# FOREIGN INVESTMENT LAWS

The national government has neither the constitutional authority nor the law enforcement capacity to oversee, on a worldwide basis, every noncitizen acquisition of an interest in a business operating within the FSM. Michelsen v. FSM, 3 FSM R. 416, 423 (Pon. 1988).

The "applicant" referred to in the Foreign Investment Act is one interested in doing business, not just investing money, in the Federated States of Micronesia, and the considerations to be employed in determining whether to grant an application relate to business operations within the FSM, not to investment of funds. Michelsen v. FSM, 3 FSM R. 416, 425 (Pon. 1988).

The Foreign Investment Act regulates the operation of noncitizen business within the Federated States of Micronesia, not individual investors. 32 F.S.M.C. §§ 203(2) and 204 have no application to acquisitions of interests in a business operating in the Federated States of Micronesia with a national foreign investment permit. Michelsen v. FSM, 3 FSM R. 416, 426 (Pon. 1988).

Since Congress used the Trust Territory Investment Act as the overall model in drafting the FSM Foreign Investment Act and adopted language similar to that employed in the Trust Territory statute for describing the activities to be covered in the FSM law, analysis of the new Act must begin with a presumption that Congress intended that the FSM Foreign Investment Act would regulate essentially the same activities as those covered by the Trust Territory Investment Act. Carlos v. FSM, 4 FSM R. 17, 26 (App. 1989).

Based on the language and legislative history of the FSM Foreign Investment Act, 32 F.S.M.C. 201-232, and on that law's similarity to its Trust Territory predecessor, there is no indication that Congress intended the Foreign Investment Act to apply to the provision of legal services. Carlos v. FSM, 4 FSM R. 17, 28-29 (App. 1989).

Since Congress did not give any consideration to, or make any mention of, the services enumerated in article XIII, section 1 of the FSM Constitution in enacting the Foreign Investment Act, 32 F.S.M.C. 201-232, the avoidance of potential conflict with the Constitution calls for the conclusion that Congress did not intend the Foreign Investment Act to apply to noncitizen attorneys or to any other persons who provide services of the kind described in article XIII, section 1 of the Constitution. Carlos v. FSM, 4 FSM R. 17, 30 (App. 1989).

A foreign investment permit applicant aggrieved by a final permit decision may appeal the decision to the FSM Supreme Court. 32 F.S.M.C. 215. Michelsen v. FSM, 5 FSM R. 249, 252-53 (App. 1991).

By statute the practice of law is specifically included in businesses engaged in by noncitizens requiring a foreign investment permit. 32 F.S.M.C. 203. Michelsen v. FSM, 5 FSM R. 249, 254 (App. 1991).

The Foreign Investment Act does not explicitly limit judicial review therefore an aggrieved person affected by an agency decision may seek review under the Administrative Procedures Act. Michelsen v. FSM, 5 FSM R. 249, 254 (App. 1991).

When considering a foreign investment permit application, the Secretary of Resources and

Development must consider "the extent to which the activity will contribute to the constitutional policy of making education, health care, and legal services available to the people of the Federated States of Micronesia." 32 F.S.M.C. 210(8). Michelsen v. FSM, 5 FSM R. 249, 254 (App. 1991).

The scheme of national, constitutionally-authorized foreign investment legislation is so pervasive there is no room for the state to supplement it. Non-FSM citizen attorneys and their private practice of law are expressly subjected to the national legislative scheme. Insofar as attorneys who are engaged in the private practice of law and whose business activities are within the scope of the national FIA, the state FIA is invalid. Berman v. Pohnpei, 5 FSM R. 303, 306 (Pon. 1992).

An isolated, interest-free, unsecured loan is not engaging in business within the meaning of the Pohnpei State Foreign Investment law. Kihara v. Nanpei, 5 FSM R. 342, 345 (Pon. 1992).

By statute, the national government guarantees that there will be no compulsory acquisition or expropriation of any foreign investment property for which a Foreign Investment Certificate has been issued and that the national government will not take action, or permit any state or other entity within the FSM to take action that although not formally designated or acknowledged as compulsory acquisition or expropriation, indirectly has the same injurious effect ("creeping expropriation") and that if such action nevertheless takes place, the national government is responsible for the prompt and adequate compensation of any injured noncitizen. This statute creates a cause of action by the aggrieved alien against the FSM for compensation for a state's conduct in violation of § 216(1) and (4). AHPW, Inc. v. FSM, 12 FSM R. 114, 120 (Pon. 2003).

