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Due Process in Micronesia: Are Fish Due Less Process?

Kathleen M. Burch*

I. INTRODUCTION

The Supreme Court of the Federated States of Micronesia has rigorously sought to protect the constitutional rights of foreign nationals, particularly the owners of foreign fishing vessels whose vessels are subject to in rem forfeiture actions because the vessel was used to fish illegally within the jurisdiction of the Federated States of Micronesia (FSM).¹ While at first glance it appears that the FSM Supreme Court has adequately protected the due process rights of the vessel owner, upon closer examination, the minimal safeguards established by the Court are inadequate to satisfy constitutional due process. The judicially created post-seizure hearing is fundamentally unfair because in the majority of cases it is the only evidentiary hearing and acts as a determination on the merits without the due process safeguards of a trial.

This Article addresses the issue of whether the judicially created post-seizure hearing meets the due process requirements of the FSM Constitution. The Article concludes that when the realities of the fishing industry and the manner in which illegal fishing

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1. The FSM is an island state of approximately 607 islands with a landmass of 270.8 square miles occupying one million square miles of the Pacific Ocean and located approximately 2,500 miles southwest of Hawaii. FSM Visitors Center, Geography, at <http://www.visit-fsm.org/visitors/geography.html> (last visited Dec 17, 2002). The States comprising the FSM were formerly part of the United Nations Trust Territory of the Pacific Islands. FSM Visitors Center, History, at <http://www.visit-fsm.org/visitors/history.html> (last visited Dec. 17, 2002).

cases are prosecuted are acknowledged, the judicially created post-seizure hearing is fundamentally unfair, in violation of the vessel owner's right to due process. The Article proposes a solution in the form of a court adopted rule, which rule balances the constitutional rights of the vessel owner, the geographic and economic realities of the FSM, and the needs and concerns of the prosecuting government.

In order to fully understand the importance of this issue to the FSM, it is necessary to understand how the FSM's domestic fisheries laws and how the FSM Supreme Court's role in protecting the vessel owner have developed over the past quarter century.

A. *Background*

During the past twenty-five years, the FSM has been working toward gaining economic independence through the exploitation of its primary natural resource – the marine resources within its exclusive economic zone (EEZ). In order to obtain economic independence and to take their rightful place in the international community, Micronesians first had to gain their political independence from the United States. Even before recognition as a coastal state by the international community, the FSM took pro-active steps to ensure that upon the ratification of the Third United Nations Convention on the Law of the Sea (UNCLOS III), the international community would recognize Micronesians' traditional rights to their marine resources.

Micronesians have traditionally relied upon their marine resources for survival. Prior to the mid-1980s, Micronesians relied upon marine resources for subsistence. With the ratification of UNCLOS III, Micronesians, who control vast expanses of ocean, were able to charge distant water fishing fleets for access to those ocean expanses where large quantities of tuna are caught by these fishing fleets. Fishing soon became and remains the largest source of income, other than foreign aid, for the FSM.²

A healthy and vibrant fishing industry is essential to the economic well-being of the FSM and its constituent states. A healthy fishing industry requires foreign fishing fleets to legally fish within

2. Asian Development Bank, *Country Economic Review: Federated States of Micronesia*, Nov. 2000, Table A-8: Consolidated General Government Finances – Revenues, available at http://www.adb.org/Documents/CERs/FSM/CER/_FSM_2000.pdf.

the FSM EEZ and to base their fleets within the FSM. The jurisdiction where a foreign fleet fishes is determined by the location of the fish and the legal and regulatory framework of the fishing industry within a particular jurisdiction.

Over the past decade, the FSM has experienced a dramatic drop in both foreign fishing fees and in on-shore foreign investment in the fisheries industry. This decline in economic activity within the fisheries sector can be explained only in part by the climactic effects of el niño, a weather pattern that causes an increase of ocean water temperature which, in turn, causes tuna migration to cooler ocean areas.³ While it is easy for foreign fishing fleets to claim that they are leaving a jurisdiction because they are not being treated fairly, when on-shore investment leaves the country, the legal and regulatory framework must be assessed to determine whether there is any legitimacy to the complaint of unfairness.

B. *Assessing the Due Process Framework*

While many FSM laws affect the fishing industry, this Article focuses on the FSM domestic fisheries laws. The development of the FSM's domestic fisheries law is integrally tied to the emergence of the FSM as a nation-state. The legal rights the FSM and its constituent states are enforcing through their fisheries laws are based in international law. Thus, this Article will first address the international foundations of the FSM's rights to enforce its fisheries laws. The FSM's rights are founded in UNCLOS III and numerous regional agreements, including the South Pacific Forum Fisheries Agency Convention and the Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest.

The Article will then turn to the FSM's domestic fisheries laws. Following the principles of Micronesian customary law, the FSM has divided jurisdiction over its marine space between the FSM Government and the state governments, with the FSM exercising sovereign rights in the EEZ and the States exercising sovereign rights in the territorial sea. In order to obtain a fully

3. *El Niño and La Niña Affect Pacific Tuna Catches*, Pacific Islands Report (June 21, 1999), available at <http://166.122.164.43/archive/1999/June/06-22-17.html>; see also *Marshall Islands Suffers Decreased Revenue from Tuna Licenses*, Pacific Islands Report (May 18, 2001), available at <http://166.122.164.43/archive/2001/May/05-29-05.html>.

integrated view of the FSM's domestic fisheries laws, those laws enacted by the FSM Congress as well as those laws enacted by the state legislatures must be considered. Due to the author's familiarity with the State of Yap, the discussion of state law will focus on the Yap State Fishery Zone Act of 1980.

Because the FSM Constitution vests exclusive jurisdiction over admiralty and maritime cases in the FSM Supreme Court, the Article next discusses the enforcement of the FSM's domestic fisheries laws within the procedures established by the Court. The focus is on the in rem forfeiture actions brought by both the FSM and state governments and the judicially created post-seizure hearing, commonly referred to as a probable cause hearing. After concluding that the judicially created probable cause hearing does not satisfy the due process requirements of the FSM Constitution, the Article proposes a solution: a prompt trial on the merits. The Article suggests that the FSM Supreme Court promulgate the proposed rule, which would require in rem forfeiture actions in illegal fishing cases to proceed to trial on an expedited calendar. The proposed rule strikes a balance between the constitutional due process rights of the vessel owner, the geographic and economic reality of the FSM, and the needs and concerns of the FSM in both protecting marine resources and promoting economic development.

II. THIRD UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

A. *Background*

The Third United Nations Convention on the Law of the Sea (UNCLOS III)⁴ was under discussion and negotiation during the same time period that the islands of the Pacific were severing their colonial ties with western industrial powers.⁵ The former United

4. Third United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397 [hereinafter UNCLOS III], <http://www.oceanlaw.net/texts/losc.htm>.

5. UNCLOS III convened in 1973 and concluded in 1982. Oceans and Law of the Sea, The United Nations Convention on the Law of the Sea (A Historical Perspective), at http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited Oct. 30, 2002). In 1965, the Congress of Micronesia was established, and in 1966, the Congress of Micronesia petitioned U.S. President Lyndon Johnson to begin status negotiations. The first round of status negotiations was held in 1969. The first Congress of the Federated States of Micronesia convened in May, 1979. Chronology of Events in Micronesia, Congress

Nations Trust Territories of the Pacific Islands⁶ were no exception.⁷ In fact, the emerging international consensus regarding coastal states' sovereignty over 200-mile EEZs and the marine resources located therein, including highly migratory species (i.e. tuna),⁸ fueled the islands' desire to obtain independence while at the same time fueling the tension between the islands and their colonial power, the United States.⁹ The FSM stood to make great economic gains from the ratification of UNCLOS III. Moreover, Micronesians believed that the international recognition of a coastal state's right to a 200-mile EEZ with its inherent sovereignty over marine resources was an implicit validation of the his-

of the Federated States of Micronesia [hereinafter FSM Congress' Chronology of Events in Micronesia], at <http://www.fsmcongress.org/PressReleaseGenInfo/Chronology.htm> (last visited Dec. 17, 2002).

6. The former Trust Territories of the Pacific Islands are now the Federated States of Micronesia, the Republic of the Marshall Islands, the Republic of Belau, and the Commonwealth of the Northern Marianas Islands. FSM Visitors Center, History, at <http://www.visit-fsm.org/visitors/history.html> (last visited Dec. 17, 2002).

7. The Congress of Micronesia began discussions with the United States regarding independence and self-determination in 1969. The islands of Yap, Truk (now Chuuk), Ponape (now Pohnpei), and Kosrae ratified the Constitution of the Federated States of Micronesia at a territory-wide plebescite on July 12, 1978. The effective date of the Constitution of the Federated States of Micronesia is July 12, 1979. FSM CONST. art. XVI. The FSM did not gain full sovereignty until November 3, 1986, after the FSM Congress' and the U.S. Senate's ratification of the Compact of Free Association. See FSM Congress' Chronology of Events in Micronesia, *supra* note 5. The experiences of the Republic of the Marshall Islands and the Republic of Belau were similar. See GEORGE KENT, THE POLITICS OF PACIFIC ISLAND FISHERIES 42-44 (1980).

8. Tuna is the only resource of significant commercial value in the EEZ. KENT, *supra* note 7, at 42-44.

9. In 1972, the Congress of Micronesia created the Joint Committee on the Law of the Sea (Committee), which observed the United Nations Seabed Committee, the predecessor to the United Nations Law of the Sea Conference (LOS Conference). In 1973, the Committee informed the United States of the Micronesian 200-mile zone claim based on the archipelago theory. In 1974, the Committee and United States representatives entered into a Memorandum of Understanding whereby Micronesians agreed to refrain from claiming archipelagic status and the United States agreed to support the creation of the 200-mile EEZ and coastal state regulation of tuna at the LOS Conference. One month later at the LOS Conference in Caracas, Venezuela, the United States repudiated the Memorandum of Understanding. See FSM Congress' Chronology of Events in Micronesia, *supra* note 5. If Micronesians had maintained the claim to archipelagic status, the ocean between the islands would have become internal waters from which foreign fishing fleets would have been excluded. See UNCLOS III, *supra* note 4, arts. 46-54. In other words, if the FSM had secured archipelagic status, the United States tuna fleet would have been excluded from the world's most fertile tuna fishing grounds.

toric Micronesian belief that islanders owned the marine resources surrounding their islands.¹⁰

B. UNCLOS III

UNCLOS III recognizes a coastal state's sovereignty over airspace, marine space, and the seabed and subsoil.¹¹ While Micronesians gladly accepted sovereignty over airspace and the corresponding seabed and subsoil, Micronesian sovereignty over the marine space of the territorial sea and the EEZ was of greater social, political, and economic importance.

The articles of UNCLOS III that propelled Micronesians to political independence and began the FSM's journey toward economic independence can be divided into three categories: (1) Territorial Sea; (2) Exclusive Economic Zone; and (3) Enforcement.

1. Territorial Sea

Article 2 of UNCLOS III extends the "sovereignty of a coastal State . . . to an adjacent belt of sea, described as the territorial sea."¹² "[S]overeignty extends to the air space over the territorial sea as well as to its bed and subsoil."¹³ The territorial sea may not

10. It is important to understand that Micronesians have always believed that they own their ocean resources. See J. COMM. ON THE LAW OF THE SEA, 5TH CONG. OF MICRONESIA, LAW OF THE SEA: THE PRELIMINARY MICRONESIAN POSITION (Saipan, Mariana Islands 1973). The Journal of the FSM Constitutional Convention confirms this understanding. Committee of Governmental Functions, SCREP No. 33, II J. MICRONESIAN CONST. CONVENTION 813, 819 (Oct. 10, 1975) ("Micronesian custom generally recognizes family, clan or island ownership of fishery resources within lagoons and for several miles beyond reefs."). For a discussion of the recent position taken by the States of Chuuk, Kosrae, Pohnpei, and Yap with regard to ownership of marine resources see *Chuuk v. Sec'y of Fin.*, 9 FSM Intrm. 424 (App. 2000), <http://www.fsmlaw.org/fsm/decisions/>; and *Chuuk v. Sec'y of Fin.*, 8 FSM Intrm. 353 (Pon. 1998), <http://www.fsmlaw.org/fsm/decisions/>. See also YAP STATE CONST. art. XIII, § 5 ("The State recognizes traditional rights and ownership of natural resources and areas within the marine space of the State No action may be taken to impair these traditional rights and ownership"), <http://www.fsmlaw.org/yap/constitution>. *Id.* § 6 ("A foreign fishing, research or exploration vessel shall not take natural resources from any area within the marine space of the State, except as may be permitted by the appropriate persons who exercise traditional rights and ownership and by statute."), <http://www.fsmlaw.org/yap/constitution/>.

11. UNCLOS III, *supra* note 4, art. 2.1.

12. *Id.*

13. *Id.* art. 2.2.

exceed "12 nautical miles, measured from the baselines"¹⁴ of the coastal state. For the majority of Micronesian islands,¹⁵ the baseline is the "outward of the low-water line of the reef."¹⁶ All waters inward of the baseline are internal waters.¹⁷

All states enjoy the right of innocent passage through a coastal state's territorial sea.¹⁸ Innocent passage does not include "fishing activities"¹⁹ or "the carrying out of research or survey activities."²⁰ A coastal state is granted the authority to "adopt laws and regulations" to conserve the "living resources of the sea,"²¹ to prevent the violation of "fisheries laws and regulations,"²² to regulate pollution,²³ and to regulate "marine scientific research and hydrographic surveys."²⁴

With the international recognition of the territorial sea, Micronesians obtained the right to legally exclude and enforce the exclusion of foreign fishing fleets from the coastal waters they traditionally fished and continue to use for subsistence fishing. These are the same waters that are the most economically and technologically feasible for Micronesians to exploit for their own economic development.

2. *Exclusive Economic Zone*

In addition to the territorial sea, a coastal state has sovereign rights over its exclusive economic zone (EEZ).²⁵ The EEZ is 200 nautical miles measured outward from the baselines used to measure the territorial sea.²⁶

14. *Id.* art. 3.

15. UNCLOS III establishes two methods for determining a coastal state's baseline. *Compare id.* art. 5, *with* art. 6. The majority of Micronesian islands have a fringing reef. The baselines for these islands are determined according to the method set forth in Article 6. For an exception, see the island of Fais, one of the islands of the State of Yap and one of the only high islands in the FSM without a fringing reef.

16. UNCLOS III, *supra* note 4, art. 6.

17. *Id.* art. 8.

18. *Id.* art. 17.

