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**Review of implementation of the United Nations
Convention against Corruption**

Executive summary

Note by the Secretariat

Addendum

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II. Executive summary

Federated States of Micronesia

1. Introduction: Overview of the legal and institutional framework of the Federated States of Micronesia in the context of implementation of the United Nations Convention against Corruption

The Convention was acceded to by the Government of the Federated States of Micronesia (FSM) on 21 March 2012 and entered into force on 20 April 2012.

FSM is an independent, sovereign nation made up of the four States of Chuuk, Kosrae, Pohnpei and Yap. The State Governments carry out many major governmental functions and have corresponding legislative powers. FSM is a constitutional democracy. The Judicial Branch is composed of the FSM Supreme Court, a single court at national level, with judges sitting in trial as well as appellate divisions. Corruption cases involving national public officials or national funds which are either administered at a national or State level are tried at the national level. At the State level, each State has a court, comprising of first instance and appellate divisions, which try cases according to the criminal law of the respective State.

FSM has a mixed legal system of common and customary law. The FSM Supreme Court can act as the final interpreter of the Constitution and laws. When FSM courts have not yet addressed an issue, the Court may look to the restatements and decisions of other common law jurisdictions to determine the meaning of particular provisions if suitable for FSM.

The written law is comprised of the Constitution and the various titles of the FSM Code. Title 11 of the FSM Code comprises the Revised Criminal Code Act.¹ Customary law is recognized in the criminal process and should be considered by the courts.

The review focused on the national level. Although it was confirmed that the majority of laws relevant for the implementation of the Convention at the State level were similar to the national level, it was pointed out that the conduct of a review at the State level would be beneficial to assess if the provisions were sufficient against the requirements of the Convention.

Key authorities fighting corruption are the Department of Justice (DoJ) headed by the Secretary of Justice (otherwise known as the Attorney-General (AG)), National Police (NP), including the Financial Intelligence Unit (FIU) and Transnational Crime Unit (TCU), and the National Public Auditor (NPA).

¹ All sections cited in this Executive Summary refer to the Revised Criminal Code Act of title 11 of the FSM Code unless otherwise specified.

2. Chapter III: Criminalization and law enforcement

2.1. Observations on the implementation of the articles under review

Bribery and trading in influence (arts. 15, 16, 18 and 21)

Active and passive forms of bribery are criminalized in section 516. Sections 519 to 521 comprise additional provisions. Section 516 meets most requirements of the Convention. Cases involving third-party beneficiaries are not clearly regulated. The same gap exists in regard to most corruption offences and should be addressed. Sections 516, 519 and 521 differentiate between benefits and pecuniary benefits. The mixed terminology should be consolidated to cover all undue advantages.

The terms “public official” and “public servant” are defined in section 104 as “any person elected, appointed or employed to perform a governmental function on behalf of FSM”. This includes the President, Government employees, legislators, judges, consultants and unpaid positions. Section 516 extends the definition to persons who have been elected, appointed, hired or designated, but do not yet occupy the position. Persons performing a service for a governmental enterprise are covered if national funds are involved (e.g. in form of subsidies or shares held by the Government).

Bribery of foreign public officials or officials of public international organizations is not criminalized.

Bribery in the private sector is not criminalized.

Trading in influence is partially criminalized under section 521 where conduct occurs with a view to influence a public official. Cases of supposed influence are not included.

No case examples of bribery or trading in influence were provided.

Money-laundering, concealment (arts. 23 and 24)

Money-laundering is defined in section 903 and criminalized in section 918. Taken together, all elements required by the Convention can be found. However, due to incoherent language some elements are only comprised in one or the other section and therefore cause gaps and potential challenges in implementation.

In regard to predicate offences, FSM applies a serious offence approach. Serious offences are those punishable by imprisonment for a term of more than one year under the law of FSM or any of its States or under the law of a foreign State, in relation to acts or omissions, which, had they occurred in FSM would have constituted such an offence (s.903(20)). All Convention offences, as far as they are criminalized in FSM, constitute serious offences, except obstructing the administration of law or other governmental functions (s.501).

