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The Permanent Mission of the Federated States of Micronesia to the United Nations presents its compliments to the Secretariat of the International Seabed Authority and has the honor to submit the national comments of the Government of the Federated States of Micronesia regarding the draft Regulations on Exploitation of Mineral Resources in the Area, as contained in document ISBA/25/C/WP.1.

The Permanent Mission of the Federated States of Micronesia to the United Nations avails itself of this opportunity to extend to the International Seabed Authority the assurances of its highest consideration.

New York, 14 October 2019

Secretariat of the International Seabed Authority
KINGSTON, JAMAICA

INTERNATIONAL SEABED AUTHORITY

COMMENTS ON THE DRAFT REGULATIONS OF THE INTERNATIONAL SEABED AUTHORITY ON THE EXPLOITATION OF MINERAL RESOURCES IN THE AREA

THE GOVERNMENT OF THE FEDERATED STATES OF MICRONESIA

15 OCTOBER 2019

I. INTRODUCTION

1. The Government of the Federated States of Micronesia ("FSM") welcomes the opportunity to provide its national comments on the current Draft Regulations on Exploitation of Mineral Resources in the Area ("Draft Regulations"), as contained in document ISBA/25/C/WP.1.

2. As a preliminary matter, the FSM notes that it is a small island developing State Party to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"), inclusive of the 1994 Agreement relating to the implementation of Part XI of UNCLOS. As a small island developing State with long-standing historical and cultural connections to and reliance on the Ocean and its bounty, the FSM is committed to discharging its obligations under the aforementioned major instruments in a manner that protects and preserves the marine environment to the fullest extent possible while ensuring that any exploitation of the Ocean's resources is done in a sustainable manner. The FSM views itself as a steward for the Ocean and its resources, a caretaker for present and future generations, just as our ancestors were for us.

3. As another preliminary matter, the FSM stresses that the comments contained herein are to be considered in connection with statements made by the FSM in the second part of the twenty-fifth session of the Council of the International Seabed Authority ("ISA") as well as in the twenty-fifth session of the Assembly of the ISA, as pertaining to the Draft Regulations. For the sake of completeness, the main body of this submission will reiterate a number of points raised in those statements.

II. COMMENTS ON DRAFT REGULATIONS

4. On Draft Regulation 2, the FSM is doubtful that there is proper balance reflected here with respect to fundamental principles on the one hand, and policies on the other hand. The FSM recommends either separating principles and policies into individual Draft Regulations or, at the very least, specifying which of the items listed in Draft Regulation 2 are fundamental principles and which are policies (if one Draft Regulation is to be retained).

   Additionally, the FSM welcomes the deletion of the phrase "if any" in Draft Regulation 2(e), in connection with regional environmental management plans ("REMPs"). The deletion implies that REMPs must be adopted prior to the issuance of a plan of work for the relevant region of the Area. The FSM supports such a requirement and encourages that this be clearly stated in this Draft Regulation and other relevant Draft Regulations.

   Furthermore, in Draft Regulation 2(e)(iv), the FSM queries the use of the modifier "market-based" with respect to "instruments, mechanisms and other relevant measures"

aimed at applying the "polluter pays" principle. Principle 16 of the 1992 Rio Declaration on Environment and Development and many other international instruments allow for other modalities for operationalizing the polluter pays principle beyond market-based modalities, including through governmental taxes and similar levies. The text should be amended to enable this clarification, perhaps by moving the language on "market-based" to the end of the listing. The FSM also supports an explicit reference to compensation for damage to ecosystem services in this Draft Regulation.