19. *Id.* art. 19.2(i).

20. *Id.* art. 19.2(j).

21. *Id.* art. 21.1(d).

22. *Id.* art. 21.1(e).

23. *Id.* art. 21.1(f).

24. *Id.* art. 21.1(g).

25. *Id.* arts. 55-56.

26. *Id.* art. 57.

A coastal state has the exclusive sovereign right to control exploration, exploitation, conservation, and management of all natural resources, both living and non-living, within its EEZ.²⁷ In other words, the coastal state has the exclusive right to regulate all economic activity within its EEZ, including fishing.²⁸ Fishing has been broadly defined to include all activities related to fishing.²⁹ The coastal state has both the right and the obligation to limit the fish catch by volume, species, season, and fishing method.³⁰ The coastal state, using available scientific evidence, should set the allowable catch at a level that will allow for maximum yield while sustaining the species' ability to restore its population.³¹ UNCLOS III vests the coastal state with the right to environmentally sustainable economic development of its EEZ.

Implicitly recognizing that many coastal states are developing states that do not have the ability to fully exploit their own marine resources, Article 62 of UNCLOS III carefully balances the developing state's sovereign rights against the distant water fishing nation's economic needs. Each coastal state is required to determine its ability to harvest the marine resources within its EEZ.³² If the coastal state determines that it cannot harvest the "entire allowable catch," it must allow other states access to the surplus of marine resources.³³ Access can be achieved through a variety of

27. *Id.* art. 56.

28. *Id.* arts. 56(a), (b)(ii), (b)(iii).

29. Fishing includes:

[S]earching for, catching, taking or harvesting fish; attempting to search for, catch, take or harvest fish, engaging in any other activity which can reasonably be expected to result in the locating, catching, taking or harvesting fish; placing, searching for or recovering fish devices or associated electronic equipment such as radio beacons; any operations at sea directly in support of, or in preparation for, any activity described in this paragraph; use of any other vehicle, air or sea-borne, for any of the activities described in this paragraph; or any related activity.

Federated States of Micronesia Arrangement for Regional Fisheries Access, November 30, 1994, art. 1 [hereinafter FSM Arrangement], <http://www.oceanlaw.net/texts/Micronesia.htm>; see also FSM Pub. L. No. 12.034, § 102(32) (defining "fishing"). Fishing includes the provision of fuel and other supplies to fishing vessels. *FSM v. Skico, Ltd.*, 8 FSM Intrm. 40 (Chk. 1997) (holding that a fuel tanker which had no foreign fishing permit violated FSM fisheries law when it refueled fishing vessels in FSM EEZ).

30. UNCLOS III, *supra* note 4, arts. 61.1, 62.4.

31. *Id.* art. 61.3.

32. *Id.* art. 62.2.

33. *Id.*

agreements entered into between the coastal state and other states or private parties.³⁴ Coastal states can enact laws and regulations regarding the execution of foreign fishing agreements and foreign fishing.³⁵ Foreign nationals fishing in a coastal state's EEZ are required to comply with all of the coastal state's laws and regulations.³⁶

The international recognition of a coastal state's sovereignty over its EEZ, including the explicit right to charge an access fee or to otherwise require payment for the privilege of extracting marine resources,³⁷ meant that small island states gained the right to control vast portions of the ocean and thus, to garner the corresponding economic benefits from the natural resources located therein. In other words, Micronesians now had the possibility of attaining economic independence from the United States, either by harvesting ocean resources themselves or charging an access fee to others who would harvest those resources.³⁸

3. *Enforcement*

The possibility of economic development inspires hope for the future. That hope, however, is meaningless without the ability to realize economic benefit through the exercise of sovereignty. The ability to enforce one's rights is an essential element of the exercise of sovereignty. The international community recognized the importance of enforcement mechanisms in UNCLOS III Article 73.1, which provides that a coastal state may enforce its domestic fisheries laws through such measures as boarding and inspecting vessels within the territorial sea and EEZ and arresting and prosecuting

34. *Id.*

35. These laws and regulations can relate to licensing, access fees, catch quotas by species, age, size or vessel, fishing seasons, gear, vessel and catch reports, research, scientific data, observers, landing of catch, joint-venture arrangements, training of fisheries personnel, transfer of fisheries technology, and enforcement. *Id.* art. 62.4.

36. *Id.*

37. *Id.* art. 62.4(a).

38. Since its independence from the United States, foreign fishing fees have remained the second largest source of income for the government of the FSM. The largest source of income remains funds received from the United States through the financial provisions of the Compact of Free Association. ASIAN DEV. BANK, COUNTRY ECONOMIC REVIEW: FEDERATED STATES OF MICRONESIA (Nov. 2000), at http://www.adb.org/Documents/CERs/FSM/CER_FSM_2000.pdf.

foreign vessels and their owners for violating the coastal state's domestic fisheries law.³⁹

UNCLOS III explicitly recognizes the coastal state's right to enforce its sovereignty over its territorial sea and EEZ.⁴⁰ Enforcement means more than the declaration of an EEZ and establishment of a licensing procedure. Enforcement requires effective surveillance, which in turn requires patrol boats, aircraft, and trained personnel. Enforcement also requires an efficient legal system capable of prosecuting illegal fishing cases, in other words, implementing legislation, trained prosecutors, resources for expert witnesses and translators, and court resources. Exercising sovereign rights is expensive. Developed coastal states with greater financial resources are better able to exercise sovereignty over their ocean resources than can emerging island states with no resources other than their newly recognized ocean resources. UNCLOS III merely establishes the framework of hope for economic independence without addressing the economic reality that small island states like the FSM do not have the tools to effectively exercise sovereignty within their EEZs in such a way as to garner the full economic benefits of the natural resources within those EEZs.⁴¹

UNCLOS III recognized the sovereign rights that provide Micronesians with the possibility of substantial economic gains and thus, economic and political independence. The economic value of these sovereign rights are obtainable only if Micronesians have the ability to collect more than a nominal fee from foreign fishing fleets for the privilege of harvesting marine resources in their EEZ and have the ability to exclude from their EEZ those who do not pay the required fee. Micronesians need the ability to negotiate equitable fishing agreements with developed distant water fishing nations and the ability to enforce domestic fisheries laws. UNCLOS III does not provide these mechanisms. In order to realize the economic potential of the effective exercise of sovereignty over their EEZ, Micronesians turned to their Pacific Island neighbors and a regional solution.

39. UNCLOS III, *supra* note 4, art. 73.1.

40. *Id.* art. 73.

41. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 74 (Pon. 1985) ("With the limited resources available here, it is extraordinarily difficult for law enforcement authorities to police the vast waters of the Federated States of Micronesia. Yet, effective law enforcement to prevent fishing violations is crucial to the economic interests of this new nation."), <http://www.fsmlaw.org/fsm/decisions/>.

III. REGIONAL AGREEMENTS

A. *South Pacific Forum Fisheries Agency Convention*

Even before the ratification of UNCLOS III, the South Pacific Forum Fisheries Agency Convention (Convention)⁴² recognized coastal states' sovereign rights over the marine resources located in the EEZ⁴³ and established mechanisms for the full realization of these sovereign rights.⁴⁴ These same sovereign rights were recognized three years later in Articles 2 and 56 of UNCLOS III.⁴⁵ The Convention was entered into as a response to the conflict of interest that had arisen during the negotiation of UNCLOS III between the colonial powers' attempts to further their interests as distant water fishing nations and their fiduciary duties to their lesser developed colonies.⁴⁶ The Convention was a strong message to the international community and, in particular, to distant water fishing nations during UNCLOS III negotiations that the small Pacific island states would enforce their sovereign rights over the marine resources, i.e. tuna, in their respective EEZs. The Convention created a unified Pacific voice backed by the technical support of the Forum Fisheries Agency.

Article III of the Convention explicitly recognizes a coastal state's sovereignty over its 200 nautical mile EEZ.⁴⁷ The coastal state's sovereignty is for the purpose of "exploring and exploiting,

42. South Pacific Forum Fisheries Agency Convention, July 10, 1979, 2 OCEAN Y.B. 575 (1980) [hereinafter Convention]. The signatories to the Convention are Australia, Cook Islands, FSM, Fiji, Kiribati, the Republic of the Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu. Chris Hedley, ed., *Internet Guide to International Fisheries Law, South Pacific Forum Fisheries Agency Convention*, OCEAN LAW, at <http://www.oceanlaw.net/texts/summaries/ffa.htm> (last updated Jan. 31, 2001). For a discussion of the negotiation of the Convention, see Florian Guban, *History and Role of the Forum Fisheries Agency*, in TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLANDS REGION 245 (David J. Douman, ed. 1987) [hereinafter *History of FFA*].

43. Convention, *supra* note 42, art. III.

44. *Id.* arts. V, VII.

45. UNCLOS III, *supra* note 4, arts. 2, 56.

46. In particular, in 1974, the United States had repudiated its agreement with the Congress of Micronesia to support the creation of the 200-mile EEZ and coastal state regulation of tuna. See *supra* note 9.

47. Convention, *supra* note 42, art. III. Although Article III states that the EEZ "may extend 200 nautical miles from the baseline from which the breadth of its territorial sea is measured," the Convention does not define territorial sea or baseline.

conserving and managing the living resources, including highly migratory species."⁴⁸ Unlike UNCLOS III, the Convention does not define "exploring and exploiting," "conserving and managing," or "highly migratory species."⁴⁹ Because the Convention was a response to UNCLOS III, it is logical for these undefined terms to be given the same meaning as they have in UNCLOS III. Once these terms are defined, it is obvious that Article III of the Convention was a clear message to all distant water fishing nations that Pacific Island states have sovereign rights over the tuna⁵⁰ in their respective EEZs.

The economic value of sovereign rights over tuna are inchoate without mechanisms by which to establish a meaningful allowable catch, a prerequisite to entering into licensing agreements with distant water fishing nations. In order to establish a unified negotiating position with distant water fishing nations, and to enforce sovereign rights, the Convention establishes these mechanisms thereby allowing the parties economic realization of their sovereign rights. The Convention created the Forum Fisheries Agency (FFA),⁵¹ to provide the parties with the expertise needed to realize the full economic potential of their EEZs. The FFA consists of the Forum Fisheries Committee⁵² and a Secretariat.⁵³ The Forum Fisheries Committee provides policy and administrative guidance to the FFA⁵⁴ and a forum for consultation "on matters of common

48. *Id.*

49. *Compare id.* art. III, with UNCLOS III, *supra* note 4, arts. 61, 62, 64, annex I.

50. *See* UNCLOS III, *supra* note 4, annex I.

51. Convention, *supra* note 42, art. I.

52. The Committee consists of a representative from each member of the FFA. Membership to the FFA is limited to members of the South Pacific Forum and other states or territories in the region agreed to by the members. *Id.* art. II. Because many Pacific island nations believed that the South Pacific Commission "was perpetuating distasteful colonial relationships," the South Pacific Forum was established in 1971 as an alternative to the South Pacific Commission, whose members were the colonial governments of the United Kingdom, the United States, Australia, France, and the Netherlands. KENT, *supra* note 7, at 55, 57. Former colonial powers and territories that were not seeking independence were excluded from membership. *Id.* at 57. The primary purpose of the Forum is to promote economic development and regional cooperation of its members. *Id.* at 57-58.

53. Convention, *supra* note 42, art. II.

54. *Id.* art. V.1(a).

concern in the field of fisheries.”⁵⁵ The Committee is directed to “promote intra-regional coordination and cooperation” in the areas of fisheries management policy,⁵⁶ “relations with distant water fishing nations,”⁵⁷ and “surveillance and enforcement.”⁵⁸

In order to further its coordination effort and to provide technical assistance to the parties to the Convention, the FFA is directed to collect, analyze, evaluate, and disseminate information regarding fisheries (tuna in particular), including biological data,⁵⁹ management procedures,⁶⁰ legislation,⁶¹ and fishing agreements.⁶² More importantly, the FFA maintains current information regarding fish prices, trans-shipment, processing, and marketing.⁶³ The FFA provides technical assistance with regard to the development of fisheries policies, negotiation of foreign fishing agreements, and training of surveillance officers.⁶⁴ In order to further FFA’s usefulness to the parties, the parties are required to provide to the Secretariat information relating to catch reports and information on fishing operations within the parties’ EEZ,⁶⁵ information on fishing operations of vessels under the parties’ jurisdictions,⁶⁶ the parties’ fisheries laws and regulations,⁶⁷ and “relevant biological and statistical data.”⁶⁸

Due to the cooperative efforts of its members, the FFA has successfully fulfilled its purpose to provide the parties with assistance negotiating foreign fishing agreements, developing fisheries man-

55. *Id.* art. V.1(b). Consultation on matters of common interest is a traditional dispute resolution mechanism used in most Pacific Island cultures. Anthony J. Slatyer, *Tuna and the Impact of the Law of the Sea*, in *TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLANDS REGION* 27, 31 (David J. Doullman, ed. 1987).

56. Convention, *supra* note 42, art. V.2(a).

57. *Id.* art. V.2(b).

58. *Id.* art. V.2(c).

59. *Id.* art. VII(a).

60. *Id.* art. VII(b).

61. *Id.*

62. *Id.*

63. *Id.* art. VII(c).

64. *Id.* art. VII(d).

65. *Id.* art. IX(a).

66. *Id.*

67. *Id.* art. IX(b).

68. *Id.* art. IX(c).

agement plans, training surveillance personnel, and coordinating surveillance and enforcement activities.⁶⁹

B. *Nauru Agreement*

Recognizing that the Convention was only the first step in attaining economic realization of sovereign rights over ocean resources, the FSM, the Republic of Kiribati, the Republic of the Marshall Islands, the Republic of Nauru, the Republic of Palau, Papua New Guinea, and the Solomon Islands executed the Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest (Nauru Agreement).⁷⁰ The Nauru Agreement was executed on February 11, 1982, ten months prior to the ratification of UNCLOS III.⁷¹ While UNCLOS III negotiations continued, the Pacific Island states were consolidating their position against the distant water fishing nations that dominated the UNCLOS III negotiations.

The signatories to the Nauru Agreement recognized their dependence upon the beneficial exploitation of tuna for their economic development and independence,⁷² and wanted to coordinate the management of fisheries within and among the respective island states' EEZs such that the island people would be "assured of

69. For a discussion of the FFA's successes see *History of FFA*, *supra* note 42, at 350-55; David J. Doulman, *Prospects and Directions in the Tuna Fishery*, in *TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLANDS REGION* 299, 300-01 (David J. Doulman, ed. 1987).

70. Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest, Feb. 11, 1982, <http://oceanlaw.net/texts/nauru.htm> [hereinafter the Nauru Agreement]. For a discussion of the Nauru Agreement see David J. Doulman, *Fisheries Cooperation: The Case of the Nauru Group*, in *TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLANDS REGION* 257 (David J. Doulman, ed. 1987) [hereinafter *Fisheries Cooperation*].

71. Compare Nauru Agreement, *supra* note 70, (executed February 11, 1982), with UNCLOS III, *supra* note 4, (ratified December 10, 1982).

72. See Nauru Agreement, *supra* note 70, pmbl. ("Mindful of their dependence, as developing island States, upon the rational development and optimum utilization of the living resources occurring within the Fisheries Zones and, in particular, the common stocks of fish therein."). The parties reaffirmed the recognition of the direct correlation between their economic independence and their ocean resources in three treaties. See FSM Arrangement, *supra* note 29; The Second Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stock in the Western and Central Pacific, June 10-13, 1997 [hereinafter *Majuro Declaration*], <http://www.oceanlaw.net/texts/majuro.htm>; Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Sep. 5, 2000, <http://www.oceanlaw.net/texts/>.

receiving the maximum benefits from such resources."⁷³ The purpose of the Nauru Agreement was to strengthen the bargaining power of the small island states in their negotiations with the industrialized and more powerful distant water fishing nations. The parties to the Nauru Agreement believed that a united front would prevent distant water fishing nations from pitting them against each other during negotiation of foreign fishing access agreements. Together, the parties to the Nauru Agreement control access to the world's largest tuna resources,⁷⁴ and through the provisions of the Nauru Agreement, exponentially increased their negotiating power against distant water fishing fleets.

By creating unity among the island states, the Nauru Agreement eliminated from the foreign fishing fleets' negotiation arsenal the threat that the fleet would leave to do business with an island state that would grant more favorable license terms and charge a lesser access fee. The unity created by the Nauru Agreement includes priority access to fishing vessels of the parties over other foreign fishing vessels,⁷⁵ "minimum, uniform terms and conditions" for the issuance of licenses to foreign fishing vessels,⁷⁶ prin-

73. Nauru Agreement, *supra* note 70, pmb; *see also id.* art. I ("The Parties shall seek, without any derogation of their respective sovereign rights, to coordinate and harmonize the management of fisheries with regard to common stocks within the Fisheries Zones, for the benefit of their people.").

74. The combined EEZs of the parties equal approximately 14 million square kilometers and historically, the large schools of tuna which foreign fishing fleets seek to harvest are found within their EEZs. *See Fisheries Cooperation, supra* note 70, at 258-61.

75. Nauru Agreement, *supra* note 70, art. II(a). This article has been implemented through the FSM Arrangement, the purpose of which is to promote greater economic participation of the parties' nationals in the tuna fishery. FSM Arrangement, *supra* note 70, art. II. The FSM Arrangement establishes a mechanism whereby the vessels flagged by one of the parties to the Arrangement, which meet particular criteria, can be issued a regional access license allowing the vessel access to the EEZs of all of the parties to the FSM Arrangement. *See id.* arts. III, V, VI.

76. Nauru Agreement, *supra* note 70, art. II(b). These minimum terms include possession of a license or permit by every foreign fishing vessel, the right to place an observer on board the foreign fishing vessel, the maintenance by all foreign fishing vessels of a standardized log book containing fish catch reports, the timely reporting of vessel movements, and standardized identification. *Id.*; *see also* The Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, July 9, 1992, art. IV(2), <http://www.oceanlaw.net/texts/niue.htm> [hereinafter Niue Treaty]. The FSM has codified the minimum terms in the Marine Resources Act of 2002. *See* FSM Pub. L. No. 12.034, § 404 (2001), <http://www.fsmcongress.org/12congress/>.

principles by which access fees would be calculated,⁷⁷ and the requirement that the “flag State or organizations having authority over a foreign fishing vessel take such measures as are necessary to ensure compliance with the relevant fisheries laws of the Parties.”⁷⁸ The most powerful and effective provisions of the Nauru Agreement are the Articles establishing the Regional Register for Foreign Fishing Vessels (Regional Register).⁷⁹ The Regional Register is a registry of good standing maintained by the FFA.⁸⁰ If a foreign fishing vessel is not in good standing on the Regional Register, no member state of the FFA will issue that vessel a foreign fishing license.⁸¹ The Regional Register has been a powerful enforcement mechanism for FFA member states.⁸²

Recognizing that UNCLOS III would not provide realization of economic benefits from ocean resources, Micronesians and other

77. Nauru Agreement, *supra* note 70, art. II(c)(i).

78. *Id.* art. II(c)(iv). This requirement became a seminal provision in the treaty entered into between the United States and the parties to the Convention. See Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, art. IV (Apr. 2, 1987), <http://www.oceanlaw.net/texts/>; see also *FSM v. Ting Hong Oceanic Enter.*, 8 FSM Intrm. 166 (Pon. 1997) (although not the owner or operator of the vessel, Ting Hong was held criminally liable for vessel's violation of fisheries law where vessel licensed under Ting Hong's foreign fishing agreement with FSM), <http://www.fsmlaw.org/fsm/decisions/>. The parties have extended this duty to their own purse seine fleets. See FSM Agreement, *supra* note 70, art. 12(1) (“Each party shall ensure, to the fullest extent possible in accordance with its laws and regulations, that its fishing vessels shall not engage in fishing within the exclusive economic or fisheries zone of any other Party unless duly licensed under this Arrangement or under other licensing arrangements.”).

79. See Nauru Agreement, *supra* note 70, arts. III, IV(b), V; see also Niue Treaty, *supra* note 76, art. IV(2).

80. Niue Treaty, *supra* note 76, art. IV(2).

81. *Id.* The benefits of the Nauru Agreement were incorporated into the Niue Agreement for the benefit of all FFA member states. See also *FSM v. Hai Hsiang* No. 63, 7 FSM Intrm. 114, n.1 (Chk. 1995) (FSM may deny foreign fishing permit if vessel is not in good standing on Regional Register maintained by FFA); FSM Pub. L. No. 12.034, § 109(4)(a) (“A [foreign fishing] permit shall be denied where: (a) the application is made in respect of a foreign fishing vessel that does not have good standing on the Regional Register of Foreign Fishing Vessels maintained by the South Pacific Forum Fisheries Agency.”), <http://www.fsmcongress.org/12congress/>.

82. *Fisheries Cooperation*, *supra* note 70, at 262 (“The Regional Register and its sanctions have proven effective in enforcing compliance with the terms and conditions of [distant water fishing nation's] . . . access agreements with [Pacific Island] . . . countries. In this way the register has helped to reduce the costs of administering agreements. The register has also reduced the incidence of illegal fishing and facilitated the collection of fines . . .”).

Pacific Island states banded together through regional agreements to establish mechanisms whereby the people of the Pacific would be able to begin to realize economic benefits from the ocean resources they had historically depended upon as an integral part of their subsistence economy. Although the cooperation among Pacific Island states, along with the technical assistance of the FFA, provided Micronesians with some of the necessary tools to begin to participate in fisheries, none of the regional agreements created the enforcement mechanisms necessary to fully capture the economic benefits of the EEZ. In order to capture these economic benefits, each island state, including the FSM, needed to establish its own enforcement mechanisms.

IV. FEDERATED STATES OF MICRONESIA

A. *Background*

In 1973, when negotiations for UNCLOS III began, the FSM did not exist as a country.⁸³ The States of Yap, Chuuk, and Pohnpei⁸⁴ of the FSM were separate administrative districts of the United Nations Trust Territory of the Pacific Islands administered by the United States. The Trust Territory Islands did not have a vote during UNCLOS III negotiations, but in 1974, with the agreement of the United States, the representatives of the Congress of Micronesia attended negotiations as a separate delegation than that of the United States.⁸⁵ Micronesians followed the UNCLOS III negotiations closely. Although Micronesians could not vote on UNCLOS III and were not in a position to declare their own EEZs, Micronesians took a number of positive steps to ensure that upon the ratification of UNCLOS III, they were positioned to claim EEZs and sovereign rights over the marine resources in their respective EEZs.

Micronesians began the process of officially laying claim to their ocean resources more than five years before the ratification of

83. The Federated States of Micronesia came into existence as a separate political state on July 12, 1979. The FSM did not obtain full sovereignty until 1986 upon ratification of the Compact of Free Association by the U.S. Senate.

84. The Trust Territory District of Ponape included the islands that now make up the States of Pohnpei and Kosrae.

85. See FSM Congress' Chronology of Events in Micronesia, *supra* note 5; KENT, *supra* note 7, at 43-44.

UNCLOS III. In 1977, the Seventh Congress of Micronesia⁸⁶ enacted Public Law No. 7-71 for the purposes of creating an "Extended Fishery Zone."⁸⁷ Public Law No. 7-71 established the Extended Fishery Zone consisting of the marine space from 12 to 200 nautical miles seaward from the baselines of each District's islands.⁸⁸ Public Law No. 7-71 was enacted at a time when Micronesians were still negotiating their political status with the United States. Recognizing each island group's right to political self-determination and recognizing the economic importance of the EEZ to each island group, Public Law No. 7-71 explicitly states that any island group which becomes its own political entity shall take its EEZ with it.⁸⁹

In 1975, the Trust Territory Islands convened their first Constitutional Convention. The draft of the Constitution ratified by the Districts of Yap, Truk and Ponape included an explicit declaration of a 200-mile EEZ.⁹⁰ The Constitution divided sovereign ownership between the FSM and the state governments by vesting the FSM Congress with 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"⁹¹ and vesting sovereignty over the territorial sea⁹² in the state governments.⁹³ Although the FSM Constitution became

86. The Congress of Micronesia was the legislative body for the United Nations Trust Territory of the Pacific Islands. *Chuuk v. Sec'y of Fin.*, 9 FSM Intrm. 424, 432 (App. 2000), <http://www.fsmlaw.org/fsm/decisions/>.

87. Pub. L. No. 7-71, § 1, 7th Cong. of Micro., 1st Spec. Sess. (1977). Public Law No. 7-71 was signed into law by the Trust Territory High Commissioner on October 18, 1977; its effective date was June 30, 1979.

88. Pub. L. No. 7-71, § 6(1), 7th Cong. of Micro., 1st Spec. Sess. (1977). The effective date of section 6 was July 1, 1979. Prior to July 1, 1979, the territorial sea was only three nautical miles in breadth. 52 T.T.C. §§ 53, 55 (1980 Ed.).

89. Pub. L. No. 7-71, § 1 codified as 52 T.T.C. § 58.

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

91. FSM CONST. art. IX, § 2(m).

92. The territorial sea is the ocean space from the island baselines outward 12 nautical miles. UNCLOS III, *supra* note 4, art. 3.

93. "The absence of an express grant of authority to the [FSM] national government to regulate marine resources within twelve miles of island baselines indi-

effective on July 12, 1979, three years prior to the ratification of UNCLOS III, the FSM did not obtain its sovereignty until 1986 upon ratification of the Compact of Free Association with the United States. Prior to gaining independence, the FSM had positioned itself to take full economic advantage of its EEZ upon the international community's recognition of the FSM as a coastal nation and of a coastal nation's sovereign right to its EEZ and the marine resources therein.

B. *FSM Exclusive Economic Zone and Territorial Sea*

At its emergence as a coastal state within the international community, the FSM claimed sovereignty over its EEZ and territorial sea.⁹⁴ Moreover, the framers of the FSM Constitution ensured that Micronesians' historical claims to sovereignty over the territorial sea and EEZ became the law of the FSM by including a transition clause in the FSM Constitution, which provides that a "statute of the Trust Territory continues in effect except to the extent it is inconsistent with this Constitution, or is amended or repealed."⁹⁵ Thus, Public Law 7-71, a Trust Territory statute, became the law of the FSM through the FSM Constitution's Transition Clause. Those portions of Public Law 7-71 establishing sovereignty over the territorial sea and the EEZ were codified in Title 18 of the FSM Code.⁹⁶ Having obtained international recognition of its sovereign rights to the marine resources within its EEZ and having claimed

cates the framers' intention that states have control over these resources." *Pohnpei v. M/V Hai Hsiang* #36 (I), 6 FSM Intrm. 594, 598 (Pohnpei 1994), *rev'd on other grounds*, 7 FSM Intrm. 456 (App. 1996), <http://www.fsmlaw.org/fsm/decisions/>; see also YAP STATE CONST. art XIII, § 5 ("The State recognizes traditional rights and ownership of natural resources and areas within the marine space of the State, within and beyond 12 miles from island baselines. No action may be taken to impair these traditional rights and ownership, except the State Government may provide for the conservation and protection of natural resources within the marine space of the State within 12 miles from island baselines."). *Accord* FSM v. *Kotobuki Maru* No. 3 (I), 6 FSM Intrm. 65, 69 (Pohnpei 1993) (stating that "regulation of the 12 mile zone is presumably a state power, pursuant to article VIII" of the FSM Constitution), <http://www.fsmlaw.org/fsm/decisions/>; FSM v. *Oli-ver*, 3 FSM Intrm. 469, 473 (Pon. 1988) ("[F]ramers intended the states to control ownership and use of marine resources within [the 12 mile zone.]").

94. FSM CONST. art. I, § 1.

95. *Id.* art. XIV, § 1.

96. 18 F.S.M.C. §§ 103, 105 (1979), <http://www.fsmlaw.org/fsm/code/title/>. These provisions had previously been codified as sections 53 and 55 of Title 52 of the Trust Territory Code. 52 T.T.C. §§ 53, 55 (1980).

sovereignty over its territorial sea and EEZ, the FSM and the state governments were now ready to implement their fisheries legislation in an effort to reap the economic benefits of the marine resources within the EEZ and to protect the marine resources within the territorial sea that support the local Micronesian subsistence economy.

C. *FSM Marine Resources Act of 1979*

The FSM Interim Congress enacted the FSM's first fisheries legislation, Public Law No. IC-3, which was later codified as Titles 18 and 24 of the FSM Code.⁹⁷ The primary purpose of the 1979 Act was to obtain economic benefits while at the same time promoting conservation, management, and development of marine resources within the FSM's EEZ.⁹⁸ Although drafted and enacted prior to the FSM's existence as a country, the 1979 Act made a good faith attempt to comply with the FFA Convention and the Nauru Agreement, both of which the FSM had acceded to prior to being recognized as an independent state by the international community.

