hostilities, especially (but not limited to) activities involving aircraft, vessels, and vehicles of the US Armed Forces.

24. In addition to the language in the SOFA on the environmental impacts of activities of the US Armed Forces, the main text of the Compact contains extensive language on environmental protection. Acknowledging the joint commitment of the FSM and the US “to promote efforts to prevent or eliminate damage to the environment and biosphere and to enrich understanding of the natural resources of the Federated States of Micronesia,”<sup>61</sup> section 161 of the Compact lists the following “mutual and reciprocal undertakings” aimed at fulfilling that joint commitment:

(a) The Government of the United States:

(1) shall continue to apply the environmental controls in effect on November 2, 1986 to those of its continuing activities subject to section 161(a)(2), unless and until those controls are modified under sections 161(a)(3) and 161(a)(4);

(2) shall apply the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321 et seq., to its activities under the Compact, as amended, and its related agreements as if the Federated States of Micronesia were the United States;

(3) shall comply also, in the conduct of any activity requiring the preparation of an Environmental Impact Statement under section 161(a)(2), with standards substantively similar to those required by the following laws of the United States, taking into account the particular environment of the Federated States of Micronesia: the Endangered Species Act of 1973, as amended, 87 Stat. 884, 16 U.S.C. 1531 et seq.; the Clean Air Act, as amended, 77 Stat. 392, 42 U.S.C. Supp. 7401 et seq.; the Clean Water Act (Federal Water Pollution Control Act), as amended, 86 Stat. 896, 33 U.S.C. 1251 et seq.; Title I of the Marine Protection, Research and Sanctuaries Act of 1972 (the Ocean Dumping Act), 33 U.S.C. 1411 et seq., the Toxic Substances Control Act, as amended, 15 U.S.C. 2601 et seq.; the Solid Waste Disposal Act, as amended, 42 U.S.C. 6901 et seq.; and such other environmental protection laws of the United States and of the Federated States of Micronesia, as may be mutually agreed from time to time with the Government of the Federated States of Micronesia; and

(4) shall develop, prior to conducting any activity requiring the preparation of an Environmental Impact Statement under section 161(a)(2), written standards and procedures, as agreed with the Government of the Federated States of Micronesia, to implement the substantive provisions of the laws made applicable to U.S. Government activities in the Federated States of Micronesia, pursuant to section 161(a)(3).

(b) The Government of the Federated States of Micronesia shall continue to develop and implement standards and procedures to protect its environment. As a reciprocal obligation to the undertakings of the Government of the United States under this Article, the Federated States of Micronesia, taking into account its particular environment, shall continue to develop and implement standards for environmental protection substantively similar to those required of the Government of the United States by section 161(a)(3) prior to its conducting activities in the Federated States

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<sup>61</sup> Amended Compact, *supra* note 50, section 161

of Micronesia, substantively equivalent to activities conducted there by the Government of the United States and, as a further reciprocal obligation, shall enforce those standards.

(c) Section 161(a), including any standard or procedure applicable thereunder, and section 161(b) may be modified or superseded in whole or in part by agreement of the Government of the United States and the Government of the Federated States of Micronesia

(d) In the event that an Environmental Impact Statement is no longer required under the laws of the United States for major Federal actions significantly affecting the quality of the human environment, the regulatory regime established under sections 161(a)(3) and 161(a)(4) shall continue to apply to such activities of the Government of the United States until amended by mutual agreement.

(e) The President of the United States may exempt any of the activities of the Government of the United States under this Compact, as amended, and its related agreements from any environmental standard or procedure which may be applicable under sections 161(a)(3) and 161(a)(4) if the President determines it to be in the paramount interest of the Government of the United States to do so, consistent with Title Three of this Compact, as amended, and the obligations of the Government of the United States under international law. Prior to any decision pursuant to this subsection, the views of the Government of the Federated States of Micronesia shall be sought and considered to the extent practicable. If the President grants such an exemption, to the extent practicable, a report with his reasons for granting such exemption shall be given promptly to the Government of the Federated States of Micronesia.