Also, in Draft Regulation 2(g), on incorporating the Best Available Scientific Evidence into decision-making processes, the FSM reiterates previous interventions and comments on the relevance and value of the traditional knowledge of Indigenous Peoples and local communities ("IPLCs") regarding the marine biological diversity and ecosystems of the high seas and the Area that can complement decision-making in relation to activities in the Area. Traditional knowledge exists about marine species that migrate between coastal waters on the one hand and the high seas water columns and the seabed on the other hand, as well as about marine biological diversity and marine processes encountered through longstanding instrument-free traditional navigation on the open Ocean. There is also traditional knowledge about environmental management best practices in coastal waters, including in terms of extractive efforts and how to regulate them, that can be of use in planning, management, and decision-making processes in connection with activities in the Area as best practices. Numerous multilateral instruments and processes of relevance to the high seas water column and the seabed recognize traditional knowledge, including the Convention on Biological Diversity ("CBD") and its process for identifying Ecologically or Biologically Significant Marine Areas, the Central Arctic Ocean Fisheries Agreement, the United Nations Framework Convention on Climate Change and its Paris Agreement, the ongoing negotiations for an international legally binding instrument under the United Nations Convention on the Law of the Sea ("UNCLOS") on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, and the current effort to develop a Road Map for the United Nations Decade of Ocean Science for Sustainable Development. The FSM also stresses that holders of such traditional knowledge must be properly involved in management and decision-making processes relating to activities in the Area, similar to efforts in Canada and elsewhere with interests in the Area. In this respect, Draft Regulation 2(g) can be amended to insert the phrase "and traditional knowledge of Indigenous Peoples and local communities" right after the reference to "Best Available Scientific Evidence," and Draft Regulation 2(e)(vii) can be amended to include a reference to holders of traditional knowledge—i.e., "Encouragement of effective public participation, including by Indigenous Peoples and local communities." Additionally, traditional knowledge can be reflected as part of the definition of Best Environmental Practices, which is referenced in numerous places in the overall Draft Regulations. Specifically, in the Schedule of the Draft Regulations pertaining to the use of terms and scope, the definition of "Best Environmental Practices" can be modified to mean "the

application of the most appropriate combination of environmental control measures and strategies, that will change with time in the light of improved, understanding, technology or knowledge, including the traditional knowledge of Indigenous Peoples and local communities, taking into account the guidance set out in the applicable Guidelines." These comments regarding Best Environmental Practices as well as Best Available Scientific Evidence apply to all other references to Best Environmental Practices and Best Available Scientific Evidence in the rest of the overall Draft Regulations (although this submission highlights specific references as well for the sake of discussion).

5. On Draft Regulation 4, the FSM welcomes revisions that clarify the roles of the Legal and Technical Commission ("LTC") and the Council of the ISA in the event of Serious Harm or a threat of Serious Harm to the Marine Environment from activities in the Area, including to the coastlines or Marine Environments of adjacent coastal States. However, in the FSM's view, the threshold of Serious Harm is too high as the basis for notification by an adjacent coastal State to the ISA Secretary-General, especially as the data in support of a notification might not be readily available to the coastal State. This is particularly burdensome for adjacent coastal States that are small island developing States such as the FSM, which are acutely vulnerable to harms to the Marine Environment but lack the capacity and wherewithal to fully assess such harms in a timely manner. The FSM proposes a two-tiered approach for Draft Regulation 4: one for likely harm to trigger notification by the adjacent coastal State, and one for Serious Harm to govern the LTC's review and recommendations to the Council.

   Additionally, the FSM stresses the importance of requiring consultations between a Contractor and an adjacent coastal State prior to submitting a Plan of Work for Exploitation in the region of the Area adjacent to the maritime zone(s) of that coastal State. These consultations can ward off any potential concerns about harms to the Marine Environment of that adjacent coastal State, or at the very least provide that State with enough information to assess a likelihood of harm and justify a notification under Draft Regulation 4.

   Furthermore, the definition of Serious Harm in the Schedule of the Draft Regulations relates to harm to the Marine Environment, whereas Draft Regulation 4(3) refers to Serious Harm to either the Marine Environment or the coastline of the notifying adjacent coastal State. There might be a need to tweak the definition of Serious Harm or the wording in Draft Regulation 4(3) to cover this discrepancy.

6. On Draft Regulation 13(3)(c), the FSM supports the insertion of references to Best Available Techniques and Best Environmental Practices alongside Good Industry Practice rather than subsumed therein. As mentioned above, the FSM considers the traditional knowledge of IPLCs to be elements of Best Environmental Practices that can

complement the Best Available Scientific Evidence in management and decision-making pertaining to Plans of Work as well as in the implementation of Plans of Work.