Provisions regarding criminal participation, attempt, solicitation and conspiracy apply also to money-laundering. A person could only be charged with the predicate or the money-laundering offence.

So far no money-laundering cases have been prosecuted, but two cases are currently under investigation.

Concealment is not criminalized separately from the money-laundering provisions.

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

Embezzlement is addressed in sections 221 and 223 of title 55 of the FSM Code, referred to as Budget Procedures Act of 1981. These sections criminalize the making or authorization of an expenditure or creation or authorization of an obligation in excess of the sum made available, in advance to its availability or for purposes other than those for which an allotment has been made. Also relevant are the provisions on theft, criminal mischief and unauthorized possession or removal of property. It was concluded that all relevant aspects could be covered through the existing provisions. Case examples were provided.

Embezzlement in the private sector could be addressed through the provisions on theft and criminal mischief (see above).

Abuse of function is criminalized in section 512 on conflict of interest. Additionally, section 515 makes it a crime, among others, to speculate or wager on the basis of official action or information. The breach of post-employment restrictions is criminalized in section 513.

Illicit enrichment is not criminalized.

Obstruction of justice (art. 25)

Obstruction of justice is criminalized. According to section 526 it constitutes a crime if a person, believing that an official proceeding or investigation is pending or about to be instituted, attempts to induce or otherwise cause a witness or informant to, for example, testify falsely or provide false information, or withhold any testimony, information, document or thing. The same section also makes it an offence for the witness to solicit any benefit for consideration of such an act. Section 527 extends the protection and makes it a crime to harm another in retaliation for any act lawfully done by such person in the capacity as a witness or informant.

Sections 501 and 502 make it a crime to interfere with, delay or obstruct a public official in the discharge of any duty. Additionally of relevance are section 517 on threats and other improper influence in official and political matters and section 518 that protects against retaliation for a past official action.

No case examples were provided.

Liability of legal persons (art. 26)

Criminal liability of legal persons exists in FSM without prejudice to the criminal liability of natural persons. The term “person”, “he”, “she”, “accused” and “defendant” include any natural or legal persons, including but not limited to, a government, corporation or unincorporated association, or other organization (s.104(9) and s.903(13)).

The penalties provided by law are applicable to both natural and legal persons alike, with the exception of section 918 on money-laundering which foresees specific penalties for legal persons. The available range of sentences does not appear to be effective and sufficiently dissuasive for legal persons.

Participation and attempt (art. 27)

All relevant forms of participation are covered in sections 301 and 104, as well as sections 202 and 204.

The attempt of an offence is criminalized in section 201. Some preparatory acts are covered under conspiracy (s.203), if any party to the conspiracy commits an overt act in furtherance of the conspiracy.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

No minimum penalties are established in regard to Convention offences. Most Convention offences are criminalized by a maximum term of imprisonment of 5 or 10 years, convertible into a fine not exceeding \$50,000 or \$100,000. Courts are required by case law to apply individualized sentencing, taking the defendant, the defendant's background and the nature of the offence into account. According to section 1203, the courts shall give due recognition to generally accepted customs and restitution, reparation or service to the victim or to his or her family.

FSM only provides for functional, but not for criminal immunities.

The AG has wide discretion to prosecute based on common law principles. Due to the small size of the team (four assistant AGs at the time of the country visit with two positions being vacant) all Government attorneys are responsible for all types of crime.

Title 12 of the FSM Code on Criminal Procedure sets forth measures to be taken on the conditional release of persons being prosecuted, taking into account the need to ensure the presence of the accused in the future (s.604).

In most cases, parole can be granted after one third of the sentence has been served. The trial justice is required to consider the views of the prosecution, prisoner and victim, among other things, in the decision to grant parole (s.1204).

The National Public Service System applies to all employees of and positions in the Government of FSM, with the exception of the persons listed in in section 117 of title 52 of the FSM Code on Public Employment. This includes members of Congress, judges and court personnel, members of any board, public corporation, commission or similar body, among others.