(f) The laws of the United States referred to in section 161(a)(3) shall apply to the activities of the Government of the United States under this Compact, as amended, and its related agreements only to the extent provided for in this section.<sup>62</sup>

25. The Compact allows the FSM to seek judicial review in US federal court for any activities by the US under the Compact and its related agreements (e.g., the SOFA) in order to ensure that the US meets its environmental protection obligations under section 161(a) of the Compact.<sup>63</sup> If warranted, the FSM can win civil relief (other than punitive damages) from the US with regard to the US's section 161(a) obligations<sup>64</sup> Considering the extensive number of US federal environmental laws that apply (either directly or in kind) to the activities of the US in the FSM under section 161(a) of the Compact, the FSM can conceivably seek civil relief from the US for, *inter alia*, the failure of the US to take all lawfully necessary steps to prevent, minimize, and/or redress the environmental harms caused by activities of the US military in the FSM, including harms caused by vessels, aircraft, and equipment belonging to the US military, even those activities that occur prior to, and in the aftermath of, actual combat hostilities in the FSM. Although the Compact grants the US President some leeway to suspend the application of some US federal environmental laws to US activities in the FSM when in the "paramount interest" of the US, such a suspension must be consistent with the existing obligations of the US under international law.

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<sup>62</sup> Id

<sup>63</sup> Id , section 162

<sup>64</sup> Id , section 162(a)

26. In addition to a general requirement for the US to protect the environment of the FSM when conducting its activities in the FSM, the Compact has specific language about certain types of activities that may harm the environment of the FSM (as well as the health and safety of the people of the FSM). According to section 314 of the Compact:

(a) Unless otherwise agreed, the Government of the United States shall not, in the Federated States of Micronesia:

(1) test by detonation or dispose of any nuclear weapon, nor test, dispose of, or discharge any toxic chemical or biological weapon; or

(2) test, dispose of, or discharge any other radioactive, toxic chemical or biological materials in an amount or manner which would be hazardous to public health or safety.

(b) Unless otherwise agreed, other than for transit or overflight purposes or during time of a national emergency declared by the President of the United States, a state of war declared by the Congress of the United States or as necessary to defend against an actual or impending armed attack on the United States [or] the Federated States of Micronesia . . . , the Government of the United States shall not store in the Federated States of Micronesia . . . any toxic chemical weapon, nor any radioactive materials nor any toxic chemical materials intended for weapons use.

(c) Radioactive, toxic chemical, or biological materials not intended for weapons use shall not be affected by section 314(b).

(d) No material or substance referred to in this section shall be stored in the Federated States of Micronesia except in an amount and manner which would not be hazardous to public health or safety. In determining what shall be an amount or manner which would be hazardous to public health or safety under this section, the Government of the United States shall comply with any applicable mutual agreement, international guidelines accepted by the Government of the United States, and the laws of the United States and their implementing regulations.<sup>65</sup>

Any dispute arising in regard to section 314 of the Compact (as well as the broader Title Three of the Compact, of which section 314 is a part) must be submitted for resolution to a Joint Committee comprised of senior government officials from the FSM and the US. If the Joint Committee is incapable of resolving the dispute, then the matter must be submitted to the US and FSM governments for resolution. At that stage, the FSM “shall be afforded, on an expeditious basis, an opportunity to raise its concerns with the United States Secretary of Defense personally regarding any unresolved issue which threatens its continued association with the Government of the United States.”<sup>66</sup> In considering the concerns of the FSM, the US is obligated under the Compact to “accord due respect to the authority and responsibility of the Government of the Federated States of Micronesia under Titles One, Two and Four [of the Compact] and to the responsibility of the Government of the Federated States of Micronesia to assure the well-being of its people.”<sup>67</sup>

27. The Compact’s carefully crafted language regulating the US’s use, storage, disposal, and movement of radioactive, toxic chemical, and biological weapons and materials in the FSM attempts to strike a balance between the military security and defense

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<sup>65</sup> Id , section 314

<sup>66</sup> Id , section 351(d)

<sup>67</sup> Id , section 352

objectives of the US on the one hand, and the health and safety of the FSM public on the other hand. The US has the authority to store certain highly destructive weapons and materials intended for weapons use in the FSM, but only in limited circumstances relating to transit/overflight, pressing military defense, and acts of war, and never in an amount and manner that would be hazardous to public health and safety in the FSM. Inasmuch as public health and safety of the FSM people are jeopardized by the harmful effects of such weapons and materials on the natural environment of the FSM, the US is obligated under the Compact to protect the environment of the FSM when moving and/or storing such weapons and materials.