Additionally, on Draft Regulation 13(4), as noted by many ISA member delegations in previous debates of the Council of the ISA, it is the FSM's view that the LTC's review of a proposed Plan of Work can greatly benefit from the involvement of independent experts to assist the LTC (as well as the Council) in the assessment process under this Draft Regulation. (The FSM also sees relevance of this approach in Draft Regulation 11 pertaining to the LTC examining Environmental Plans.) The assessment process is a complex undertaking that will benefit from full expert input with broad geographical backgrounds and areas of expertise, particularly for areas of expertise not traditionally within the expertise of LTC members, including socio-cultural considerations and interests. UNCLOS already recognizes the possibility of the LTC seeking advice from recognized experts, but this can be formalized to the extent necessary in the Draft Regulations, while fully respecting the mandates of the LTC as well as the Council to make recommendations and take decisions with respect to Plans of Work. A roster of experts can be helpful in this regard, selected in a transparent and inclusive manner. Belgium's proposal along these lines is one that the FSM views with great interest.

7. On Draft Regulation 15, the FSM is inclined to allow the LTC some discretion in approving or disapproving Plans of Work even if they meet criteria in Draft Regulations 12(4) and 13, particularly where there is substantial evidence to indicate risk of Serious Harm to the Marine Environment, which is a discretion granted to the LTC by article 165 of UNCLOS. It is not clear that the criteria in Draft Regulations 12(4) and 13 take this point about substantial evidence of Serious Harm to the Marine Environment into consideration, other than perhaps the very general language in Draft Regulation 13(1)(b) on an application being in conformity with the Regulations, Standards, and Guidelines as well as in Draft Regulation 13(4)(e) on Environmental Plans providing for the effective protection of the Marine Environment. These Draft Regulations should be clarified to indicate that they include considerations of Serious Harm to the Marine Environment. There is also value in giving general discretion to the LTC in case some matters arise in the future that are not currently contemplated in Draft Regulations 12(4) and 13.

8. On Draft Regulation 20(1), the FSM prefers the previous formulation of the text that had an explicit reference to the ISA and the Contractor possibly agreeing to a period shorter than 30 years for the initial term of an exploitation contract. Text on a shorter initial term gives flexibility to all parties involved in light of changes in relevant knowledge and circumstances without discounting the possibility of granting a full initial term of 30 years.

   Additionally, with respect to Draft Regulation 20(3), it is the FSM's view that a Contractor applying to renew an exploitation contract must submit a revised Plan of

Work unless otherwise determined by the Council of the ISA. This is particularly necessary if the initial term of contract can be for as long as 30 years, during which time there will likely be significant changes in relevant knowledge and circumstances that will justify modification of the Plan of Work. Draft Regulation 20(3) trusts the Contractor to make the determination as to whether a Material Change has occurred to necessitate the submission of a revised Plan of Work, but this does not provide for sufficient regulatory oversight by the ISA.

Furthermore, with respect to Draft Regulation 20(6), and in line with the preceding comment, it is the FSM's view that the LTC and the Council of the ISA should have greater discretion when assessing an application to renew an exploitation contract than currently envisioned in this particular Draft Regulation. The FSM welcomes the criterion in Draft Regulation 20(6)(b) requiring the Contractor's compliance with the rules, regulations, and procedures adopted by the ISA to ensure effective protection for the Marine Environment from harmful effects which may arise from activities in the Area as a precondition for approval of an application to renew. However, there may be other considerations of an unforeseen nature that are not captured in this text but which the LTC and the Council should have discretion to consider in the assessment process.

9. On Draft Regulation 24(1), a "change of control" should not be limited to an instance where ownership changes by 50 percent or more, but should also include an instance where there is a change in ownership that is less than 50 percent in that particular case but which results in a cumulative amassing of ownership of 50 percent or more. A simple tweak to the language in this Draft Regulation can resolve this—i.e., "a 'change in control' occurs where is a change resulting in ownership of 50 percent or more of the Contractor, or of the membership of the joint venture, consortium or partnership, as the case may be, or a change resulting in ownership of 50 percent or more of the entity providing an Environmental Performance Guarantee."

   Additionally, regarding Draft Regulation 24 more generally, there is too much regulatory authority given to the ISA Secretary-General with respect to determining whether there has been a "change of control" without sufficient oversight by (an)other organ(s) of the ISA. There should also be a requirement that the decision-making entity take into consideration the determination by the relevant Sponsoring State (including relevant ministries and agencies therein) that a "change of control" has actually taken place with respect to the sponsored Contractor.

10. On Draft Regulation 26, as a general matter, the FSM supports robust language obligating a Contractor to deposit a financial security as a guarantee of performance of environmental obligations attached to an approved Plan of Work and that may be used to rectify any damage, clean-up, compensation or other loss arising or resulting from a failure or fault by the Contractor to adhere to its obligations under such Plan of Work.