An employee of the Government of FSM who has been accused of any criminal offence may be suspended by the management official for a period longer than 30 days without pay pending the outcome of the investigation. Without prejudice to the criminal process, an employee may also be dismissed if the good of the public service is to be served. According to section 136 of title 52 of the FSM Code, referred to as the National Public Service System Act, the commission of or attempt of any material deception or fraud would cause removal and permanent disqualification of appointment from the public service. It was explained that corrupt activities would be considered in the same way. The provisions do not extend to employment in public enterprises.

The possibility of granting immunity from prosecution to cooperating offenders in exchange for testimony and other assistance is within the AG's discretionary powers. Further, the prosecutor and counsel for the defendant may enter into plea

agreements. Courts usually treat cooperation as a mitigating factor at the sentencing stage.

Protection of witnesses and reporting persons (arts. 32 and 33)

No specific witness and victim protection programmes exist. However, some measures can be taken to provide a certain level of protection. Any interference or influence of witnesses is criminalized, as described above. This extends also to retaliatory measures (s.527).

FSM tries to encourage the reporting of corruption through measures such as a toll-free hotline operated by the NPA. No provisions on whistle-blower protection are in place, except through the efforts to grant confidentiality to reporting persons. A bill to address whistle-blower protection is under preparation.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

Sections 929 et seq. and 935 et seq. regulate the confiscation of tainted property. This is property used in, or in connection with, the commission of a serious offence, or proceeds of crime, including property into which any property derived or realized directly from the offence was later converted, transformed or intermingled property, as well as income, capital or other economic gains derived or realized from such property at any time since the offence. Property destined for use in a corruption offence is not clearly covered in title 11 of the FSM Code; however, section 304(f) of title 12 on search and seizure states that search warrants may be issued for property designed or intended for use in, or property which is, or has been used as the means of committing, a criminal offence.

Non-conviction based forfeiture has been considered and is partially addressed in sections 933 and 934 where a person dies or absconds.

In case the property has been disposed of, cannot be traced, has been substantially diminished or commingled and cannot be divided without difficulty, forfeiture of the equivalent value is possible (s.940).

Tracing, search and seizure are regulated in sections 920 et seq. and 950 et seq. and under chapter 3 on searches and seizure of title 12 of the FSM Code. It was explained that, in practice, the same provisions are used for freezing accounts and that the FSM Code also provides for search warrants to be issued by telephone or other means of communication in case of urgency (e.g. s.951).

Bona-fide third parties are protected under various sections, in particular sections 907, 935 and 938.

The Supreme Court appoints a receiver of frozen, seized or confiscated property and may give directions (s.966 et seq.).

Section 924 in chapter 9 on money-laundering and proceeds of crime highlights that any secrecy and confidentiality obligations are overridden by the provisions of this chapter. However, in practice, a narrow interpretation seems to be a challenge as only the bank which sent a suspicious transaction report (STR) is required to lift bank secrecy and to provide the requested documentation. Also, the regulation only exists in the chapter on money-laundering but not in relation to other corruption offences.

Statute of limitations; criminal record (arts. 29 and 41)

Prosecution of a crime punishable by imprisonment for ten years or more must be commenced within six years after it is committed or within two years after it is discovered, or with reasonable diligence could have been discovered, whichever is the longest. For crimes punishable by imprisonment for five years, the times are diminished to three years after the commission or one year after the discovery, whichever is the longest. Considering the secrecy and complexity of corruption cases, these time limits could pose a challenge to successful prosecutions.

Suspension of the statute of limitations period is possible when the accused is absent from the jurisdiction or a prosecution is pending against the accused for the same conduct.

Prior convictions in any jurisdiction are admissible if they are relevant, subject to the rules of evidence for the FSM.

Jurisdiction (art. 42)

FSM has territorial jurisdiction over the offences established in accordance with the Convention when they are committed in whole or in part in the exclusive economic zone of FSM (s.104, title 18 of the FSM Code), on board of a vessel flagged and registered by FSM or any airborne vehicle of the Government.

Active and passive personality jurisdiction is partly established focusing on national public servants. Thus, FSM may extend its jurisdiction over offences committed against or by national public servants in the course of, or in connection with their employment or service.