### **National legislation and policy**

28 As discussed above, the Compact imposes mutual and reciprocal obligations on the FSM and the US to adopt and implement policies in favor of environmental protection in the FSM. In that spirit, the Federated States of Micronesia Environmental Protection Act—originally adopted in 1982 and amended into its current form in 2012—provides the framework under which the FSM operates to regulate human impacts on the FSM’s natural environment. As the Act proclaims:

- (1) It is the policy of the Federated States of Micronesia to use all practicable means, consistent with other considerations of national policy, to improve and coordinate governmental plans, functions, programs, and resources to the end that the inhabitants of the Federated States of Micronesia may:
  - (a) fulfill the responsibilities for each generation as trustee for the environment for succeeding generations,
  - (b) enjoy safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
  - (c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable or unintended consequences;
  - (d) preserve important historic, cultural, and natural aspects of our Micronesian heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; and
  - (e) remain responsible members of the global community by complying with the international legal obligations accepted by the Federated States of Micronesia upon ratifying or acceding to international environment agreements.<sup>68</sup>

The Act further proclaims that “each person has a responsibility to contribute to the preservation and enhancement of the environment.”<sup>69</sup> The Act defines “person” expansively to include:

the Federated States of Micronesia, a State, municipality, political subdivision, a public or private institution, corporation, partnership, joint venture, association, firm, or company organized or existing under the laws of the Federated States of

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<sup>68</sup> Federated States of Micronesia Environmental Protection Act, 25 F S M C § 102(1) (2012) For the full Act, see Appendix *infra*

<sup>69</sup> Id., § 102(3)

Micronesia or any State or country, lessee or other occupant of property, or individual, acting singly or as a group.<sup>70</sup>

29. A major focus of the Act is on the regulation of pollutants. The Act defines the term “pollutant” to mean:

one or more substances or forms of energy which, when present in the air, land, or water, are or may be harmful or injurious to human health, welfare, or safety, to animal or plant life, or to property, or which unreasonably interfere with the enjoyment by the people of life or property.<sup>71</sup>

This broad definition of “pollutant” allows the Director of the FSM Office of Environment and Emergency Management to prescribe rather expansive regulations and take other necessary steps to deter the introduction of substances into the natural environment of the FSM that might pose risks to “human health, welfare, or safety.” Some of those steps include ordering and reviewing environmental impact statements from entities whose activities “may significantly affect the quality of the environment” within the FSM;<sup>72</sup> entering any establishment or property suspected of introducing pollutants in the natural environment and seizing any substances, materials, goods, or equipment that may have been used in such an introduction;<sup>73</sup> and pursuing enforcement actions against parties responsible for the introduction, including the imposition of a civil penalty up to \$100,000 for each day the pollutant is introduced.<sup>74</sup>

30. Taken as a whole, the Act emphasizes the collective responsibility of virtually every facet of public and private life in the FSM to protect, preserve, and enhance the natural environment of the FSM.<sup>75</sup> This extends to any foreign State (not just the US) that conducts activities in the FSM or has some sort of formal presence in the FSM. The Act also grants the FSM substantial authority to pursue civil penalties and other enforcement actions against any “person” that violates the environmental protections of the Act, including the Act’s regulation of “pollutants.” Unless otherwise regulated in a separate instrument or other domestic or international legal arrangement or norm, the

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<sup>70</sup> Id , § 103(4)

<sup>71</sup> Id , § 103(5)

<sup>72</sup> Id , § 302(1)

<sup>73</sup> Id , § 303

<sup>74</sup> Id , § 304

<sup>75</sup> The original version of the FSM Environmental Protection Act, as adopted in 1982, emphasized even more explicitly the interconnectedness of all aspects of the environment and the collective intergenerational responsibility of humankind for the protection of the environment. According to the 1982 Act (which was later amended for streamlining rather than revisionary purposes)