While injunctive relief would be available to prospectively enforce 32 F.S.M.C. 219, noticeably absent from this section is any language which creates a cause of action for damages on the aggrieved party's part. AHPW, Inc. v. FSM, 12 FSM R. 114, 122 (Pon. 2003).

An isolated interest-free, unsecured loan transaction plainly is not engaging in business within the meaning of the applicable Pohnpei law and regulations. Similarly, execution of an isolated promissory note and security agreement, to establish payment on an open account, is not engaging in business within the meaning of the Pohnpei foreign investment laws. Goyo Corp. v. Christian, 12 FSM R. 140, 146 (Pon. 2003).

A foreign owned entity's isolated attempt to secure payment of a debt should not require that the foreign entity obtain a foreign investment permit. Goyo Corp. v. Christian, 12 FSM R. 140, 147 (Pon. 2003).

The national government guarantees that there will be no compulsory acquisition or expropriation of the property of any foreign investment as to which a Foreign Investment Certificate has been issued. AHPW, Inc. v. FSM, 12 FSM R. 164, 166 (Pon. 2003).

When a party has not alleged that the state has dispossessed it of any property, and that property is now in the possession of the state or its designee, the party has not stated a cause of action for expropriation under the FSM foreign investment statutes. AHPW, Inc. v. FSM, 12 FSM R. 164, 167 (Pon. 2003).

While § 219 of the Foreign Investment Laws admits of a cause of action for prospective,

injunctive relief against the FSM, it does not permit an action for damages. Chapter 3 provides a remedy for damages, but notwithstanding the fact that the remedy is against Pohnpei, and not the FSM, it is nevertheless a remedy. If the plaintiff prevails, the conduct alleged will not go unsanctioned. AHPW, Inc. v. FSM, 12 FSM R. 164, 167 (Pon. 2003).

There is no meaningful distinction between the terms "compulsory acquisition" and "expropriation." AHPW, Inc. v. FSM, 12 FSM R. 164, 167 (Pon. 2003).

The unilateral cancellation of a foreign investment permit in derogation of the procedures provided for under Kos. S.C. § 15.308(10) is arbitrary and grossly incorrect, and as such constitutes a violation of the national civil rights statute. Wortel v. Bickett, 12 FSM R. 223, 226 (Kos. 2003).

The Kosrae State Code provides that a state foreign investment permit may be temporarily suspended only if the permit holder a) begins operation in a different economic sector from the one(s) for which the permit was issued, or b) alters, changes, modifies or transfers the amount of the ownership interest which the non-citizen retains. Wortel v. Bickett, 12 FSM R. 223, 226 (Kos. 2003).

When a canceled foreign investment permit was ultimately reinstated, it renders moot the cancellation itself and leaves no administrative remedy for the permit holder to pursue. What then remains as a live court issue is the arbitrary and grossly incorrect manner in which the permit was originally canceled. This conduct constitutes a violation of 11 F.S.M.C. 701 *et seq.*, and entitles the plaintiff to a summary judgment. Wortel v. Bickett, 12 FSM R. 223, 226 (Kos. 2003).

A noncitizen cannot engage in business in the FSM unless that noncitizen holds a valid foreign investment permit. A "noncitizen" is any business entity in which any ownership interest is held by a person who is not a citizen of the FSM. Geoffrey Hughes (Export) Pty, Ltd. v. America Ducksan Co., 12 FSM R. 413, 414-15 (Chk. 2004).

By statute, the national government guarantees that there will be no compulsory acquisition or expropriation of the property of any foreign investment as to which a foreign investment certificate has been issued. Pohnpei v. AHPW, Inc., 14 FSM R. 1, 23 (App. 2006).

By statute, the national government will not take action, or permit action, or permit action to be taken by any state or other entity within the FSM, that although not formally designated or acknowledged as compulsory acquisition or expropriation, indirectly has the same injurious effect ("creeping expropriation"), and that if such action takes place, the national government will be responsible for the prompt and adequate compensation of any injured noncitizen. Pohnpei v. AHPW, Inc., 14 FSM R. 1, 23 (App. 2006).

By statute, the national government will not take action, or permit any state to take action, that would result in a foreign investor being given treatment that is less favorable than the treatment given to citizens, or business entities wholly owned by citizens, engaging in business in the FSM. Pohnpei v. AHPW, Inc., 14 FSM R. 1, 23 (App. 2006).

A state would have to actually acquire the property in some fashion for there to be an expropriation, and 32 F.S.M.C. 219 only authorizes injunctive relief and does not create a cause of action for damages. Pohnpei v. AHPW, Inc., 14 FSM R. 1, 24 (App. 2006).