FSM may also exercise jurisdiction over offences which have been committed against FSM and over acts that occur outside of its territory, if a person conspires, causes, assists, aids or abets another to commit or attempt to commit an offence in FSM, and if a person intentionally causes, or attempts to cause a result within FSM prohibited by criminal law.

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

No concrete forms of remedial action were cited. However, in practice, operating licences can and have been revoked upon conviction of an offence, for example, in the context of fishing by the competent maritime authority.

In a criminal proceeding, the court can make an order for appropriate restitution, reparation or service to the victim of the crime or to his or her family (s.1202(6)).

Entities or persons, who have suffered damage as a result of an act of corruption, have the right to initiate legal proceedings to claim compensation from those responsible for the damage due to the deprivation of their rights according to Title 11, Chapter 7, subsection 701(3). Also general rules of tort or breach of contract apply.

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

DoJ is mandated to combat corruption, economic crime and money-laundering. The Secretary of Justice has the function of AG and is appointed by the President upon

the advice and consent of the Congress for a term of four years. Termination of Office would also require the consent of Congress.

NP, including FIU and TCU, is set up under DoJ and investigates corruption and money-laundering cases. NPA, who is appointed by the President upon the advice and consent of the Congress for a term of four years and whose appointment can only be terminated with a 2/3 majority of the Congress, also investigates corruption cases under his or her mandate. Both institutions refer cases to AG for prosecution and/or advice.

Interagency cooperation is regular but mainly on an informal basis. Specifically, NP and DoJ at national level cooperate closely and on a daily basis.

A joint law enforcement agreement exists between the Police at national and State levels. Cases are transferred depending which level of administration is involved. Exchange of further information such as case statistics is weak and plans are under way to strengthen this exchange and data-management.

FIU receives STRs from financial institutions and cash dealers. There is no formalized cooperation with the private sector, but reporting of alleged offences is encouraged through awareness-raising and NPA's toll-free hotline.

2.2. Successes and good practices

- Extension of the public official and public servant definition to include persons who have been elected, appointed, hired or designated to become a public official although not yet occupying that position (s.516(2)).
- Strong collaboration and knowledge exchange between law enforcement authorities at the national level, in particular NP and AG.

2.3. Challenges in implementation

- Include advantages or benefits for “another person or entity” (third-party beneficiaries) in corruption offences and expand the terminology of “benefit” instead of “pecuniary benefit” to all corruption offences.
- Criminalize active bribery of foreign public officials and officials of public international organizations and consider criminalizing its passive form.
- Consider criminalizing bribery in the private sector.
- Consider extending the scope of the provisions relative to trading in influence and abuse of functions in line with the Convention.
- Harmonize and consolidate the provisions on money-laundering.
- Consider criminalizing illicit enrichment.
- Extend the statute of limitations period.
- Extend the range of — and/or streamlining existing — criminal and non-criminal penalties for Convention offences to ensure they are proportionate and dissuasive in regard to legal persons.
- Consider further measures to address the consequences of corruption, such as the blacklisting of companies.

- Strengthen witness and victims (insofar as they are witnesses) protection measures, including possibilities of closed hearings and specific evidentiary rules.
- Continue ongoing efforts to put in place whistle-blower protection measures.
- Ensure that sufficient measures are in place to lift bank secrecy for criminal investigations in relation to all corruption offences.
- Strengthen the collection and exchange of data, statistics and information in regard to Convention offences comprising both State and national levels. Ensure sufficient and continued resources and training for the bodies and persons specialized in combating corruption.
- Consider extending extraterritorial jurisdiction to crimes committed abroad against or by not only a national public official, but also against or by any national of FSM or a stateless person with habitual residence in FSM.

2.4. Technical assistance needs identified to improve implementation of the Convention

FSM indicated that it would require a range of technical assistance.