The Federated States of Micronesia, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth and redistribution, cultural change, resource exploitation, and new expanding technological advances, and recognizing further the critical importance of restoring and maintaining environmental quality for the overall welfare and development of man, declares that it is the continuing policy of the Federated States of Micronesia, in cooperation with State and municipal governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the Federated States of Micronesia

Federated States of Micronesia Environmental Protection Act, 25 F S M C § 502(1) (1982) (*later amended*)

FSM can conceivably pursue civil action against any State and/or its nationals for any activities it conducts in the FSM that pollute or otherwise damage the FSM's natural environment. While there may be some restrictions on such an effort by the FSM with regard to certain military activities—particularly the seeking of civil relief for the environmental harms caused by warships—that does not foreclose the possibility of the FSM taking steps to ensure that foreign actions in the FSM relating to armed conflict (including related actions prior to, and in the aftermath of, actual military hostilities) do not undermine the FSM's efforts to protect its natural environment. Even if the FSM is barred from seeking civil relief for the environmental harms caused by certain military vessels, the State that flags/owns those vessels remains obligated under international law to address the environmental harms caused by those vessels in the FSM

### State practice

31. On 1 July 1971, the US Congress enacted Public Law 92-39—the Micronesian Claims Act—to provide compensation for losses incurred during and immediately following World War II by the inhabitants of the Pacific islands that comprised the Trust Territory of the Pacific Islands (TTPI), which the US administered as a strategic trust territory on behalf of the United Nations beginning in 1947.<sup>76</sup> The Act established a Micronesia Claims Commission to solicit and resolve claims arising from such losses. In order to receive compensation, TTPI inhabitants (which included inhabitants from the islands that eventually comprised the FSM) had to successfully demonstrate that they “suffered loss of life, physical injury, and property damage directly resulting” from armed hostilities between the US and Japan in World War II as well as during the period between the cessation of hostilities and 1 July 1951 (when the US Department of Interior assumed administrative control of the TTPI from the US Navy).<sup>77</sup> To fund compensation for the war claims, the Act authorized the US to “make an ex gratia contribution of \$5,000,000 matching an equivalent contribution of the Government of Japan, to Micronesian inhabitants of the TTPI . . . determined by the Micronesian Claims Commission to be meritorious claimants.”<sup>78</sup>

Although the Act limited claims to certain types of injury and loss, and although the Act specifically disclaimed the liability of the US for “wartime damages suffered by the Micronesians,” it is the FSM's view that the Act constituted State practice in relation to the provision of compensation to address destructive impacts on natural environments from armed conflicts. Although the compensation from the US was provided ex gratia (i.e., out of a sense of moral obligation rather than legal requirement), it was nevertheless intended to help discharge the US's “responsibility for the welfare of the Micronesian people as the administering authority of the [TTPI],”<sup>79</sup> which was a legitimate and binding legal responsibility of the US with regard to the lingering aftereffects of World War II hostilities (albeit separate from a legal obligation to provide reparations for war damages) Furthermore, the Act allowed meritorious claims for “property damage” For the indigenous inhabitants of the TTPI (including those from the islands that eventually comprised the FSM), terrestrial and maritime

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<sup>76</sup> Micronesian Claims Act of 1971, Pub L No 92-39, 85 Stat 92, available at <https://www.gpo.gov/fdsys/pkg/STATUTE-85/pdf/STATUTE-85-Pg92.pdf> (last accessed Jan 24, 2016)

<sup>77</sup> Id., section 104(a)

<sup>78</sup> Id., section 101(a)

<sup>79</sup> Id., preambular paragraph 2

resources are vital real property interests, being intrinsically linked to the cultural practices, political rankings, and traditional identities of those inhabitants. Conceivably, then, TTPI inhabitants could have submitted meritorious claims for the damage inflicted by World War II hostilities on the marine and territorial properties of the inhabitants. The US, under the Act, would provide compensation for those damages as a function of its administrative responsibilities to provide for the welfare of TTPI inhabitants rather than out of a legal obligation to provide reparations for war damages, but such compensation would still constitute a form of legal obligation, regardless of the administrative nature of its provision, and the compensation would still be in relation to the environmental harms arising from World War II hostilities between the US and Japan