The 1979 Act created the Micronesian Maritime Authority (Authority), which was charged with implementing and enforcing the Act.⁹⁹ The 1979 Act prohibited fishing within the EEZ except

97. The 1979 Act, with few amendments, remained in effect until March, 2002, when it was superseded by Public Law 12.034 (the 2002 Act). The 1979 Act is still worthy of discussion, both for historical purposes and because all of the reported decisions of the FSM Supreme Court interpret the 1979 Act. Moreover, the thesis of this Article, that the due process rights of foreign nationals are being violated, applies equally to the 1979 Act and the 2002 Act.

98. 24 F.S.M.C. § 101 ("The resources of the sea around the Federated States of Micronesia are a finite but renewable part of the physical heritage of our people. As the Federated States of Micronesia has only limited land-based resources, the sea provides the primary means for the development of economic viability which is necessary to provide the foundation for political stability. The resources of the sea must be managed, conserved, and developed for the benefit of the people living today and for the generations of citizens to come. For this reason, the harvesting of this resource, both domestic and foreign, must be monitored, and when necessary, controlled. The purpose of this title is to promote conservation, management, and development of the marine resources of the Federated States of Micronesia, generate the maximum benefit for the Nation from foreign fishing, and to promote the development of a domestic fishing industry.")

99. Pub. L. No. IC-3, § 9. The Micronesian Maritime Authority was later renamed the Micronesian Fisheries Authority (both entities are referred to as the "Authority"). Pub. L. No. 11-57. The Authority was renamed again in Pub. L. No. 12.034 to the National Oceanic Resource Management Authority, effective March 8, 2002. Pub. L. No. 12.034, § 201.

by permit or license issued pursuant to a foreign fishing agreement.¹⁰⁰ In an effort to fulfill the FSM's treaty obligations, the 1979 Act: (1) authorized, but did not mandate, that the Authority deny the application for a fishing permit for a vessel not in good standing on the Regional Registry;¹⁰¹ (2) authorized the Authority to charge foreign vessels access fees;¹⁰² (3) authorized the Authority to develop an observer program;¹⁰³ and (4) required fishing vessels fishing within the EEZ to report fish catch information to the Authority.¹⁰⁴

The 1979 Act created enforcement mechanisms in addition to the observer program. A person who violated the 1979 Act was liable for civil penalties,¹⁰⁵ criminal penalties,¹⁰⁶ and forfeiture of all property used in violation of the Act.¹⁰⁷ The 1979 Act did not distinguish between those violations of the Act that created civil liability from those that created criminal liability.¹⁰⁸ The same underlying act could be, and often was, the basis for a civil penalties action, a criminal action, and an in rem forfeiture action.¹⁰⁹ If a person was found to have violated a provision of Section 501¹¹⁰ of the 1979 Act, the FSM Supreme Court could impose a civil fine not

100. 24 F.S.M.C. §§ 103, 401.

101. *Id.* § 111(3)(b) ("A permit *may* be denied . . . where the application is made in respect of a foreign fishing vessel, and such vessel does not have good standing on the Regional Register of Foreign Fishing Vessels maintained by the South Pacific Forum Fisheries Agency.") (emphasis added).

102. *Id.* §§ 113-15, 402.

103. *Id.* § 106(1)(b).

104. *Id.* § 116.

105. *Id.* § 502.

106. *Id.* § 503.

107. *Id.* §§ 504-06.

108. *Id.* § 501 (section 501 sets forth the acts prohibited under Title 24).

109. *See also* FSM v. Zhong Yuan Fishery Co., 9 FSM Intrm. 351 (Kos. 2000) (stating that it is within prosecutor's discretion to simultaneously file both civil and criminal cases against some defendants based on same incident), <http://www.fsmlaw.org/fsm/decisions/>. *Compare id.* § 502(1) ("Any person who is found by the Supreme Court of the Federated States of Micronesia in a civil proceeding to have committed an act prohibited by section 501 of this chapter shall be liable to the Federated States of Micronesia for a civil penalty."), *with id.* § 503(1) ("A person is guilty of an offense if he commits any act prohibited by section 501 of this chapter."), *and id.* § 504(1) ("Any fishing vessel involved in the commission of any act prohibited by section 501 of this chapter shall, along with its fishing gear, furniture, appurtenances, stores, or cargo used, be forfeited to the Federated States of Micronesia.").

110. Section 501 enumerates the acts prohibited under Title 24 of the FSM Code. 24 F.S.M.C. § 501.

to exceed \$5 million for each violation.¹¹¹ Furthermore, each day constitutes a separate violation.¹¹² If a person was found guilty of committing an act prohibited by Section 501 of the 1979 Act, pursuant to Section 503 of the 1979 Act, the FSM Supreme Court was required to impose a mandatory minimum criminal fine ranging from \$5,000 to \$1 million.¹¹³

Although the FSM Supreme Court has held that the 1979 Act is constitutional on its face,¹¹⁴ as discussed more fully in Sections V and VI, the enforcement of the 1979 Act violates the principles of due process embodied in the FSM Constitution.¹¹⁵

D. *FSM Marine Resources Act of 2002*

In 2002, the FSM Congress enacted the Marine Resources Act of 2002 (the 2002 Act), substantially amending Title 24 of the FSM Code.¹¹⁶ The stated purposes of the 2002 Act are “to ensure the sustainable development, conservation and use of the marine resources” in the FSM EEZ¹¹⁷ and to ensure the FSM’s compliance with international law and its treaty obligations.¹¹⁸ The 2002 Act satisfies the FSM’s treaty obligations in a number of areas, including the requirement that foreign fishing vessels obtain a license issued pursuant to an access agreement,¹¹⁹ that foreign fishing vessels pay a fee or royalty for access to the EEZ,¹²⁰ that foreign fishing vessels maintain adequate fish catch records in English,¹²¹ and the codification of minimum terms for fishing access agree-

111. *Id.* § 502(2). All fines must be paid in U.S. dollars. *See* 57 F.S.M.C. § 101 (“Legal tender of the [FSM] shall be the coins and currencies of the [United States.]”).

112. 24 F.S.M.C. § 502(2).

113. *Id.* § 503.

114. *FSM v. Skico, Ltd. (II)*, 7 FSM Intrm. 555 (Chk. 1996), <http://www.fsmlaw.org/fsm/decisions/>.

115. *See infra* sections V and VI.

116. Pub. L. No. 12.034 (2001), <http://www.fsmcongress.org/12congress/>.

117. *Id.* § 101(1).

118. FSM CONG. COMM. ON RES. & DEV., *STANDING COMM. REP. NO. 12-57*, at 2 (12th Cong. 2002).

119. Pub. L. No. 12.034, §§ 103-05.

120. *Compare* Pub. L. No. 12.034, § 113(1), *with* Nauru Agreement, *supra* note 70, art. II(c)(i).

121. *Compare* Pub. L. No. 12.034, § 115, *with* Nauru Agreement, *supra* note 70, art. II(c)(ii).

ments and licenses.¹²² The 2002 Act also established the National Oceanic Resource Management Authority (NORMA),¹²³ established a procedure for the imposition of administrative penalties,¹²⁴ increased the number of and expanded the scope of presumptions available to the FSM Secretary of Justice further reducing the FSM's burden in prosecuting cases,¹²⁵ and substantially reduced the minimum fine for violations of FSM law.¹²⁶

The Executive Director of NORMA and the FSM Secretary of Justice have the discretion to enforce the 2002 Act through the imposition of newly created administrative penalties¹²⁷ or through court proceedings. The in rem action, civil penalties action, and criminal action are continued from the 1979 Act. The 2002 Act, however, adds to the Secretary of Justice's enforcement arsenal six new presumptions¹²⁸ and places the burden of proof on the person alleged to be in violation of the act.¹²⁹ While the 2002 Act makes great strides in bringing the FSM into compliance with its interna-

122. Compare Pub. L. No. 12.034, §§ 110, 115, with Nauru Agreement, *supra* note 70, art. II(b).

123. Pub. L. No. 12.034, § 201.

124. *Id.* § 703.

125. Compare Pub. L. No. 12.034, § 706, with 24 F.S.M.C. § 515.

126. Compare Pub. L. No. 12.034, §§ 906-20, with 24 F.S.M.C. § 503.

127. Pub. L. No. 12.034, § 703. The administrative penalty process established under the 2002 Act does not provide the person or vessel charged with violating the Act a right to a hearing, thus raising potential due process concerns. See *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 76 (Pon. 1985), <http://www.fsmlaw.org/fsm/decisions/>; *FSM v. Skico, Ltd. (II)*, 7 FSM Intrm. 555, 556 (Chk. 1996), <http://www.fsmlaw.org/fsm/decisions/>. The Executive Director of NORMA does have the authority to promulgate regulations for the administrative penalty process. Pub. L. No. 12.034, § 204(1)(f). If the regulations include the right to notice and a hearing to contest the imposition of the administrative penalty, the potential constitutional defect may be cured. It is also possible that if the 2002 Act's administrative penalty process is challenged, the FSM Supreme Court will, as it did in *Ishizawa*, create the right to a hearing, thus judicially curing the constitutional defect. 2 FSM Intrm. 67.

128. Compare 24 F.S.M.C. § 515, with Pub. L. No. 12.034, § 706.

129. Pub. L. No. 12.034, § 707 (stating that it applies to any proceeding under 2002 Act). This transfer of the burden of proof applies to criminal proceedings, as well as to civil proceedings, filed under the Act. See *id.* The transfer of the burden of proof raises additional due process concerns which are not addressed in this Article. See *Ludwig v. FSM*, 2 FSM Intrm. 27, 35 (App. 1985) (noting that in criminal cases, the government has the burden of proof and must prove each element of the crime beyond a reasonable doubt), <http://www.fsmlaw.org/fsm/decisions/>; *FSM v. Ting Hong Oceanic Enters.*, 8 FSM Intrm. 166, 171 (Pon. 1997) (stating that the government has burden of proof in case charging criminal violation of fisheries law), <http://www.fsmlaw.org/fsm/decisions/>.

tional treaty obligations, the enforcement mechanisms continue to violate the principles of due process embodied in the FSM Constitution.¹³⁰

E. *Yap State Fishery Zone Act of 1980*¹³¹

The State of Yap¹³² has sovereign rights over the territorial sea surrounding its islands.¹³³ Yap enforces its sovereign rights over its territorial sea through the Yap State Fishery Zone Act of 1980 (Fishery Zone Act).¹³⁴ The stated purpose of the Fishery Zone Act is to “promote economic development and to manage and conserve living sea resources” within the State’s territorial sea.¹³⁵ The Fishery Zone Act authorizes Yap Fishing Authority, a statutorily created entity of the State,¹³⁶ to issue licenses to foreign fishing vessels allowing them to fish within Yap’s Fishery Zone.¹³⁷ To date, Yap Fishing Authority has not issued a license to any foreign fishing vessel.¹³⁸ Thus, the importance of the Fishery Zone Act is not the grant of power to Yap Fishing Authority to collect foreign

130. See *infra* sections V and VI.

131. The States of Chuuk and Kosrae have similar statutes. See 25 Draft C.S.C. §§ 1001 *et seq.*, Legal Information System of the Federated States of Micronesia, Chuuk State Code (Draft Version), <http://www.fsmlaw.org/chuuk/code/index.htm>; 19 K.S.C. §§ 19.101 *et seq.*, Legal Information System of the Federated States of Micronesia, Kosrae State Code, <http://www.fsmlaw.org/kosrae/code/index.htm>.

132. The State of Yap consists of more than 300 islands and atolls spread over thousands of square miles of ocean. Yap’s territorial sea is separated by large expanses of ocean which are regulated by the FSM under Title 18 of the FSM Code and Pub. L. No. 12.034. See *Chuuk v. Sec’y of Fin.*, 9 FSM Intrm. 424 (App. 2000), <http://www.fsmlaw.org/fsm/decisions/>.

133. See *supra* note 93.

134. 18 Y.S.C. § 201-18 (1980) [hereinafter *Fishery Zone Act*], available at Legal Information System of the Federated States of Micronesia, Yap State Code, <http://www.fsmlaw.org/yap/code/index.htm>.

135. *Id.* § 202.

136. *Id.* §§ 101 *et seq.*

137. *Id.* §§ 208, 210-11.

138. The author was legal counsel to Yap Fishing Authority from 1997 through 2001. This information was confirmed August 30, 2002. E-mail from Mike Gaan, Chief of the Division of Commerce and Industry, Department of Resources and Development, State of Yap to Kathleen M. Burch, Professor of Legal Writing, Roger Williams University School of Law (Aug. 29, 2002, 21:59 EST) (on file with author). The fact that Yap Fishing Authority, a state agency, has not issued any foreign fishing licenses since its creation in 1979 is consistent with the Yapese position that marine resources are private property, the ownership of which is determined under custom and tradition. See YAP STATE CONST. art. XIII, §§ 5, 6.

fishing fees,¹³⁹ but the prohibition of foreign fishing without a permit¹⁴⁰ and the enforcement provisions.¹⁴¹

The Fishery Zone Act authorizes the Attorney General to prosecute illegal fishing cases.¹⁴² If a vessel engages in a prohibited act as defined in section 212,¹⁴³ the Attorney General may file a civil penalties action,¹⁴⁴ a criminal action,¹⁴⁵ and an in rem forfeiture action.¹⁴⁶ As in the 1979 Act and the 2002 Act, the same underlying violation can be, and usually is, the basis for the civil penalties action, the criminal action, and the in rem forfeiture action. While each day is considered a separate violation,¹⁴⁷ the Fishery Zone Act does not establish mandatory minimum civil penalties¹⁴⁸ or criminal fines.¹⁴⁹

Over the past ten years, the majority of the foreign fishing vessels caught illegally fishing within Yap's boundaries¹⁵⁰ were caught fishing in Yap's Fishery Zone by citizens of the State of Yap, either in their official capacity as government employees or in their capacity as ordinary citizens. Yap received approximately

139. 18 Y.S.C. § 211(g).

140. *Id.* §§ 211(a), 212.

141. *Id.* §§ 213-15.

142. *Id.* § 217(a).

143. The prohibited acts listed in section 212 are not coextensive with the prohibited acts listed in section 501 of the 1979 Act or section 906 of the 2002 Act. Compare 18 Y.S.C. § 212, with 24 F.S.M.C. § 501 (1979), and Pub. L. No. 12.034, § 906 (2002).