- In regard to the criminalization of offences, predominantly legal advice and some assistance in legislative drafting.
- Capacity-building through on-site assistance by an anti-corruption and forensic expert for the Police (FIU) and Government attorneys in the investigation and prosecution of corruption and money-laundering offences.
- Legal advice and training in regard to the legal mandate to freeze proceeds of crime and on the issue of lifting bank secrecy.
- In regard to the liability of legal persons, assistance in legislative drafting, on the matter of blacklisting companies and the establishment of proportionate and effective sanctions.
- Legal advice on how to establish a comprehensive non-conviction based forfeiture system.
- Good practices and capacity-building on witness and whistle-blower protection, particularly for Small Island Developing States.
- Assistance in conducting a Convention review at the State level.

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Extradition; transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45 and 47)

In FSM, extradition is regulated by chapter 14 on criminal extradition, title 12, of the FSM Code. FSM makes extradition conditional on the existence of an agreement with the foreign State (s.1401). It currently has extradition agreements with the United States of America and the Philippines.

Conduct-based dual criminality is required and either national or State law may be applied.

FSM endeavours to swiftly carry out extradition procedures, pursuant to section 1404 on the time commitment pending extradition. According to that section, once a justice certifies an accused as extraditable, the person will be imprisoned until extradition. Bail will only be granted in special circumstances. Section 1402 covers the provisional arrest of persons sought for extradition from a foreign country to FSM.

FSM can extradite its own nationals, as is clearly stipulated in its agreement with the United States of America and has also been the practice.

Under the Constitution and the FSM Code, persons sought in extradition proceedings benefit from due process and fair treatment throughout the process, similarly to any other ordinary criminal proceeding.

As a matter of practice, consultations take place with requesting States before refusing extradition.

FSM does not have substantial experience in dealing with extradition. In the last 5 years, three corruption-related extradition requests were sent (two granted and one still pending) and none were received.

The competent authority responsible for extradition in FSM is the Ministry of Foreign Affairs.

The transfer of sentenced persons is addressed in chapter 15, title 12, of the FSM Code. Such a transfer is conditional on the existence of an agreement with the foreign State. The offender must be a national of the foreign State or a national or citizen of FSM and must consent to the transfer, and the dual criminality requirement must be satisfied (s.1501). The central authority for the transfer of sentenced persons is AG's Office (s.1503).

The transfer of criminal proceedings is not provided for.

Mutual legal assistance (art. 46)

Chapter 17, title 12, of the FSM Code regulates issues pertaining to the provision of mutual legal assistance (MLA).

MLA is only provided in relation to a serious offence (s.1705). The definition of "serious offence" requires dual criminality to be fulfilled with a penalty threshold of imprisonment for a period of not less than twelve months (s.1704). FSM can then afford a requesting State the widest measure of MLA to the extent that the request is made through the Secretary of DoJ. Sections 1709 (general provision on foreign requests for an evidence-gathering order or a search warrant), 1710 and 1713-1716 cover the purposes of the Convention for which MLA is to be afforded. Section 1707 also provides for the forms of MLA that the Secretary can request.

Chapter 17 covers the consensual transfer of detained persons from and to FSM in response to an MLA request (ss.1710 and 1711), also guaranteeing his or her personal liberty in FSM.

The Secretary of DoJ is the central authority for MLA. FSM notified the Secretary-General of the United Nations that MLA requests are to be submitted in English.

Section 1708 outlines what is to be included in an MLA request. While a request received will be executed in accordance with the domestic law of FSM, a requesting State can provide the procedure that it wishes to have followed in giving effect to the request (s.1708(1)(d)).

FSM requires the submission of an MLA request before information can be transmitted. No information or other materials obtained through MLA can be used for a purpose other than that specified in the request, unless the Secretary consents after consulting with the foreign State (s.1708). Foreign documents are privileged in MLA proceedings (s.1717). After consulting with the requesting State, FSM may postpone an MLA request where it is likely to prejudice an ongoing investigation or proceeding (s.1705(2)(c)).

MLA may be refused on the grounds that granting the request would be likely to prejudice the sovereignty, security or other essential public interest of FSM (s.1705(2)(b)). Moreover, nothing is to be construed or interpreted to affect FSM's powers in relation to its own criminal investigations and other mutual assistance in criminal matters (s.1705(4)). The Secretary also has a general power to grant a request on such terms and conditions as he or she deems fit (s.1705(2)(a)).