32. The FSM recently addressed an issue regarding the impact of armed conflict on the environmental integrity of the FSM. The matter involved the USS *Mississinewa*, a US Naval warship that was struck by a Japanese submarine in Ulithi Lagoon in the Yap island-group (one of the major island groups in the FSM) during World War II hostilities. Due to the strike, the USS *Mississinewa* sunk to the bottom of Ulithi Lagoon, taking with it 19 million liters of highly flammable fuel. In the ensuing decades, the wreck of the USS *Mississinewa* corroded, raising the specter of oil leakage. In 2001 a typhoon struck Ulithi Lagoon, churning up the waters of the Lagoon and causing the USS *Mississinewa* to leak large amounts of oil into the ocean. FSM President Leo Falcam declared a state of emergency and banned fishing in the Lagoon, a severe blow to the subsistence lifestyle of the inhabitants of Ulithi Lagoon.

Subsequently, the FSM President asked SPREP for assistance in assessing the seriousness of the environmental threat posed by the leakage from the USS *Mississinewa*. The assessment highlighted the serious threat posed by the leakage to the marine environment in the Ulithi Lagoon. Armed with the assessment, the FSM and SPREP then called on the US to take responsibility for the leakage. In response, the US Navy deployed a salvage team to Ulithi Lagoon that removed oil from the USS *Mississinewa* and stopped its leaking.<sup>80</sup>

The FSM's experience with the USS *Mississinewa* and the US Navy was an example of the FSM taking advantage of its involvement in multilateral environmental agreements (e.g., the SPREP Agreement, the Noumea Convention) to finance and conduct a risk assessment of matters relating to armed conflict, as well as utilizing the FSM's bilateral relationship with the US and highlighting the US's international law obligations to protect the environment of the FSM from the harmful effects of war, long after the cessation of the armed hostilities that produced those effects.

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<sup>80</sup> For more information on the USS *Mississinewa* incident, see SPREP Regional Strategy, *supra* note 36

APPENDIX

FSM ENVIRONMENTAL PROTECTION ACT

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CODE OF THE FEDERATED STATES OF MICRONESIA

TITLE 25

ENVIRONMENTAL PROTECTION

SUBTITLE I

FSM ENVIRONMENTAL PROTECTION ACT

CHAPTERS

- 1 General Provisions (§§ 101-103)
- 2 FSM Environmental Protection Board (§§ 201-210)
- 3 Enforcement (§§ 301-308)

CHAPTER 1

General Provisions

SECTIONS

- § 101. Short title.
- § 102. Public policy.
- § 103. Definitions.

§ 101. Short title.

This subtitle may be cited as the Federated States of Micronesia Environmental Protection Act

§ 102. Public policy.

(1) It is the policy of the Federated States of Micronesia to use all practicable means, consistent with other considerations of national policy, to improve and coordinate

governmental plans, functions, programs, and resources to the end that the inhabitants of the Federated States of Micronesia may:

(a) fulfill the responsibilities for each generation as trustee of the environment for succeeding generations;

(b) enjoy safe, healthful, productive, and aesthetical and culturally pleasing surroundings;

(c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable or unintended consequences;

(d) preserve important historic, cultural, and natural aspects of our Micronesian heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; and

(e) remain responsible members of the global community by complying with the international legal obligations accepted by the Federated States of Micronesia upon ratifying or acceding to international environment agreements.

(2) The effort to protect and preserve the environment will be carried forward in close consultation with the States in the formulation of policy, enforcement, and other activities.

(3) The Federated States of Micronesia recognizes that each person has a responsibility to contribute to the preservation and enhancement of the environment.

### **§ 103. Definitions.**

The following words, for the purpose of this subtitle, shall have the following meanings:

(1) “Director” means the Director of the Office of Environment and Emergency Management;

(2) “Exclusive Economic Zone” means the exclusive economic zone defined in title 18 of this code;

(3) “Office” means the Office of Environment and Emergency Management of the Federated States of Micronesia;

(4) “Person” means the Federated States of Micronesia, a State, municipality, political subdivision, a public or private institution, corporation, partnership, joint venture, association, firm, or company organized or existing under the laws of the Federated States of Micronesia or any State or country, lessee or other occupant of property, or individual, acting singly or as a group;

(5) “Pollutant” means one or more substances or forms of energy which, when present in the air, land, or water, are or may be harmful or injurious to human health, welfare,

or safety, to animal or plant life, or to property, or which unreasonably interfere with the enjoyment by the people of life or property.