144. 18 Y.S.C. § 213. Proceeds collected as civil penalties are divided equally between the State and the municipality in whose boundaries the illegal fishing occurred. *Id.* § 213(c). The municipality must use the funds to "maintain, develop, and protect" marine resources. *Id.*

145. *Id.* § 214. Criminal fines are deposited in the State Treasury. 13 Y.S.C. § 501 (stating that all revenues shall be deposited in the Yap State General Fund).

146. 18 Y.S.C. § 215. The net proceeds from forfeiture actions are divided equally between the state and the "persons whose traditional fishing rights have been violated" by the illegal fishing. *Id.* § 215(d).

147. *Id.* §§ 213(a), 214(d), (e).

148. *Id.* § 213(a) (stating that "the civil penalty shall not exceed \$75,000.00 for each violation").

149. *Id.* § 214. Criminal fines range from \$50,000.00 to \$250,000.00. *Id.* § 214(b), (c). The one exception to the mandatory fine is a violation of the waste holding tank requirement. See *id.* § 214(e) (noting that failure for a vessel with living quarters to have a waste holding tank of at least two weeks capacity is "punishable by a fine of \$25,000.00").

150. See FSM CONST. art. I, § 2 (State includes the islands corresponding to the Trust Territory District and marine space to the equidistant point of the adjacent state) and YAP STATE CONST. art. XI (identifying island groups of state).

\$1.1 million from enforcing the Fishery Zone Act between 1988 and 1996.¹⁵¹ The enforcement of the Fishery Zone Act, however, raises the same due process concerns as does the enforcement of the 1979 and 2002 FSM Marine Resources Acts because in rem forfeiture actions brought under both the Yap and the FSM Acts are governed by the procedure created by the FSM Supreme Court.¹⁵²

F. *Illegal Fishing*¹⁵³

Authorized surveillance officers may be found aboard patrol vessels, fishing vessels operated by Yap Fishing Authority, and civilian passenger ferries.¹⁵⁴ A foreign fishing vessel can, however, be stopped and boarded by individuals who do not appear to be aboard surveillance vessels and who are likely not in uniform. A marine surveillance officer may stop and search any vessel regardless of whether the officer suspects that the vessel is engaged in criminal activity.¹⁵⁵ Foreign fishing vessels are usually arrested hundreds of miles from the state capital and the nearest judicial

151. Robbe Burch, *Yap Port Authority: Financial Analysis*, Sea Port Division (Dec. 9, 1997) (unpublished report of the Division of Commerce and Industry, State of Yap) (on file with author).

152. *M/V Hai Hsiang #36 v. Pohnpei*, 7 FSM Intrm. 456 (App. 1996) (stating that the FSM Supreme Court has exclusive jurisdiction in illegal fishing cases), <http://www.fsmlaw.org/fsm/decisions/>.

153. The information contained in this section is based upon the author's prosecution of foreign fishing vessels charged with violating the Fishery Zone Act.

154. Only an authorized surveillance officer may arrest a vessel. 18 Y.S.C. § 217(b) (1980); 24 F.S.M.C. § 513 (1979); Pub. L. No. 12.034, § 603. In November, 1995, after marine surveillance training, the Yap Attorney General authorized and appointed employees of Yap State Public Safety (fire and police), the Division of Marine Resources of the Department of Resources and Development, the Division of Marine Transportation of the Department of Public Works, employees of Yap Fishing Authority, the officers and crew of the Pawlulap (surveillance vessel), and the officers and crew of the MicroSpirit (passenger ferry), as Yap State Marine Surveillance Officers. 18 Y.S.C. § 217(b) (stating that the Attorney General must authorize and appoint marine surveillance officers). The 1995 marine surveillance training was conducted by the author. Documentation of the training is available in the Yap State Office of Attorney General.

155. 18 Y.S.C. § 217(b)(1)(B); 24 F.S.M.C. § 513(1)(b)(i); Pub. L. No. 12.034, § 603 (1) (a), (c), (e), (f). Vessel searches have been justified on various grounds including border searches, administrative inspection of a highly regulated industry, and exigent circumstances. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 74 (Pon. 1985) (citing U.S. authorities), <http://www.fsmlaw.org/fsm/decisions/>.

officer.¹⁵⁶ The arrest and prosecution of one foreign fishing vessel can cost the state thousands of dollars.¹⁵⁷

It is not uncommon for foreign vessels arrested for illegal fishing to be seized without a warrant on the open seas.¹⁵⁸ By the time the vessel arrives in port, the state has already filed an action in rem against the vessel and the fish on board the vessel,¹⁵⁹ an emergency ex parte motion for sale of the fish,¹⁶⁰ a civil penalties action against the owner and operators of the vessel, including the captain and master,¹⁶¹ and a criminal action against the operators of the vessel – in particular the captain, master, and agent of the vessel.¹⁶² The in rem action and the civil penalties action are filed

156. See *FSM v. Yue Yuan Yu No. 708*, 7 FSM Intrm. 300 (Kos. 1995) (“Many FSM seizures take place on the high seas, and vessels are often arrested at outer islands.”), <http://www.fsmlaw.org/fsm/decisions/>. The FSM Supreme Court maintains chambers in the capital of each state. The Yap State Court maintains chambers in Colonia, Yap.

157. In *In re Kuan Hsing 182 & An Unknown Quantity of Fish*, the vessel was arrested by the crew of the *MicroSpirit*, Yap’s passenger ferry, within twelve miles of Elato atoll. 7 FSM Intrm. 465 (Yap 1996), <http://www.fsmlaw.org/fsm/decisions/>. Elato does not have sufficient land mass to accommodate an air strip. The crew of the *MicroSpirit* had to pilot the vessel and the *MicroSpirit* to Woleai, more than 100 miles away. Police officers and personnel to crew the vessel were flown via a chartered flight from Yap to Woleai to escort the vessel to Colonia, Yap. Upon arrival in Tomil Harbor, Colonia, Yap, the vessel was secured by a 24-hour police watch until bond was posted. The cost of arrest was more than \$50,000.00. Documentation is available in the Yap State Attorney General’s Office.

158. During the author’s six years in Yap, there was only one case in which a warrant was issued before seizure. *But see FSM v. Skico, Ltd. (II)*, 7 FSM Intrm. 555 (Chk. 1996).

159. See 18 Y.S.C. § 215.

160. See *id.* § 215(f). In order to maintain the commercial value of the fish seized, the fish are usually off-loaded and sold as soon as possible. The proceeds from the sale of fish are deposited into a savings account with the Bank of FSM. The signatory to the account is the presiding judge and the clerk of the court.

161. See *id.* § 213.

162. See *id.* § 214. The FSM Supreme Court has acknowledged the government’s “prosecutorial discretion to [simultaneously] file both the civil and criminal cases” against the same defendants arising out of the same illegal fishing incident in violation of fisheries law. *FSM v. Zhong Yuan Fishery Co.*, 9 FSM Intrm. 351 (Kos. 2000), <http://www.fsmlaw.org/fsm/decisions/>. The FSM Supreme Court has not addressed the issue of whether assessment of fines in the criminal action and forfeiture of the vessel and fish in the in rem action based on the same conduct is a violation of the prohibition against excessive fines. Both the FSM Constitution and the Yap State Constitution contain prohibitions against excessive fines. See FSM CONST. art. IV, §§ 7, 8; YAP STATE CONST. art. II, §§ 6, 7. The excessive fines issue was raised but not properly preserved in *FSM v. Cheng Chia-A (II)*, 7 FSM Intrm. 205, 218-19 (Pon. 1995), <http://www.fsmlaw.org/fsm/decisions/>.

in the Trial Division of the FSM Supreme Court,¹⁶³ while the criminal action is filed in the Trial Division of the State Court for the State of Yap.¹⁶⁴

The defendants are entitled to a probable cause hearing in the criminal action¹⁶⁵ pending before the state court and a probable cause hearing in the in rem action¹⁶⁶ pending before the FSM Supreme Court. Usually, the owner of the vessel retains counsel to represent all parties charged with illegal fishing. When counsel is from off-island, as is commonly the case, the probable cause hearing is delayed until counsel's arrival. At defense counsel's election, the probable cause hearing is usually (and only) held in the in rem action.¹⁶⁷

163. "The trial division of the [FSM] Supreme Court has original and exclusive jurisdiction in . . . admiralty or maritime cases." FSM CONST. art. XI, § 6(a). See also *M/V Hai Hsiang No. 36 v. Pohnpei*, 7 FSM Intrm. 456 (App. 1996) (stating that the in rem action and civil penalties action against commercial fishing vessel and owner for violation of state fishing law within state waters is within the exclusive admiralty and maritime jurisdiction of the FSM Supreme Court); *Fed. Bus. Dev. Bank v. S/S Thorfinn*, 4 FSM Intrm. 367, 374 (App. 1990) (stating that the FSM Supreme Court has jurisdiction over all maritime cases), <http://www.fsmlaw.org/fsm/decisions/>; *Weilbacher v. Kosrae*, 3 FSM Intrm. 320 (App. 1988) (noting that admiralty and maritime jurisdiction in the FSM is similar to admiralty and maritime jurisdiction in the United States), <http://www.fsmlaw.org/fsm/decisions/>; 18 Y.S.C. § 215(b) ("A court of competent jurisdiction in the State shall have jurisdiction" in the in rem proceeding.).

164. 4 Y.S.C. § 124 ("The Trial Division of the State Court shall have original jurisdiction to try all causes, civil and criminal, except those matters which fall under the exclusive jurisdiction of the Supreme Court of the Federated States Micronesia.").

165. YAP STATE R. CRIM PRO. R. 5.1, <http://www.fsmlaw.org/yap/rules/crim.htm>.

166. *FSM v. M.T. HL Achiever (III)*, 7 FSM Intrm. 256, 257 (Chk. 1995) (stating that "a post-seizure hearing is required by the constitutional guarantee of due process"), <http://www.fsmlaw.org/fsm/decisions/>.

167. Arguably, a defendant may only be entitled to one probable cause hearing. *Pohnpei v. M/V Zhong Yuan Yu No. 606*, 6 FSM Intrm. 464 (Pon. 1994), <http://www.fsmlaw.org/fsm/decisions/>. In *M/V Zhong Yuan Yu No. 606*, on defendant's petition to remove the action from state court, the FSM Supreme Court abstained from taking jurisdiction over the case and remanded the case back to the state court because the state court had already held a probable cause hearing and entered substantive orders in the case. *Id.* at 464. Citing the rule on removal, the FSM Supreme Court stated that defendants would not be entitled to a new probable cause hearing if the Court did exercise jurisdiction. *Id.* at 466. There is no reported decision in which either the FSM Supreme Court or a state court has addressed the issue of whether a defendant would be entitled to a probable cause hearing in the in rem action pending before the FSM Supreme Court and a separate probable cause hearing in the criminal action pending in the state court when

At the probable cause hearing, the State is allowed to establish probable cause through reliable hearsay evidence.¹⁶⁸ Because of the relaxed rules of evidence, usually only one surveillance officer testifies.¹⁶⁹ The surveillance officer's testimony is based upon the collective knowledge of all of the individuals involved in the arrest. The surveillance officer testifies as to the location of the vessel when it was illegally fishing, the activity of the crew that led the officer to believe that the vessel was illegally fishing, the condition of the fish on board the vessel, the evidence seized, and the procedure used to seize the vessel and crew. The testifying officer need not have witnessed the illegal activity; need not have boarded the vessel to determine if the vessel was engaged in illegal fishing; and need not have been involved in the search or seizure of the vessel.¹⁷⁰ Although the vessel's attorney is given the opportunity to cross-examine the testifying officer, the court usually finds probable cause.¹⁷¹

In order to obtain release of the vessel once probable cause is found, the vessel owner can post a bond. The vessel is not released

both actions are premised upon the same illegal conduct of the defendant. *Id.* The availability of separate probable cause hearings raises the specter of inconsistent rulings being entered based on the same evidence by the two different courts. *Id.* Because the witnesses can not testify in two separate proceedings at the same time, one probable cause hearing will necessarily conclude first, and as the criminal action and the in rem forfeiture action are premised on the same event, it is likely that the prevailing party, usually the State, will raise the issue of collateral estoppel. See *Berman v. FSM Supreme Court* (I), 7 FSM Intrm. 8 (App. 1995), *Mid-Pacific Constr. Co. v. Semes* (II), 6 FSM Intrm. 180 (Pon. 1993) (recognizing doctrine of collateral estoppel); *Nahnken of Nett v. United States* (III), 6 FSM Intrm. 508 (Pon. 1994) (same). It should be noted, however, that individual defendants in the criminal action are not always the same parties who have standing in the in rem forfeiture action. Thus, the court may be unwilling to collaterally estop a defendant from raising the issue of probable cause.

168. *FSM v. Yue Yuan Yu* No. 708, 7 FSM Intrm. 300, 303 (Kos. 1995), <http://fsmlaw.org/fsm/decisions/>.

169. See *id.* at 305. The State of Yap usually has an officer who was involved with some aspect of the arrest of the vessel testify at the probable cause hearing. The FSM has relied upon affidavits of surveillance officers instead of testimony before the court. See *id.*; *FSM v. Zhong Yuan Yu* No. 621, 6 FSM Intrm. 584 (Pon. 1994), <http://www.fsmlaw.org/fsm/decisions/>.

170. The choice of which officer will testify on behalf of the State at the probable cause hearing is based on practical considerations such as whether the officer is fluent in English, whether the officer can read and interpret nautical charts, whether the officer can identify fish species, whether the officer has prior experience testifying, and whether the officer is related to the judge.