An Environmental Performance Guarantee is a welcome tool along those lines, but the FSM notes that specific language on rectifying damage, clean-up, compensation, and/or other environmental loss can be incorporated in Draft Regulation 26(2) along with the other items listed therein.

11. On Draft Regulation 31, the FSM welcomes language requiring Contractors to show reasonable regard for other activities in the Marine Environment when carrying out Exploitation under an exploitation contract. It is the FSM's view that, in line with the expansive language on "other activities" in article 147 of UNCLOS, such "other activities" include, among other things, instrument-free traditional navigation on the open Ocean by IPLCs, including those in the Pacific, which is highly dependent on the consistency of wave patterns and other marine processes as well as food sources of the Ocean that could be impacted by activities in the Area; as well as other uses of the Marine Environment by IPLCs, including with respect to their traditional conservation and sustainable use of marine species that range between coastal waters on the one hand and the high seas and the Area on the other hand. Contractors must show reasonable regard to such traditional uses of the Marine Environment when conducting Exploitation in the Area, including to the extent that such Exploitation potentially interferes with navigational routes, the ability of traditional navigators to use marine ecosystems as guides in their voyages, the reliance of traditional navigators on marine life for sustenance as well as for navigational aid, and the longstanding cultural uses of the Marine Environment (inclusive of its biological diversity) by IPLCs, including in coastal waters with connectivity to the high seas and the Area . The FSM envisions that the relevant Guidelines will capture these concerns.

12. On Draft Regulation 35, the FSM supports this language in general, including the reference to the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), but the FSM wishes to see the language strengthened. When a Contractor encounters an object or site of an archaeological or historical nature or human remains of a similar nature in its Contract Area and notifies the Secretary-General of the ISA of such an encounter, the Secretary-General must in turn notify not just the sponsoring State, the State from which the human remains originated, the Director General of UNESCO, and any other competent international organization, but also constituencies of IPLCs that might have interests in the object or site or human remains. After centuries of instrument-free traditional navigation by IPLCs on the open Ocean—a practice that continues to the present day, including in the Pacific—it is highly likely that relics of such navigational voyages are located in the Area, including large stone discs transported by IPLCs from the FSM across the open Ocean. The Secretariat of the CBD, among other secretariats, maintains contact information for representatives of IPLC constituencies that can be consulted for this purpose. The FSM also welcomes the involvement of UNESCO, as it has already done some work on this matter in the Pacific.

13. On Draft Regulation 44, the FSM reiterates that the incorporation of the traditional knowledge of IPLCs as well as the direct involvement of holders of such traditional knowledge should be considered to be part of Best Environmental Practices for carrying out measures to effectively protect the Marine Environment as well as a complement to the Best Available Scientific Evidence in environmental decision-making, as contemplated under Draft Regulation 44. Such traditional knowledge and its holders can be explicitly referenced in the definition of Best Environmental Practices as well as mentioned alongside Best Available Scientific Evidence as a complementary source of relevant knowledge and information, as done in multiple other multilateral environmental agreements and related processes.

14. On Draft Regulation 45(a), the text should make clear that the listed examples of "environmental quality objectives" are non-exhaustive.

15. On Draft Regulation 46(2)(a), the FSM queries the definition of "environmental objectives" as well as the soundness of allowing a Contractor to identify such objectives on its own as part of the relevant environmental management system, as strongly implied by the text. As a corollary, there needs need to be clarity as to whether all Contractors should follow a particular template when it comes to developing an environmental management system—perhaps a template identified in Guidelines or Standards.

16. On Draft Regulation 47, as a general matter, the FSM welcomes robust text on a process for conducting environmental impact assessments ("EIAs"). International law—including as reflected in UNCLOS—imposes clear obligations on States (including the entities under their jurisdiction or control) to conduct EIAs in connection with activities that cross a certain threshold of harm to the natural environment, including the Ocean. It is vital that the Draft Regulations as a whole contain appropriate language in this regard. In the FSM's view, the process for an EIA (including decision-making) should be legally binding and transparent to ensure predictability and public confidence; articulate roles for a Contractor, sponsoring State, and the ISA; provide for public consultation of draft EIAs as part of the approval process; require publication of EIAs once approved; have specific reference to consultations with relevant coastal States, including adjacent coastal States; allow for public review and comments; provide space for the use of independent experts to aid in the preparation and/or review of EIAs; and highlight efforts taken by a proponent Contractor to mitigate environmental harms identified in the EIA process.