## CHAPTER 2

### FSM Environmental Protection Office

#### SECTIONS

§§ 201-205. [RESERVED]

§ 206. **Technical assistance.**

§ 207. [RESERVED]

§ 208. **Reports.**

§ 209. **General powers and duties of the Office.**

§ 210. **Specific powers and duties of the Office.**

**§§ 201-205. [RESERVED].**

**§ 206. Technical assistance.**

The President shall provide the Office with necessary technical and legal assistance through departments, offices, and agencies of the National Government.

**§ 207. [RESERVED].**

**§ 208. Reports.**

The Director shall transmit to the President and Congress, no later than September 30<sup>th</sup> of each year, an environmental quality report for the preceding calendar year, covering the status and conditions of the environment of the Federated States of Micronesia, and a review of the programs and activities of the National Government, state governments, municipal governments and nongovernmental entities, with particular reference to their effect on the environment of the Federated States of Micronesia.

**§ 209. General powers and duties of the Office.**

The Office shall have the power and duty to protect the environment, human health, welfare, and safety and to abate, control, and prohibit pollution or contamination of air, land, and water in accordance with this subtitle and with the regulations adopted and promulgated pursuant to this subtitle, including measures undertaken to prohibit or regulate the testing, storage, use, disposal, import and export of radioactive, toxic chemical, or other harmful substances. The Office shall balance the needs of economic and social development with those of environmental quality and shall adopt regulations and pursue policies which, to the maximum extent possible, promote both these needs and the policies set forth in section 102 of this subtitle.

**§ 210. Specific powers and duties of the Office.**

For the purposes set forth in section 209 of this chapter, the Director is authorized and empowered to:

(1) Adopt, approve, amend, revise, promulgate, and repeal regulations to effect the purposes of this subtitle, and enforce such regulations which shall have the force and effect of law. These may include regulations to give effect to the obligations contained in the following international environmental treaties ratified by the Federated States of Micronesia:

(a) Basel Convention on the Control of Trans boundary Movements of Hazardous Wastes and Their Disposal;

(b) Montreal Protocol on Substances that Deplete the Ozone Layer;

(c) Stockholm Convention on Persistent Organic Pollutants; and

(d) Waigani Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes within the South Pacific Region

(2) In accordance with regulations adopted under this section may collect fees from persons submitting applications or receiving permits or licenses. Fees collected under this subsection shall be paid to the Treasury of the Federated States of Micronesia for credit to the General Fund of the Federated States of Micronesia;

(3) Accept appropriations, loans, and grants from any appropriate sources, public or private, which shall not be expended for other than the purposes of this subtitle,

(4) Adopt and provide for the continuing administration of nationwide programs for the protection of the environment, human health, welfare, and safety of the Federated States of Micronesia, and from time to time review and modify such programs as necessary; and

(5) Collect information and establish recordkeeping, monitoring, and reporting requirements as necessary and appropriate to carry out the purposes of this subtitle

## **CHAPTER 3**

### **Enforcement**

#### **SECTIONS**

- § 301. Cooperative agreements.**
- § 302. Environmental impact statements.**
- § 303. Right of entry and seizure.**
- § 304. Violation—Enforcement action.**
- § 305. Administrative procedure applicable.**
- § 306. Judicial review.**
- § 307. False statement.**
- § 308. Authorized officers.**

#### **§ 301. Cooperative agreements.**

The Director is authorized to enter into written cooperative agreements with the States or state agencies to assist in achieving the purposes set out in this subtitle. The Director is authorized to enter into written cooperative agreements with the departments or agencies of the National Government of the Federated States of Micronesia to assist in achieving the purposes of this subtitle.

#### **§ 302. Environmental impact statements.**

(1) Any person, prior to taking any action that may significantly affect the quality of the environment within the Exclusive Economic Zone of the Federated States of Micronesia, or within the boundaries of the National Capital Complex at Palikir, must submit an environmental impact statement to the Director, in accordance with regulations established by the Director.

