

CHAPTER 4

Access Agreements for

Foreign Fishing and Related Activities

Editor's note: Section 41 of PL 12-34 created a new chapter 4 entitled Access Agreements for Foreign Fishing and Related Activities of subtitle I of this title.

Section 1 of PL 12-34 repealed chapters 1 through 5 in their entirety. Section 2 of PL 12-34 enacted a new subtitle I entitled Marine Resources Act of 2002. Section 104 of PL 12-34 renumbered chapters 6 and 7 as chapters 10 and 11, respectively. PL 12-34 enacted new chapters 1 through 9 of subtitle I. PL 12-34 became law in 2002 without the signature of President Leo A. Falcam.

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§ 401. [RESERVED]

Source: PL 12-34 § 42.

§ 402. Negotiation of access agreements.

The Authority shall negotiate and enter into access agreements on behalf of the Government of the Federated States of Micronesia in accordance with this subtitle. Such agreements may, at the Authority's discretion:

- (1) establish fees to be collected for permits issued under the access agreement;
- (2) establish a minimum or maximum number of vessels to be granted access under the agreement; and
- (3) permit the rebate of access fees in accordance with section 403(2) of this subtitle, as the Authority deems appropriate at the end of the licensing period if the operator of any applicable vessel participated substantially in shore-

based developments or otherwise made a substantial contribution to the development of the fishing industry of the Federated States of Micronesia.

Source: PL 12-34 § 43.

Cross-reference: The statutory provisions on the President and the Executive are found in title 2 of this code. The statutory provisions on the FSM Congress are found in title 3 of this code.

§ 403. Fees for permits for foreign fishing vessels.

(1) Fees and other forms of compensation for the right to engage in fishing within the exclusive economic zone by foreign fishing vessels shall be established in access agreements entered into pursuant to this chapter.

(2) The Authority may accept all or a portion of the fee paid under an access agreement pending rebate under such conditions as the Authority may prescribe in writing or by regulation, and when the Executive Director is satisfied that all conditions have been met. That portion of a fee that is subject to rebate shall be held in a separate trust account maintained by the Secretary of the Department of Finance and Administration until rebated to the foreign fishing vessel or paid into the General Fund of the Federated States of Micronesia, or its successor, pursuant to the terms of the agreement.

Source: PL 12-34 § 44.

Cross-reference: The statutory provisions on the President and the Executive are found in title 2 of this code. The statutory provisions on the FSM Congress are found in title 3 of this code. The statutory provisions on Marine Resources are found in title 24 of this code.

§ 404. Access agreements—minimum terms.

All access agreements shall include the following minimum terms:

(1) the foreign party recognizes the sovereign rights and exclusive fishery management authority of the Federated States of Micronesia within the exclusive economic zone;

(2) the operator and each member of the crew shall comply with the applicable access agreement, applicable permit conditions, this subtitle, all regulations issued pursuant to this subtitle and all other applicable laws and regulations;

(3) the operator shall:

(a) accept the Authority's authorized observers;

(b) provide any authorized observer, while on board the vessel, at no expense, with officer level accommodations, food and medical facilities;

(c) meet the following costs of the authorized observer:

- (i) full travel costs to and from the vessel;
 - (ii) salary; and
 - (iii) full insurance coverage;
- (d) display any permit or permit number issued for any such vessel, pursuant to this subtitle, or any other documentation as required by the Authority to be displayed, under any access agreement, in the wheelhouse of such vessel;
- (e) ensure that appropriate position-fixing and identification equipment is installed and maintained in working order on each vessel;
- (f) ensure that the vessel is marked and identified in accordance with the Food and Agricultural Organization (FAO) approved Standard Specifications for the Marking and Identification of Fishing Vessels;
- (g) ensure the continuous monitoring of the international distress and call frequency 2182 kHz (HF) or the international safety and call frequency 156.8 MHz (channel 16, VHF-FM) to facilitate communication with the fisheries management, surveillance and enforcement authorities;
- (h) ensure that a recent and up-to-date copy of the International Code of Signals (INTERCO) is on board and accessible at all times;
- (i) ensure that the vessel is seaworthy and contains adequate life safety equipment and survival gear for each passenger and member of the crew;
- (j) ensure that, promptly upon direction by the Authority, each vessel will have installed, maintained and fully operational at all times on board a transponder, in accordance with section 611 of chapter 6 of this subtitle, and shall be responsible for all operational and maintenance costs of the transponder and cooperate fully with the Authority in their utilization.
- (4) the party to the access agreement shall, for the duration of the access agreement:
- (a) appoint and maintain a resident agent in the Federated States of Micronesia that is approved by the Authority, or establish and maintain a company registered in accordance with the laws of the Federated States of Micronesia, authorized to receive and respond to any legal process issued in the Federated States of Micronesia with respect to the owner or operator of the vessel, and shall notify the Federated States of Micronesia of the name and address of such agent or company, and any communication, information, document, direction, request or response to, or from that agent or company, shall be deemed to have been sent to, or received from such owner or operator;
 - (b) not exceed any allocation which may be established in any given licensing period in accordance with this subtitle;
 - (c) ensure compliance by each fishing vessel, its operator and crew members, with the access agreement, all laws of the Federated States of Micronesia and the terms of the permit; and
 - (d) ensure compliance by each fishing vessel, its operator and crew members, with subregional and regional conservation and management measures for highly migratory fish stocks.

Source: PL 12-34 § 45.

Cross-reference: The statutory provisions on the President and the Executive are found in title 2 of this code. The statutory provisions on the FSM Congress are found in title 3 of this code.

Case annotation: A party to a foreign fishing agreement is bound by statute and by the foreign fishing agreement to ensure that an authorized vessel complies with the FFA and all applicable FSM laws, rules, and regulations. *FSM v. Kana Maru No. 1*, 17 FSM R. 399, 404 (Chk. 2011).

§ 405. Access agreements—effective date.

To take effect within the exclusive economic zone, an access agreement involving ten or more vessels shall be submitted to the Congress of the Federated States of Micronesia for approval by resolution. If the Congress does not approve or reject an access agreement before a pre-existing access agreement, if any, expires, then the pre-existing access agreement shall be deemed to be revived and in force from the date on which the access agreement is submitted to Congress and shall be deemed to remain in force until Congress approves or rejects the access agreement submitted for consideration.

Source: PL 12-34 § 46; PL 14-55 § 1.

Cross-reference: The statutory provisions on the FSM Congress are found in title 3 of this code.

The official website of the Congress of the Federated States of Micronesia contains the public laws enacted by the Congress, sessions, committee hearings, rules, and other Congressional information at <http://www.fsmcongress.fm/>.

Case annotations: When Congress enacted Title 24 and engaged in an executive function by formally inserting itself into the execution and implementation of a portion of that act by vesting in itself the power to control how the law regarding fishing access agreements is executed when more than nine vessels are involved, this was impermissible under the separation of powers doctrine since negotiated access agreements are not approved and licenses are not issued until Congress acts (and the parties to the negotiations presumably know this and adjust their behavior accordingly) and since negotiation and approval of commercial transactions is ordinarily an Executive power. *Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth.*, 17 FSM R. 181, 189 (Pon. 2010).

When, if the section of Title 24 requiring congressional approval of access agreements for more than nine vessels is struck down, that section is easily severed from the rest of Title 24, which would function perfectly well without it; that is, it would function just as it already does for access agreements for nine or fewer vessels, then that section is not so vital to the whole Title 24 regulatory scheme that it cannot be severed from the rest of Title 24. *Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth.*, 17 FSM R. 181, 189 (Pon. 2010).

If Congress feels that the current Title 24 statutory requirements for access agreements are too loose or are not in the nation's best interests and should be tightened, it can enact further and stricter requirements or it can provide for that review by creating a mechanism for further review in the executive branch, since Congress, through its investigatory powers, can always keep itself informed on the Executive's execution of the laws, and enact remedial legislation when it feels that the Executive needs further guidance in executing national policy that Congress has enacted. But Congress may not execute the laws itself. *Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth.*, 17 FSM R. 181, 189 (Pon. 2010).