    Additionally, the FSM welcomes the reference to Best Environmental Practices in Draft Regulation 47(3)(d) as being part of the consideration when preparing an Environmental Impact Statement. As noted above, the traditional knowledge of IPLCs as well as the holders of such traditional knowledge should be viewed as part of such Best Environmental Practices. The FSM welcomes a standalone reference to such traditional

knowledge in this text, but at a minimum, such traditional knowledge (as well as its holders) should be reflected as part of the definition of Best Environmental Practices.

17. On Draft Regulation 48(3)(c), the FSM queries the omission of a reference to Best Environmental Practices in connection with the preparation of an Environmental Management and Monitoring Plan; Best Environmental Practices, as currently defined in the Draft Regulations, would appear to be relevant here. The FSM also reiterates its comments in this connection in Draft Regulation 47(3)(d), as noted above.

18. On Draft Regulation 50(2), the FSM is concerned that the threshold of avoidance of harm for permitted Mining Discharges is for avoidance of Serious Harm. The FSM recognizes the circumstances involved in this type of permitted Mining Discharge, but in the light of the potential of Mining Discharges to harm not just the Area but also the marine ecosystems of adjacent coastal States, there should be at a minimum a requirement for the carrying out of assessments, mitigation, monitoring, and similar measures after these Mining Discharges, for the sake of the ecosystems in the Area and high seas as well as in coastal States' marine environments.

19. On Draft Regulation 55, it is the FSM's view that the main purpose of the Environmental Compensation Fund should be focused on the considerations identified in sub-paragraph (a) therein, with significant consideration also given to restoration and rehabilitation of the Area as contemplated in sub-paragraph (e) therein as well. The FSM also acknowledges the consonance between this Fund and Environmental Performance Guarantees; both instruments can reinforce each other, with the latter being funded by relevant Contractors and the former being funded more broadly.

20. On Draft Regulation 57, echoing certain comments above, it is the FSM's view that the determination of what constitutes a Material Change—in this case, for the purpose of modifying a Plan of Work—should be in accordance with legally binding Standards and involve the LTC in some significant manner, rather than give much discretion to the ISA Secretary-General to make this determination.

21. On Draft Regulation 89(3), the FSM stresses that the listing of data and information that are not considered "Confidential Information" should not be an exhaustive one. Instead, the relevant ISA entity (e.g., the Council) should have the discretion to expand/amend the listing, as necessary, particularly data and information pertaining to the protection and preservation of the Marine Environment.

    Additionally, the FSM expresses concern that the designation of Confidential Information in Draft Regulation 89(2) relies on too much discretion on the parts of the Contractor and the ISA Secretary-General. Guidelines or Standards should be adopted to guide/regulate

such a designation, along with periodic review of such a process to minimize abuse (e.g., "Sponsor State shopping").

22. On Draft Regulation 94, the FSM welcomes language clarifying that Standards will be legally binding. This raises the issue of how to assess/adjudicate non-compliance with Standards, including non-compliance by ISA member States and organs of the ISA. Additionally, the modifier "relevant" for Stakeholders in Draft Regulation 94(1) should be deleted. All stakeholders, by definition, are relevant. In this connection, the FSM stresses that IPLCs who hold relevant traditional knowledge (as discussed above) are Stakeholders for purposes of the Draft Regulations unless specific allowance is made for representatives of IPLCs to formally and directly participate in the work of the ISA, including as observers. These comments apply to other uses of the phrase "relevant Stakeholders" in the overall Draft Regulations.

23. On Draft Regulation 95, the FSM expresses concern that there is no clarity as to the degree to which Contractors and other actors involved in activities in the Area should take Guidelines into consideration. If Guidelines are not legally binding (as opposed to Standards), then there should at least be some textual clarity requiring Contractors (among others) to take all necessary steps to comply with relevant Guidelines. Whether this should be a due diligence obligation on the part of Contractors or something stronger (without explicitly labeling Guidelines as legal obligations *per se*) requires further consideration.

24. On Draft Regulation 97, it is the FSM's view that Inspectors as a whole (e.g., an inspectorate or similar roster of Inspectors) should have the broadest range of expertise possible to allow them to conduct the necessary inspections in an effective manner, including expertise on socio-cultural considerations impacted by and/or incorporated in activities in the Area.