171. During the years 1995-2001, the FSM Supreme Court found probable cause in all cases brought by the State of Yap.

until the bond is posted.¹⁷² Settlement negotiations can begin within hours of the arrest of the vessel, and it is possible for a settlement to be reached before any litigation is filed.¹⁷³ Most cases filed by the State of Yap conclude in a settlement equal to the proceeds from the sale of the fish, the insured value of the vessel, and the cost of arrest, including the cost of securing the vessel in port.¹⁷⁴ The economics of the fishing industry dictate that the vessel and crew be released from custody and return to the fishing grounds as quickly as possible. Once the vessel and crew are released, they are not likely to return for trial.¹⁷⁵ From August of 1995 through August of 2001, not one illegal fishing case went to trial in the State of Yap; all cases were either settled before litigation was filed or after the probable cause hearing.¹⁷⁶

In order to comply with its treaty obligations,¹⁷⁷ the FSM requires the State to report the identity of the vessel caught illegally fishing, the name of the vessel's owners, the name of the vessel's captain, the nature of the violation, and the resolution of the illegal

172. In order for a court in the FSM to maintain in rem jurisdiction, "the vessel must be seized and be under the control of the court." *Kosrae v. M/V Voea Lomipeau*, 9 FSM Intrm. 366, 370 (Kos. 2000) (discussing the court's dismissal of a complaint against a vessel because the vessel had not been seized and was not in the FSM), <http://www.fsmlaw.org/fsm/decisions/>. *Accord Moses v. M.V. Sea Chase*, 10 FSM Intrm. 45, 51-52 (Chk. 2001) (stating that the vessel must be in jurisdiction of court for in rem action); *In re Kuang Hsing No. 127*, 7 FSM Intrm. 81, 82 (Chk. 1995) (dismissing in rem action where the vessel was never seized and no bond was posted), <http://www.fsmlaw.org/fsm/decisions/>. See also Pub. L. No. 12.034, §§ 801(2), 807. On occasion, a prosecutor has not had the foresight to require the posting of a bond before agreeing to release the vessel. See *Ting Hong Oceanic Enters. v. FSM*, 7 FSM Intrm. 471 (App. 1996) (discussing the government's release of a vessel and the individual defendants before procuring a bond), <http://www.fsmlaw.org/fsm/decisions/>.

173. See Settlement Agreement between State of Yap and Fukuichi Maru No. 85, Fukuichi Fisheries Co., Ltd., Akio Oyama, and Japan Far Seas Purse Seine Fishing Association (Aug. 6, 1996) (unpublished agreement, on file with author).

174. The State of Yap structures the settlement agreement such that, after reimbursement to the State of the cost of arrest and prosecution, at least fifty percent of the settlement is designated as criminal fines and the remainder is designated as payment in lieu of forfeiture. See *supra* notes 146-47. To date, the largest payment made pursuant to 18 Y.S.C. § 215(d) was \$125,000.00 paid to the traditional chief of Rumung. Documentation is available in the Yap State Office of Attorney General.

175. *Ting Hong Oceanic Enters. v. FSM*, 7 FSM Intrm. 471, 475 (App. 1996) (discussing situation where vessel and two members of the crew left the FSM before trial and did not return), <http://www.fsmlaw.org/fsm/decisions/>.

176. Documentation is available in the Yap State Office of Attorney General.

177. Niue Treaty, *supra* note 76, art. IV(2).

fishing charges to the FFA for documentation on the Regional Register. For vessels prosecuted by the FSM, the FSM is required to report the same information to the FFA for documentation on the Regional Register. Because the settlement is entered after the probable cause hearing, but before a trial on the merits, and includes payment of criminal fines and cash in lieu of forfeiture, the information reported to the FFA appears to indicate that the vessel was guilty of illegal fishing when, in fact, the vessel owner may have settled the litigation not based on guilt but based on the economic need to have the vessel and crew return to the fishing grounds.¹⁷⁸

While the receipt of settlement funds is an economic benefit to the State, the prosecution of individuals for illegal fishing in violation of their rights to due process negates the short-term economic benefit of the settlement payment. The prosecution of foreign fishing vessels, their owners, and operators in proceedings that are fundamentally unfair lead those same persons to move their investment to a jurisdiction that provides, or is at least perceived to provide, a more equitable system of adjudicating disputes. Thus, while the State may receive a lump sum cash payment in settlement, it stands to lose the future income stream and on-shore investment, including local job creation, from a viable fishing industry.¹⁷⁹

178. The practice in Yap has been for the settlement to explicitly state that the settlement is not an admission of liability by the vessel owner and captain. See Settlement Agreement in Yap v. Koueki Suisan Guam Co., Civil Action No. 1995-3031, FSM Supreme Court, Trial Division, June 19, 1998 – Yap State (“Waiver and release of the Settlement Funds by Tuna Industrial Co. and Koueki does not constitute an admission by either Tuna Industrial Co. or Koueki of liability for the alleged fishing incident which resulted in the filing of the Civil Penalties Action, the Forfeiture Action, and the Criminal Action.”). The settlement agreement, however, is not forwarded to the FFA.

179. In 1995, Ting Hong Oceanic Enterprises was the largest fishing operator in the FSM. FSM v. Cheng Chia-W (II), 7 FSM Intrm. 205, 218 (Pon. 1995), <http://www.fsmlaw.org/fsm/decisions/>. Ting Hong accounted for 60% of the FSM catch and exported \$90 million of sashimi grade tuna to the Japanese market. *Id.* After a \$1.2 million criminal fine was assessed against it in *FSM v. Ting Hong Oceanic Enterprises*, the company left the FSM. 8 FSM Intrm. 166 (Pon. 1997). Ting Hong Oceanic Enterprises’ exit from Yap left the State with no foreign on-shore fisheries investment and no fishing fleet based in Yap. To date, Yap has not been able to attract comparable foreign on-shore fisheries investment.

V. DUE PROCESS

A. *Due Process in the Federated States of Micronesia*

The FSM and its constituent states adopted the concept of due process from the United States Constitution.¹⁸⁰ Article V, Section 3 of the FSM Constitution states “[a] person may not be deprived of life, liberty, or property without due process of law”¹⁸¹ Similarly, the Yap State Constitution states that “[n]o person shall be deprived of life, liberty, or property, without due process of law”¹⁸² Because a vessel owner’s right to due process under the FSM Constitution and the Yap State Constitution are co-extensive,¹⁸³ only the FSM Constitution will be addressed.

Because the FSM Constitution borrowed the concept of due process from the United States, the courts of the FSM have explicitly stated that the due process jurisprudence of the FSM has been built upon the principles of due process established by the United States Supreme Court.¹⁸⁴ Micronesian due process consists of both

180. *FSM v. Skico, Ltd. (II)*, 7 FSM Intrm. 555, 556-57 (Chk. 1996) (stating that the due process provision of the FSM Constitution was derived from the due process provision of the United States Constitution), <http://www.fsmlaw.org/fsm/decisions/>.

181. FSM CONST. art. IV, § 3.

182. YAP STATE CONST. art II, § 4, cl. 1; *see also* POHNPEI STATE CONST. art. 4, § 4 (“No person may be deprived of life, liberty, or property without due process of law. Private property may not be taken except for a public purpose with just compensation.”); CHUUK CONST. art. III, § 2 (“No person may be deprived of life, liberty, or property without due process of law.”); KOSRAE CONST. art. II, § 1(b) (“A person may not be deprived of life, liberty, or property without due process of law.”).

183. *Thomson v. George*, 8 FSM Intrm. 517, 523 (App. 1998) (noting that where the language of the due process clause in a state constitution is the same as the FSM Constitution, the due process clauses are identical in meaning and scope) (citing *Alik v. Kosrae Hotel Corp.*, 5 FSM Intrm. 294, 297 (Kos. 1992)), <http://www.fsmlaw.org/fsm/decisions/>.

184. *See, e.g., Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 76 (Pon. 1985) (stating that because FSM Constitution borrowed due process from U.S. Constitution, FSM courts look to U.S. law for guidance), <http://www.fsmlaw.org/fsm/decisions/>; *Paulus v. Pohnpei*, 3 FSM Intrm. 208, 221 (Pon. S. Ct. Tr. 1987) (defining and explaining due process), <http://www.fsmlaw.org/fsm/decisions/>; *see also Tammow v. FSM*, 2 FSM Intrm. 53, 56-57 (App. 1985) (stating that where framers of FSM Constitution borrowed language of the U.S. Constitution, it is “presumed that the phrases so borrowed were intended to have the same meaning given to them by the Supreme Court of the United States.”); *Ludwig v. FSM*, 2 FSM Intrm. 27, 35 (App. 1985) (stating that because FSM due process clause is based on U.S. Constitution, look to interpretation of U.S. Constitution for guidance), <http://www.fsmlaw.org/fsm/decisions/>.

procedural due process and substantive due process.¹⁸⁵ Procedural due process includes the right to notice and an opportunity to be heard.¹⁸⁶ Substantive due process encompasses notions of fundamental fairness.¹⁸⁷

As persons whose "substantial interests," either in the vessel or in their own liberty, will be affected by the proceedings, the owners, captains, and agents of foreign fishing vessels are entitled to due process.¹⁸⁸ Moreover, foreign nationals are persons within the meaning of the due process clause,¹⁸⁹ and it cannot be disputed that a fishing vessel is property within the meaning of the due process clause.¹⁹⁰ And clearly, the restriction of a person to a particular geographic area¹⁹¹ pending resolution of the in rem forfeiture action and criminal charges is a deprivation of liberty.¹⁹² The protections of the due process clause are applicable to both the State's and the FSM's prosecution of illegal fishing cases, whether prosecuted as in rem forfeiture actions in the FSM Supreme Court or as criminal actions in either the FSM Supreme Court or a state court.

Although a defendant's due process rights are triggered in both the in rem forfeiture action and the criminal action, because

185. *Paulus*, 3 FSM Intrm. at 221 ("Procedural due process relates to the requisite characteristics of proceedings tending toward a deprivation of life, liberty, or property and thus makes it necessary that a person whom it is sought to deprive of such a right must be given notice of this fact; in other words, he must be given notice of the proceedings against him in that regard, he must be given an opportunity to defend himself before a tribunal or office having jurisdiction of the cause, and the problem of the propriety of this deprivation, under the circumstances presented, must be solved in a manner consistent with essential fairness.").

186. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 76 (Pon. 1985).

187. *Id.*

188. Any person whose "substantial interests" will be affected by the proceeding is entitled to due process. *Louis v. Kutta*, 8 FSM Intrm. 228, 230 (Chk. 1998) (citing 16A AM. JUR. 2D *Constitutional Law* § 835 (1979)), <http://www.fsmlaw.org/fsm/decisions/>.

189. *Berman v. FSM Supreme Court (I)*, 5 FSM Intrm. 364, 366 (Pon. 1992), <http://www.fsmlaw.org/fsm/decisions/>.

190. *Ishizawa*, 2 FSM Intrm. at 75 ("Seizure of a fishing vessel has especially profound implications. A valuable, potentially productive asset is rendered useless to the owners, depriving them of potential profits as well as their use of the vessel.").

191. Individual defendants charged with criminally violating 18 Y.S.C. § 214 are not usually detained in the Yap State jail but are released with conditions to reside at a particular location and to surrender their passports. See UNCLOS III, *supra* note 4, art. 292(c) (requiring the prompt release of individuals and vessels upon posting of adequate bond).

192. *Ishizawa*, 2 FSM Intrm. at 72, 75.

defendants usually request the probable cause hearing in the in rem action and not the criminal action, the due process problems identified in this Article are unique to the in rem forfeiture action and to the forfeiture procedures established by the FSM Supreme Court. The due process concerns arise because of the nature of the fishing industry. The owner of the vessel is interested in obtaining the release of the asset, the vessel. The captain and fish master charged in the criminal action, unless they are also the owners, are replaceable. The economic incentive is to move forward in the in rem forfeiture action, obtaining release of the vessel in order to maintain the owner's financial viability. The judicially created post-seizure hearing in the in rem forfeiture action does not take into account these realities of the fishing industry: this failure triggers due process concerns. In order to adequately assess the due process concerns, two questions must be addressed: (1) what constitutional due process rights do foreign nationals have; and (2) why are the protections established by the FSM Supreme Court insufficient to satisfy constitutional due process?

B. *Procedural Due Process*

The 1979 Act, the 2002 Act, and the Yap Fishery Zone Act are all silent with regard to a defendant's procedural rights in in rem forfeiture actions.¹⁹³ The FSM Supreme Court, however, has not found this deficiency to be constitutionally fatal.¹⁹⁴ Instead, applying the rule of statutory construction that statutes should be construed to be constitutional, the FSM Supreme Court created the right to a prompt post-seizure hearing.¹⁹⁵ This hearing has come to be known as a probable cause hearing.

As early as 1985, the FSM Supreme Court addressed the issue of whether a vessel owner was entitled to a post-seizure hear-

193. 24 F.S.M.C. §§ 504-509 (1979); Pub. L. No. 12.034, §§ 801-08; 18 Y.S.C. § 215.

194. *FSM v. M.T. HL Achiever (III)*, 7 FSM Intrm. 256 (Chk. 1995), <http://www.fsmlaw.org/fsm/decisions/>.

195. See *FSM v. Skico, Ltd. (II)*, 7 FSM Intrm. 555, 556 (Chk. 1996) (stating that a defendant is entitled to a post-seizure hearing even though the statute is silent as to a post-seizure hearing), <http://www.fsmlaw.org/fsm/decisions/>; *FSM v. M.T. HL Achiever (II)*, 7 FSM Intrm. 256, 257 (Chk. 1995) (same); *Ishizawa*, 2 FSM Intrm. at 76-77 (stating that the FSM Constitution requires that, at a minimum, the government must establish probable cause for seizure of a vessel at prompt post-seizure hearing), <http://www.fsmlaw.org/fsm/decisions/>.

ing.¹⁹⁶ In *Ishizawa v. Pohnpei*,¹⁹⁷ the vessel, Meiho Maru #77, was en route from New Zealand, where it had been squid fishing, to its home port in Japan when it ran aground on the reef fringing Ngatik Atoll, an outlying island of Pohnpei, on April 29th.¹⁹⁸ On May 14th, after the vessel was removed from the reef and towed to Pohnpei harbor, Pohnpei arrested the vessel for illegally fishing and instructed the captain and crew not to leave the island.¹⁹⁹ Pohnpei did not obtain an arrest warrant and did not file any charges against the vessel, captain, or crew.²⁰⁰ The owners of the vessel filed a habeas corpus petition on behalf of the crew and a civil action requesting immediate release of the vessel, alleging that Pohnpei did not have probable cause to arrest either the crew or the vessel.²⁰¹ The FSM Supreme Court instructed Pohnpei that before it could restrict the movements of the crew it must establish probable cause and obtain an arrest warrant.²⁰² With regard to the seizure of the vessel, Pohnpei argued that it did not need probable cause to seize the vessel and that no judicial determination of whether Pohnpei had grounds to arrest the vessel need be made until trial.²⁰³ Rejecting Pohnpei's argument, the FSM Supreme Court held that due to the exigent nature of fisheries, the government could seize a fishing vessel without a warrant so long as the government had probable cause to believe that the fishing vessel had violated a fisheries law.²⁰⁴ The Court went on to state that the owner of the vessel was entitled to a prompt post-seizure hearing at which the government is required to establish probable cause.²⁰⁵ Although the Court chastised Pohnpei for failing to file charges and failing to obtain a judicial determination for more than three days after the seizure of the vessel, the Court left open the question of whether a substantial delay by the government in requesting a post-seizure hearing violates due process.²⁰⁶

196. *Ishizawa*, 2 FSM Intrm. 67 (Pon. 1985).