(2) The environmental impact statements required by subsection (1) of this section are public documents, and must include a detailed statement on:

- (a) the environmental impact of the proposed action;
- (b) any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (c) the alternatives to the proposed action;
- (d) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and
- (e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

**§ 303. Right of entry and seizure.**

(1) Whenever it is necessary for the purposes of this subtitle, the Director, or any officer, agent, or employee when duly authorized by the Director or by court order, may, at reasonable times, enter any establishment or upon any property.

(2) Whenever it is necessary for the purposes of this subtitle, the Director, or any officer, agent, or employee when duly authorized by the Director, may seize any substance, materials, goods or equipment which the Director, or any officer, agent, or employee reasonably suspects is the subject of a breach of any provision of this subtitle or regulations made pursuant to this subtitle.

(3) Any substance, materials, goods or equipment seized under this section:

(a) shall be stored at a place, and in a manner, in accordance with a direction given by the Director; and

(b) may be retained until such time as the Director has been satisfied by its owner, or the person from whom it has been seized, that it is not and has not been the subject of any breach of this subtitle or regulations made pursuant to this subtitle.

(4) Where it is agreed by the owner of the substance, materials, goods or equipment that they are the subject of a breach of this subtitle or regulations made pursuant to this subtitle, or where the owner has not satisfied the Director under subsection (3) of this section within six months of the date of seizure, the substance, materials, goods or equipment may be disposed of or destroyed in a manner determined by the Director.

**§ 304. Violation—Enforcement action.**

Any person who violates any provision of this subtitle, or any permit, regulation, standard, or order issued or promulgated under this subtitle, shall be subject to enforcement action by the Office. Such enforcement action may include, but is not limited to:

(1) An order to cease and desist from the violation, or to comply within a specific time period;

(2) An order to clean up or abate the effects of any pollutant;

(3) The imposition of a civil penalty up to \$100,000 for each day of the violation. Penalties collected under this subsection shall be paid to the Treasury of the Federated States of Micronesia for credit to the General Fund of the Federated States of Micronesia;

(4) A civil action commenced in the Trial Division of the Federated States of Micronesia Supreme Court to enjoin the violation;

(5) A civil action for damages commenced in the Trial Division of the Federated States of Micronesia Supreme Court. Such action may be in addition to any civil penalties imposed hereunder. In determining such damages, the Court shall take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurred, and corrective action, if any, taken by the violator. Damages collected under this subsection shall be paid to the Treasury of the Federated States of Micronesia for credit to the General Fund of the Federated States of Micronesia; and

(6) Conducting a public hearing to determine the authenticity of the facts upon which the alleged violation is based, adequate notice of which and opportunity to appear and be heard at which shall be afforded to all interested persons.

### **§ 305. Administrative procedure applicable.**

The provisions of sections 304 and 307 of this chapter shall be interpreted consistently with the provisions of any law concerning administrative procedure which is or may hereafter become Federated States of Micronesia law. In the event of conflict between the two, the provisions of the latter shall supersede and be controlling.

### **§ 306. Judicial review.**

(1) Any person who is or will be adversely affected by the enforcement of any standard, policy, regulation, permit, order, or penalty imposed under this subtitle or regulations made pursuant to this subtitle and who alleges its invalidity may file a petition for a declaratory judgment thereon in the Trial Division of the Federated States of Micronesia Supreme Court.

(2) The Court shall declare the standard, policy, regulation, permit, order, or penalty invalid if it finds that it exceeds the statutory authority of the Director, or that it is arbitrary and capricious.

**§ 307. False statement.**

Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this subtitle, or by any permit, regulation, or order issued under this subtitle, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this subtitle or by a permit, regulation, or any order issued under this subtitle, is guilty of a felony, and upon conviction thereof, shall be punished by a fine of not more than \$100,000, or by imprisonment for a maximum of ten years, or by both

**§ 308. Authorized officers.**

Agreements made under section 301 of this subtitle may include the authorization by the Director of officers of national and state government agencies to perform the duties and exercise the powers provided in this subtitle or in regulations adopted and promulgated pursuant to this subtitle.