An "access agreement" is a treaty, agreement or arrangement entered into by the Authority pursuant to Title 24 in relation to access to the exclusive economic zone for fishing by foreign fishing vessels. But a fishing access agreement is usually not a treaty because treaties are

compacts or agreements between sovereign nations and most fishing access agreements are commercial agreements between the FSM national government and a commercial enterprise. They are business deals not treaties. *Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth.*, 17 FSM R. 181, 189 (Pon. 2010).

Since the Constitution specifically delegates to Congress the power to ratify treaties but does not grant Congress the power to approve or reject fishing access agreements, ruling unconstitutional the statute that requires congressional approval for fishing access agreements for more than nine vessels would not impair Congress's ability to ratify treaties and to advise and consent to presidential appointments. *Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth.*, 17 FSM R. 181, 190 (Pon. 2010).

Since approval of commercial fishing agreements is not a power that the Constitution confers on Congress, but a power that Congress has conferred upon itself by statute, the court's conclusion that that statute is unconstitutional does not have any effect on access agreements that are actually negotiated and concluded as treaties between sovereign nations because, just like any other treaty, the President would continue to submit those to Congress for ratification. *Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth.*, 17 FSM R. 181, 190 (Pon. 2010).

The court's conclusion that requiring Congress to approve or reject fishing access agreements is unconstitutional has no effect on Congress's constitutional treaty-ratification and advice and consent powers. *Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth.*, 17 FSM R. 181, 190 (Pon. 2010).

Since a government act in conflict with the Constitution is invalid to the extent of conflict, Congress's rejection of a successor access agreement was invalid because 24 F.S.M.C. 405 is in conflict with the Constitution. *Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth.*, 17 FSM R. 181, 190 (Pon. 2010).

§ 406. Access agreements—term of validity; termination; suspension.

(1) The term of validity of an access agreement shall not exceed ten years, and may be renewable with the approval of the Authority according to the following criteria, taking into account performance of the other party during the previous term:

- (a) likely compliance with the access agreement and this subtitle; and
- (b) potential economic benefits for the Federated States of Micronesia.

(2) Any access agreement whose validity exceeds one year shall include a provision for annual review by the Authority.

(3) Any access agreement may be terminated by the Authority, according to its terms or upon substantial non-compliance by the other party with any requirement of the access agreement or this subtitle.

(4) Fishing under any access agreement may be suspended by the Authority upon a determination by the Authority, based on the best scientific information in the region, that continued fishing at current levels would seriously threaten the fish stocks.

(5) If fishing is suspended pursuant to subsection (4) of this section, the Authority shall make every effort to accommodate the long-term interests of the party to the access agreement and shall rebate proportionately any fees paid for fishing during such suspension.

Source: PL 12-34 § 47.

Cross-reference: The statutory provisions on the President and the Executive are found in title 2 of this code. The statutory provisions on the FSM Congress are found in title 3 of this code.

§ 407. Related activities—transshipment.

- (1) The operator of a foreign fishing vessel shall:
 - (a) not transship at sea under any circumstances;
 - (b) provide 72 hours' notice to the Authority of a request to transship any or all of the fish on board and shall provide the name of the vessel, its international radio call sign, its position, the catch on board by species, the time and port where such transshipment is requested to occur and an undertaking to pay all fees required under the laws of the Federated States of Micronesia;
 - (c) only transship at the time and port authorized for transshipment; and
 - (d) submit full reports on transshipping on such forms as may be required by the Authority or prescribed by regulation.
- (2) During transshipment in the Federated States of Micronesia the foreign party and operator of each vessel shall comply with all applicable National and State laws and regulations in the Federated States of Micronesia relating to protection of the environment, including without limitation, sewage holding tank requirements.
- (3) Any person who violates subsection (1)(a), (1)(c), (1)(d) or (2) of this section shall be subject to a civil penalty of not less than \$75,000 and not more than \$275,000.

Source: PL 12-34 § 48.

Cross-reference: The statutory provisions on the President and the Executive are found in title 2 of this code. The statutory provisions on the FSM Congress are found in title 3 of this code.