197. 2 FSM Intrm. 67 (Pon. 1985).

198. *Id.* at 70.

199. *Id.* at 71-72.

200. *Id.* at 72.

201. *Id.* at 72-73.

202. *Id.* at 72.

203. *Id.* at 76.

204. *Id.* at 77.

205. *Id.*

206. *Id.* at 76 n.9. The FSM Supreme Court still has not addressed this issue.

Eleven years later, in *FSM v. Skico, Ltd. (II)*,²⁰⁷ the FSM Supreme Court addressed the issue of whether the forfeiture provisions of the 1979 Act²⁰⁸ were constitutional. On July 5, 1995, a warrant was issued for the arrest of a vessel, a fuel tanker, for illegally bunkering fishing vessels in the EEZ without a fishing permit.²⁰⁹ On the same day, the FSM filed an in rem forfeiture action against the vessel and fuel and a civil penalties action against the owner, agent, and other parties.²¹⁰ On July 17, 1995, at a hearing where the defendants were represented by counsel, the Court found probable cause.²¹¹ Defendant Skico, Ltd. challenged the constitutionality of the forfeiture provisions of the 1979 Act based on the fact that the Act does not specifically provide defendant with a post-seizure hearing, nor notice of that hearing.²¹² The FSM Supreme Court held that the Act was constitutional on its face.²¹³ The Court also refused to adopt a rule requiring the government to provide immediate notice to defendants of a right to a post-seizure hearing.²¹⁴ The Court found that defendant had been afforded procedural due process when it was granted a probable cause hearing.²¹⁵ Since the FSM Supreme Court's ruling in *Ishizawa*, it has been well-established that when a vessel has been seized for illegal fishing, the property owner is entitled to a probable cause hearing.

C. *Substantive Due Process*

In addition to the judicially created right to a probable cause hearing, the FSM Supreme Court has established minimum substantive due process requirements in an effort to ensure that the

207. 7 FSM Intrm. 555 (Chk. 1996).

208. 24 F.S.M.C. §§ 504-09. The forfeiture provisions of the 2002 Act and the Yap Fishery Zone Act are similar to the forfeiture provisions of the 1979 Act. *Compare id.*, with Pub. L. No. 12.034, §§ 801-08, and Pub. L. No. 12.034, § 191(c).

209. The definition of fishing includes the provision of services to fishing vessels, including bunkering. 24 F.S.M.C. § 102(22)(g).

210. *Skico, Ltd. (II)*, 7 FSM Intrm. at 556.

211. *Id.*

212. *Id.* at 557.

213. *Id.*

214. *Id.*

215. *Id.* In *FSM v. M.T. HL Achiever (III)*, an opinion in the same case (Civil Action No. 1995-1012), the FSM Supreme Court held that "a post-seizure hearing is required by the constitutional guarantee of due process." 7 FSM Intrm. 256, 257 (Chk. 1995), <http://www.fsmlaw.org/fsm/decisions/>.

determination of probable cause at the post-seizure hearing is fundamentally fair. The minimal requirements for substantive due process fall into three categories: Probable Cause, Burden of Proof, and Evidentiary Standards.

1. *Probable Cause*

Once the FSM Supreme Court held in *Ishizawa v. Pohnpei*,²¹⁶ that the vessel owner was entitled to a prompt post-seizure hearing, the Court had to establish the standards to be applied at the hearing. Relying on United States law, the Court defined probable cause as “a reasonable ground for suspicion, sufficiently strong to warrant a cautious person to believe that a crime has been committed and that the item to be seized has been used in the crime.”²¹⁷ The Court further held that the Constitution requires that the determination of “whether probable cause exists [must] be determined by the deliberate, impartial, judgment of a judicial officer” making an independent assessment of probable cause.²¹⁸ The question the Court must answer is whether, considering all of the evidence from the viewpoint of the arresting officers, “a prudent and cautious law enforcement officer, guided by reasonable training and experience”²¹⁹ would believe that the vessel was being used to violate the fisheries laws.²²⁰ Applying these standards, the *Ishizawa* Court found that probable cause did not exist at the time of the arrest because the evidence available to the government at the time of the arrest established that the vessel was not fishing within FSM waters.²²¹

In *FSM v. Zhong Yuan Yu No. 621*,²²² the issue before the FSM Supreme Court was whether the time for determining if probable cause existed was at the time of arrest or at the time of the

216. 2 FSM Intrm. 67 (Pon. 1985).

217. *Id.* at 76 (citations omitted); *see also* FSM v. Zhong Yuan Yu No. 621, 6 FSM Intrm. 584, 589 (Pon. 1994).

218. *Ishizawa*, 2 FSM Intrm. at 77 (citations omitted).

219. The Chuuk State Court has held in a non-fisheries setting that an officer's lack of training can rise to the level of a due process violation. *See* Meitou v. Uwera, 5 FSM Intrm. 139 (Chk. St. Ct. Tr. 1991). There is no reason to doubt that the FSM Supreme Court would hesitate to apply this principal to arrests of fishing vessels. Thus, the surveillance training conducted by the FFA is essential to the FSM's enforcement of its fisheries law.

220. *Ishizawa*, 2 FSM Intrm. at 77.

221. *Id.* at 79-80.

222. 6 FSM Intrm. 584 (Pon. 1994), <http://www.fsmlaw.org/fsm/decisions/>.

probable cause hearing. In *Zhong Yuan Yu No. 621*, the FSM National Police boarded the vessel on the high seas for a routine inspection.²²³ According to the arresting officer's affidavit, the name of the vessel on the fishing permit was different than the name of the vessel the officer had boarded.²²⁴ The arresting officer's affidavit also stated that the captain did not produce a catch report or log book, the VHF radio was not working, and the fish on board were recently caught.²²⁵ Based on this knowledge, the arresting officer concluded that the vessel was illegally fishing and arrested the vessel on September 29th.²²⁶ At the probable cause hearing held on October 20th, defense counsel admitted that the vessel had been fishing within the FSM EEZ, but asserted that probable cause did not exist because the vessel had a valid permit at the time of arrest.²²⁷ The Court found that the arresting officer had probable cause to arrest the vessel based on the knowledge available and known to the officer at the time of the seizure.²²⁸ Although the owners of the vessel submitted evidence to the Court at the probable cause hearing establishing that the vessel had a valid permit to fish within the FSM's EEZ, the Court refused to take this evidence into account stating that the evidence submitted by the defense was new evidence not available to the officers at the time of arrest and therefore, irrelevant to the determination of probable cause.²²⁹ In other words, although defendants might ultimately prevail at trial, the determination of the ultimate success on the merits was an issue to be raised at trial, and not at the probable cause hearing.²³⁰ Thus, at the time of seizing the vessel, the arresting officer, based on training and experience, must have evidence and information that would lead a reasonable person to believe that the vessel has been engaged in illegal fishing.

223. *Id.* at 587.

224. *Id.* at 587-88.

225. *Id.* at 588.

226. *Id.*

227. *Id.*

228. *Id.* at 590.

229. *Id.* at 590-91 n.9.

230. *Id.* at 590 n.8 ("The purpose of a post-seizure hearing . . . is not to [sic] an ultimate determination of the facts. That is the purpose of a trial. The issue at a post-seizure hearing is limited to the question of whether the Government has sufficient evidence to meet the threshold requirement of probable cause to detain.").

2. *Burden of Proof*

The FSM Supreme Court has held that the government seizing the vessel has the burden of establishing probable cause for that seizure.²³¹ In *FSM v. Yue Yuan Yu No. 708*,²³² the Court addressed the issue of whether the government could meet its burden of proof by introducing an affidavit instead of the testimony of the arresting officer. In *Yue Yuan Yu No. 708*, the only evidence introduced by the FSM at the probable cause hearing was the affidavit of a marine surveillance officer who was not present for the search or arrest of the vessel.²³³ The FSM argued that it was not required to produce a witness at the probable cause hearing and argued that defendant could have subpoenaed the marine surveillance officers if the defendant wanted to question the officers regarding the arrest of the vessel.²³⁴ The Court held that the FSM bears the burden of proving probable cause to arrest the vessel and that the FSM could not avoid this burden by submitting as its only evidence an unreliable affidavit and claiming that the defendants should have subpoenaed the marine surveillance officers.²³⁵ At the probable cause hearing, the government has the burden of proving that it had probable cause to seize the vessel and cannot shift its burden of proof to the vessel owner.²³⁶

3. *Evidentiary Standards*

In order to meet its burden of proof, the government must introduce reliable evidence at the probable cause hearing.²³⁷ According to the FSM Supreme Court, the “probable cause hearing is an informal, non-adversarial proceeding in which the formal rules of evidence and the requirement of proof beyond a reasonable doubt do not apply.”²³⁸ Because formal rules of evidence do not apply in probable cause hearings, probable cause may be established by

231. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 80 (Pon. 1985), <http://www.fsmlaw.org/fsm/decisions/>; *FSM v. Yue Yuan Yu No. 708*, 7 FSM Intrm. 300 (Kos. 1995), <http://www.fsmlaw.org/fsm/decisions/>.

232. 7 FSM Intrm. 300 (Kos. 1995).

233. *Id.* at 302.

234. *Id.* at 303.

235. *Id.* at 305.

236. *Id.* at 306.

237. *Id.* at 300.

238. *FSM v. Zhong Yuan Yu No. 621*, 6 FSM Intrm. 584, 589 (Pon. 1994), <http://www.fsmlaw.org/fsm/decisions/>.

hearsay evidence.²³⁹ This does not mean that the Court is free to ignore the rules of evidence completely.²⁴⁰ The Court should "receive all relevant evidence and discount evidence which is inherently untrustworthy or suspicious."²⁴¹ Further, the Court should not rely on hearsay evidence when more competent evidence is available.²⁴²

In *FSM v. Yue Yuan Yu No. 708*,²⁴³ the FSM Supreme Court addressed the issue of whether the affidavit of a marine surveillance officer was trustworthy when more competent evidence was readily available. At the probable cause hearing, the FSM introduced as its only evidence to establish probable cause the affidavit of a marine surveillance officer who was not involved in the search or arrest of the vessel.²⁴⁴ The defendant argued that because the affidavit was inherently unreliable, it did not establish probable cause to arrest the vessel.²⁴⁵ The FSM Supreme Court found the affidavit deficient, and therefore unreliable, because it did not state how the officer gained the information contained in the affidavit, it did not identify the marine surveillance officers directly involved in the search and arrest of the vessel, and it contained unknown layers of hearsay.²⁴⁶ The Court stated that unreliable hearsay evidence should not be used to establish probable cause when more reliable and competent evidence was available in the form of testimony from the arresting officer and documents seized from the vessel.²⁴⁷ Noting that the arresting officer could have faxed his affidavit and a copy of the documents seized from the vessel to the Court, the Court chastised the FSM for failing to use the technology available within the country to ensure the use of the most competent evidence at the probable cause hearing.²⁴⁸ The Court found that the FSM failed to establish probable cause.²⁴⁹ Even though probable cause can be established through hearsay evidence, the government cannot rely solely on hearsay

239. *Yue Yuan Yu No. 708*, 7 FSM Intrm. at 303.

240. *Id.* at 304.

241. *Id.* (citing 12 FED. P. § 33:36, at 66 (L.Ed. 1988)).

242. *Id.* (noting U.S. law).

243. *Id.* at 300.

244. *Id.* at 302-03.

245. *Id.* at 303.

246. *Id.* at 304.

247. *Id.* at 305.

248. *Id.*

249. *Id.* at 306.

evidence but must use the most reliable and competent evidence available at the probable cause hearing.²⁵⁰

The FSM Supreme Court has been aggressive in trying to protect the constitutional rights of defendants in in rem forfeiture actions, first by judicially creating a right to a probable cause hearing and second by establishing substantive standards the government must meet to establish probable cause. Nevertheless, due process is not met in most cases. Neither the type of post-seizure hearing nor the minimum substantive due process requirements established by the FSM Supreme Court are sufficient to create a fundamentally fair hearing because neither take into account the economic reality of the fishing industry.

VI. THE DUE PROCESS PROBLEM

The due process problem arises because of the inherent conflict between the economic reality of the fishing industry, the post-seizure procedures created by the FSM Supreme Court, and the FSM's obligation to report all vessels caught illegally fishing to the FFA Regional Register. The economic reality is that in order to generate income, the vessel and crew must fish. Every day the vessel sits idly in port is a cost to the owner, which can be calculated both in terms of lost revenue and cost of crew maintenance.²⁵¹ Thus, the owner's incentive is to return the asset to its revenue generating function as soon as possible. In order for the vessel to generate income, the vessel must fish; and in order for the vessel to fish, the vessel must be released.

The FSM Supreme Court has jurisdiction in the in rem forfeiture action only if the vessel (or a bond in lieu of the vessel) is physically within the Court's jurisdiction.²⁵² If the vessel leaves the FSM, the Court loses jurisdiction, and the Government cannot maintain an in rem forfeiture action.²⁵³ Thus, the Government has no incentive to release the vessel prior to a probable cause hearing or prior to the execution of a settlement agreement.

The vessel owner's only options for release of the vessel are settlement or a probable cause hearing. Usually the vessel owner requests a probable cause hearing. The vessel owner is handi-

250. *See id.* 305-06.

251. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67, 75 (Pon. 1985).

252. *See supra* note 172.

253. *Id.*

capped by the lack of discovery and by the lack of foreign language translators who can translate between English and the vessel owner's and crew's native languages. These handicaps lead to the vessel owner rarely introducing evidence to negate probable cause.²⁵⁴ In the majority of cases, the Court finds probable cause based upon hearsay evidence.²⁵⁵

The economic need to return the vessel to the fishing grounds accounts for the fact that the majority of the illegal fishing cases filed are settled after the probable cause hearing and before trial. The settlement is usually a global settlement that disposes of all litigation filed based on the same underlying act, the civil penalties action, the criminal action, and the in rem forfeiture action.²⁵⁶

The only evidentiary hearing held, and thus the only objective review of the seizure, is the probable cause hearing. The probable cause hearing is in essence a determination on the merits. This determination is based on hearsay evidence and without the vessel owner having the real ability to present evidence in defense.

It can be argued that because the vessel owner is entitled to a trial, due process concerns are not triggered. The decision to settle is a voluntary strategic decision made by the vessel owner based on economic incentives with no coercive act by the government. The cost of settlement is the cost of doing business. This argument, however, ignores reality.