In 2013, five (corruption-related) MLA requests were sent by FSM and four are in the process of being executed. One MLA request was received and successfully completed.

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

FSM has various means to facilitate law enforcement cooperation, including joint investigations. As part of the Pacific Transnational Crime Network (PTCN), the Australian Federal Police through its Law Enforcement Cooperation Program established TCU under NP. TCU also serves as the centre for the Micronesian region with liaison officers from Palau, Commonwealth of the Northern Mariana Islands and the Republic of Marshall Islands situated in FSM. TCU further cooperates with INTERPOL through the Pacific Transnational Crime Coordination Centre and Homeland Security (USA).

FSM is party to the multilateral agreement that established PTCN in the region. It has multilateral arrangements with the Pacific Islands Chief of Police, Guam-based and U.S. counterparts and other law enforcement agencies through the Pacific Islands Forum Secretariat and other law enforcement networks.

FIU has a mandate to exchange financial intelligence with other States in relation to money-laundering and terrorist financing. Information received by FIU is shared, as appropriate, with the TCU, FSM National Police and other relevant agencies. FSM is also informally a member of the Pacific Association of FIUs.

3.2. Successes and good practices

Overall, the following success and good practice in implementing Chapter IV of the Convention is highlighted:

- FSM's international law enforcement cooperation, especially through the TCU.

3.3. Challenges in implementation

The following challenges and recommendations were highlighted by the reviewers:

- Consider granting extradition requests that include several separate offences, one of which is extraditable.
- Explore the possibility of relaxing the application of the double criminality requirement in extradition cases, especially those involving corruption offences which are not established domestically.
- Consider using the Convention as a legal basis for extradition, mutual legal assistance and law enforcement cooperation in respect of Convention offences and consequently ensure that any Convention-related offences not be considered political offences.
- Ensure that any extradition treaties that FSM may conclude with other States provide that Convention offences are extraditable.
- Provide for extradition to be subject to the conditions of FSM or by the applicable extradition agreements, including a minimum penalty requirement for extradition.
- Consider further simplifying evidentiary requirements in order to allow for extradition to be dealt with efficiently and effectively.
- Ensure the existence of a ground for refusal of extradition where there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or compliance with a request would cause prejudice to that person's position for any one of these reasons.
- Ensure that extradition is not refused on the sole ground that it involves fiscal matters.
- Take such legislative measures as may be necessary to ensure that MLA involving non-coercive measures is afforded in the absence of dual criminality, in line with art. 46(9)(b) of the Convention.
- Notify the Secretary-General of the United Nations of the central authority designated for MLA.
- Consider granting legal authority for relevant authorities to proactively transmit information to a foreign competent authority, without a prior request, where such information could assist in the investigation and prosecution of Convention offences.

- Ensure that an MLA request is not declined on the ground of bank secrecy and may not be declined on the sole ground that the offence is also considered to involve fiscal matters.
- Consider the possibility of transferring criminal proceedings to and from a foreign State where it would be in the interests of the proper administration of justice.
- Introduce, to the extent permitted by the domestic legislation, special investigative techniques, as may be necessary and within existing resources, and providing the corresponding training to law enforcement personnel.

3.4. Technical assistance needs identified to improve implementation of the Convention

The following technical assistance needs were identified:

- Summary of good practices/lessons learned in relation to MLA and the transfer of criminal proceedings.
- Legal advice on how to improve extradition, MLA, the transfer of sentenced persons, transfer of criminal proceedings and special investigative techniques.
- Capacity-building programmes for authorities responsible for international cooperation in criminal matters and for cross-border law enforcement cooperation, as well as for designing and managing the use of special investigative techniques.
- Development of an international cooperation database at the national level, as well as MLA templates for requesting States and internal guidelines for staff on how to deal with international cooperation requests.
- Technological assistance (e.g. set-up and management of databases/information-sharing systems) to enhance law enforcement cooperation.
- Other: Assistance in assessing the scope and coverage of extradition in the FSM Code; and a symposium in which the transfer of convicted persons is discussed by the States that are transferring such persons.