The realities are that the FSM cannot prosecute the in rem forfeiture action unless the vessel remains in the FSM or a bond is paid to the Court, that the vessel owner cannot fish without its vessel, that the only way to obtain a release of the vessel is through the probable cause hearing or settlement, that the cost of settlement is likely less than the cost of litigation, and that the FSM is reporting violations of its fisheries laws to the FFA Regional Regis-

254. Moreover, the FSM Supreme Court has informed vessel owners that it is futile to introduce exculpatory evidence at the probable cause hearing. See *FSM v. Zhong Yuan Yu* No. 621, 6 FSM Intrm. 584 (Pon. 1994) (noting refusal by Court to consider exculpatory evidence presented by defense).

255. See, e.g., *FSM v. Zhong Yuan Yu* No. 621, 6 FSM Intrm. 584 (Pon. 1994) (finding probable cause based on arresting officer's affidavit). In those cases where the author represented the State of Yap in a probable cause hearing, probable cause was based on hearsay evidence. Documentation is available in the Yap State Office of the Attorney General.

256. Copies of settlement agreements the State of Yap has entered into are on file with the author.

ter based upon a finding of probable cause, not a finding of guilt. In other words, because the vessel owner has made a business decision, which may be based solely on financial reasons and not a guilty act, the vessel owner is penalized beyond the economic cost of the terms of the settlement agreement. The additional economic costs results from the FSM's report of the vessel to the FFA Regional Register of Foreign Fishing Vessels, which report can negatively affect the vessel's ability to obtain future fishing permits in the FSM and in other FFA countries.²⁵⁷ The potential imposition of these additional penalties based upon a finding of probable cause, which was based on hearsay, and not on a finding of guilt, creates fundamental unfairness and raises due process concerns. These due process concerns are compounded because the probable cause hearing, a non-adversarial proceeding with relaxed rules of evidence and procedure and a lesser burden of proof, is in effect a hearing on the merits.

VII. CREATING FUNDAMENTAL FAIRNESS

Even though FSM law does not favor forfeitures,²⁵⁸ forfeiture in the form of a cash settlement in lieu of forfeiture is the status quo under the procedure established by the FSM Supreme Court. While at first blush the income derived from the settlement of these illegal fishing cases appears beneficial to the FSM and state governments, a fundamentally unfair procedure that imposes undue costs on an industry that is vital to the economic well-being of the country does not benefit either the FSM or the individual states. In developing a solution, the reality of the fishing industry and the constraints on the FSM must be considered and a balance struck between protecting the vessel owner and accounting for the logistical and economic limitations of the FSM. Moreover, any solution requires the cooperation of all branches of government.

A. Authority to Create a Solution

The FSM Congress, the legislatures of each of the four states, and the FSM Supreme Court all have the authority to fashion a fundamentally fair procedure for prosecuting in rem forfeiture ac-

257. If a foreign fishing vessel is not in good standing on the FFA Regional Register, no FFA member state will issue that vessel a fishing license. See Nauru Agreement, *supra* note 70, arts. IV(b), V; Niue Treaty, *supra* note 76, art. IV(2).

258. FSM v. Skico, Ltd. (I), 7 FSM 550, 552 (Chk. 1996).

tions. Any solution enacted by the FSM Congress would, however, only apply to in rem forfeiture actions brought by the FSM Secretary of Justice alleging violation of the 2002 Act, not to actions brought by any of the states for violation of that state's fisheries laws.²⁵⁹ Likewise, any solution enacted by the legislature of any of the four states of the FSM would only apply to in rem forfeiture actions brought by that state, not to actions brought by any other state or by the FSM. Because the FSM Supreme Court has exclusive jurisdiction over maritime cases,²⁶⁰ including illegal fishing cases, the Court is the only entity that can fashion a fundamentally fair procedure applicable to all in rem forfeiture actions brought against vessels charged with illegally fishing within the FSM. Moreover, because the FSM Supreme Court is the only branch of government to date that has addressed the issue of the vessel owner's due process rights and because the Court can exercise independent rulemaking authority, the Court is the most likely branch of government to act. Since the right to a post-seizure hearing and the substantive standards applied during the hearing have all been judicially created and since the Court is the entity which will be implementing any solution, the Court is the most logical branch of government to establish a new procedure for post-seizure hearings in in rem forfeiture actions.

B. *Prompt Trial on the Merits*

In order to create a fundamentally fair post-seizure hearing in in rem forfeiture actions, the post-seizure hearing should be a trial on the merits, not a probable cause hearing. In *Ishizawa v. Pohnpei*,²⁶¹ the FSM Supreme Court held that the vessel owner was entitled to a post-seizure hearing. That post-seizure hearing is not required to be a probable cause hearing. In fact, the United States cases upon which the FSM Supreme Court based its decision held that the property owner was entitled to a prompt post-seizure hearing and that such a hearing could be the trial on the

259. It is possible that NORMA and the FSM Secretary of Justice can address some of these due process concerns in the administrative penalty procedures authorized under the 2002 Act. Pub. L. No. 12.034, § 703. As of October 2002, these administrative procedures had not been promulgated.

260. See *supra* note 163.

261. *Ishizawa v. Pohnpei*, 2 FSM Intrm. 67 (Pon. 1985).

merits.²⁶² Thus, requiring the post-seizure hearing in these forfeiture actions to be a trial on the merits complies with constitutional due process requirements.

Requiring a prompt trial on the merits is not detrimental to the prosecuting government. Currently, there is often a substantial time delay between the probable cause hearing and the settlement. After probable cause has been found, the owner of the vessel usually posts a bond; the vessel and crew are released and return to the fishing grounds. Occasionally, a pre-trial motion will be filed, but little or no discovery is conducted and government witnesses disperse. In most cases, the Government can present its best case at the probable cause hearing, not at a later trial date.

A prompt trial on the merits takes into account the economic reality of the fishing industry. Within a set period of time after arrest, the vessel owner would have a determination of guilt or innocence based on the merits, and the vessel would be released to return to the fishing grounds. Both the vessel owner and the prosecuting government would know the exact extent of the vessel owner's liability. Furthermore, any report made to the FFA Regional Register would be based on a determination of guilt on the merits, not on a finding of probable cause based on hearsay. There would no longer be the concern that the vessel owner may be subject to the additional future penalty of being denied a fishing license based on less than a finding that the vessel had violated the FSM's or state's fisheries laws.

If the solution of a prompt trial on the merits is adopted, the question becomes how soon after the arrest should the trial be scheduled? This question is complicated by the fact that most arrests occur on the high seas. It can take several days for a vessel to arrive at a port depending both upon the distance the vessel must travel and the weather conditions. Thus, any rule formulated by the FSM Supreme Court should be definite enough that the post-seizure hearing is prompt, but also flexible enough to take into account the inherent difficulties of travel within the FSM.

In formulating a rule, the FSM Supreme Court must also take into account the reality that a Justice of the Court is not always present on each of the islands; nor are the parties or their respec-

262. *FSM v. Skico, Ltd (II)*, 7 FSM Intrm. 555, 557 (stating that only post-seizure hearing needed is trial on merits) (discussing *United States v. \$8,850, 461 U.S. 555* (1983)).

tive attorneys always present in the state where the vessel is arrested. Thus, in order to ensure that a prompt trial on the merits is held and that both parties can present evidence and confront witnesses the Court must make use of and allow the parties to make use of the technology available within the FSM.

C. *Proposed Rule for In Rem Forfeiture Actions*

The following rule should be adopted by the FSM Supreme Court:

Forfeiture Actions – Illegal Fishing

1. This Rule shall apply to all forfeiture actions brought against vessels charged with violating the FSM Marine Resources Act of 2002 or any fisheries law of one of the states of the FSM.
2. In a forfeiture action brought against a vessel charged with illegal fishing in violation of the fisheries laws of the FSM or one of its states, trial shall commence no later than twenty-one days after the date the vessel is arrested. For good cause shown, the Court may grant a party's motion for a continuance.
3. For the purposes of this Rule, a vessel is arrested when an authorized surveillance officer of either the FSM or one of the states of the FSM takes command of the vessel for the purpose of enforcing the fisheries laws of the FSM or one of its states. Whether a person is an authorized surveillance officer shall be determined by statute or treaty.
4. When requesting a continuance, the party requesting the continuance shall state in writing the reason for the continuance. (a) If the prosecuting government requests a continuance, good cause shall include those situations where the vessel's arrival in port has been delayed due to weather or due to an act of the vessel's crew or where the prosecuting government is waiting for scientific testing of evidence or translation of foreign language documents. (b) If a defendant requests a continuance, the request shall be deemed a waiver of that defendant's right to a prompt post-seizure hearing. Moreover, if a defendant requests a continuance, good cause shall include those situations where the defendant is waiting for scientific testing of evidence or translation of foreign language documents. (c) The party requesting the continuance due to

scientific testing of evidence or translation of foreign language documents must submit evidence to the Court that the evidence or documents were sent for testing or translation at the first possible opportunity. (d) A request for a continuance made solely for the purpose of delay or to thwart justice shall not be granted.

5. On a case-by-case basis, the Court shall determine the most appropriate method of proceeding with the trial. Whenever possible, the Court shall use all available technology to meet the needs of the parties and to ensure a prompt and fair trial on the merits.

The proposed rule addresses a number of issues. First, based upon the FSM Supreme Court's exclusive jurisdiction, the proposed rule clearly states that it applies to all *in rem* forfeiture actions brought against vessels charged with illegal fishing, regardless of whether the prosecuting government is the FSM or one of the states. Second, the proposed rule balances the need to have a definite date on which the trial must commence with the possibility that, in a particular case, either the prosecuting government or the vessel owner may need additional time to prepare for trial. The twenty-one day period within which the trial must commence is flexible, allowing the Court to set the trial date based upon the actual circumstances of each arrest. If the vessel was arrested at the edge of the FSM EEZ and the vessel did not arrive in port for more than a week, then the Court might set the trial for the twenty-first day. If, however, the vessel was arrested a few miles off the reef, then the trial could be set for an earlier date.

The proposed rule also takes into account the geography of the FSM and the reality that a Justice of the FSM Supreme Court and the parties' attorneys are not always on the same island as the arrested vessel. The proposed rule allows the Court to determine on a case-by-case basis whether all parties to the action must appear in the same courtroom or to allow the trial to proceed through use of technology. The authorization of the use of technology is not new. For example, Associate Justice Martin Yinug uses telephone conferences on a regular basis.²⁶³ The proposed rule is drafted broadly enough to allow the Court to adopt new forms of technology as they become available.

263. See, e.g., FSM v. Yue Yuan Yu No. 78, 7 FSM Intrm. 300 (Kos. 1995).

D. Additional Changes

In addition to the FSM Supreme Court adopting a prompt trial rule, the issues of courtroom technology, foreign language translators, and marine surveillance officer training must also be addressed in order to ensure a fundamentally fair trial. While a telephone conference may be sufficient for a probable cause hearing where no witness testimony is being offered into evidence, a telephone conference would be insufficient for trial. In order to accommodate for the geography of the country and to ensure that both parties have the opportunity to present evidence and cross-examine witnesses and that the court can observe the demeanor of the witnesses, video conferencing equipment should be installed in each of the four courtrooms of the FSM Supreme Court. Additionally, access to foreign language translators must be made available either by training Micronesians in those foreign languages most commonly spoken by foreign fishing permit holders or by seeking outside translators through the FFA. If the FSM Supreme Court had video conferencing technology, it would not be necessary to maintain translators at each courthouse. Rather a pool of qualified translators could be available throughout the FSM, or even the Pacific region, and could translate via the available video conferencing technology. Finally, training of surveillance officers is essential to ensuring that vessel owners' due process rights are not violated and in ensuring that the prosecuting government can meet its burden of proof at trial. It remains essential that the FSM continue to utilize the training programs available through the FFA and other international sources for training not only FSM surveillance officers but also state surveillance officers. In order to adequately address these concerns, the FSM Congress must act by appropriating the necessary funds and NORMA must act by seeking technical assistance from the FFA.

Exercising its rulemaking authority, the FSM Supreme Court should adopt the proposed rule, thereby establishing the constitutionally required post-seizure hearing to be the trial on the merits. A prompt trial on the merits remedies the due process concerns that exist under the current system of probable cause hearings. Moreover, in order to continue to ensure that the post-seizure hearing remains fundamentally fair, the FSM Congress must continue to appropriate sufficient funds for the FSM Supreme Court to have access to necessary technology, including video conferencing.

ing and foreign language translators. In addition, NORMA must continue to seek training of both FSM and state marine surveillance officers from the FFA and other regional and international programs.

VIII. CONCLUSION

After decades of colonial domination by distant water fishing nations, the FSM has sought to capitalize on its primary economic resource – the ocean. The FSM has worked with its counterparts in other Pacific island nations to establish a regional framework that focuses on realizing the economic benefits of the marine resources that have traditionally sustained Pacific island cultures. More importantly, the FSM and its four states have enacted fisheries laws that seek to capitalize on the economic benefits of marine resources while protecting traditional subsistence fisheries.

The FSM cannot reap economic benefits from a non-existent fishing industry. It is essential that the FSM's domestic fisheries laws, both enacted law and judicially created rules, consider the economic reality of the fishing industry and balance the vessel owner's constitutional due process rights with the economic and geographic realities of the FSM.

The FSM Supreme Court has been aggressive in attempting to ensure that the vessel owner is afforded due process by judicially creating the right to a prompt post-seizure hearing and enforcing substantive due process protections. While on the surface these acts by the FSM Supreme Court appear to safeguard the vessel owner's due process rights, when examined more closely with an understanding of the fishing industry and with an understanding of how the government prosecutes in rem forfeiture actions against fishing vessels, it is apparent that these judicially created safeguards are not sufficient to comply with constitutional due process.

The establishment of a fundamentally fair post-seizure hearing is not difficult, time consuming, or costly. The FSM Supreme Court should once again take the initiative and adopt a rule of a prompt trial on the merits. The proposed rule for in rem forfeiture actions strikes a balance between the economic reality of the fishing industry, the economic and geographic reality of the FSM, and the needs and concerns of the prosecuting government. In effect, the proposed rule recognizes what, in most instances, is actually happening – the probable cause hearing is the only evidentiary

hearing and thus, a hearing on the merits. Recognizing that the post-seizure hearing is a trial on the merits, the vessel owner is afforded all of the due process rights afforded a party at trial. The hearing process is transparent and fundamentally fair. Constitutional due process has been met.