The Foreign Investment Act of 1997 establishes a system of Categories of economic sectors for the purposes of implementing the FSM policy to welcome foreign investment in all sectors of the FSM economy. Three of these categories are made up of economic sectors that are of special national significance and therefore fall within the national government's jurisdiction in respect of foreign investment regulation. The first is the National Red List. No foreign investment is permitted in the activities specified on this list, which includes the minting of money and arms manufacture. The second is the National Amber List. Banking (other than as defined in Title 29 of the FSM Code) and insurance are included on this list. Certain criteria specified in the FSM Foreign Investment Regulations must be met before investment is permitted in these areas. A third category of activities that fall within the jurisdiction of the national government appear on the National Green List. Helicopter Aerial Survey Pty., Ltd. v. Pohnpei, 15 FSM R. 329, 333-34 (Pon. 2007).

Foreign investment Category C (National Green List) comprises the set of economic sectors that are subject to national government regulation but as to which no special criteria need to be met before a foreign investment permit is to be issued. It includes banking, as defined in title 29 of the FSM Code; telecommunications; fishing in the FSM's Exclusive Economic Zone; international and interstate air transport; international shipping; and such other economic sectors as the Secretary may, after consultation with States, designate in the FSM Foreign Investment Regulations as being on the National Green List. Helicopter Aerial Survey Pty., Ltd. v. Pohnpei, 15 FSM R. 329, 334 (Pon. 2007).

In contrast to the three areas subject to national regulation, economic sectors that are not of special national significance are delegated to the jurisdiction of the state governments in respect of foreign investment regulation, which are to be established separately by each state, except that an economic sector included in any of the categories for national regulation cannot appear in any of the categories for state regulation. Helicopter Aerial Survey Pty., Ltd. v. Pohnpei, 15 FSM R. 329, 334 (Pon. 2007).

Fishing and international air transport are areas of foreign investment regulation that are subject to exclusive regulation by the national government. Helicopter Aerial Survey Pty., Ltd. v. Pohnpei, 15 FSM R. 329, 334 (Pon. 2007).

The Marine Resources Act of 2002 amended the prior fisheries law for the purpose of ensuring the sustainable development, conservation and use of the marine resources in the exclusive economic zone by promoting development of, and investment in, fishing and related activities. Included in the definition of "fishing" under the Act is the actual or attempted searching for fish; the placing of any fish aggregating device or associated electronic equipment such as radio beacons; and the use of an aircraft in relation to any activity described in this subsection. "Fishing gear" is equipment or other thing that can be used in the act of fishing, including any aircraft or helicopter. Helicopters, which are used to search for fish and to place radio devices near schools of fish to assist fishing boats in locating fish, fall within the express definition of fishing equipment. Therefore, since fishing in the FSM's EEZ is subject to the exclusive national government jurisdiction and regulation, and since a company's helicopters, based on fishing vessels and piloted by the company's employees, are used to search for fish within the FSM's EEZ, those helicopters are engaged in fishing for purposes of the statutory definition and thus the helicopters, which the company charters to the purse seine operators, and their pilots are subject to the national government's exclusive regulation. Helicopter Aerial Survey Pty., Ltd. v. Pohnpei, 15 FSM R. 329, 334-35 (Pon. 2007).

Since helicopter pilots engaged in fishing are thus subject to the national government's exclusive jurisdiction for foreign investment purposes, it follows that the company which is the pilots' principal, is bound by that conduct. Thus, that company's fishing activities in the FSM's EEZ are also subject to the FSM's exclusive regulation. Helicopter Aerial Survey Pty., Ltd. v. Pohnpei, 15 FSM R. 329, 335 (Pon. 2007).

Since engaging in business is defined as carrying out any activity relating to the conduct of a business and expressly includes leasing property of any kind for commercial purposes, when a foreign investment permittee engaged in the business of providing operational and maintenance support to helicopters servicing fishing vessels in the FSM, its leasing helicopters is one aspect of its business that relates to its fishing activity and is therefore that leasing activity is subject to the FSM's exclusive jurisdiction and regulation for foreign investment purposes. Thus Pohnpei may not require it to apply for a foreign investment permit. Helicopter Aerial Survey Pty., Ltd. v. Pohnpei, 15 FSM R. 329, 335 (Pon. 2007).

Since, by statute, an economic sector included in any of the Categories for National Regulation must not appear in any of the Categories for State Regulation, the statutory provision contemplates that state and national regulation will be mutually exclusive, and works hand in glove with the stated purpose of the Foreign Investment Act, which is to encourage foreign investment. Helicopter Aerial Survey Pty., Ltd. v. Pohnpei, 15 FSM R. 329, 335-36 (Pon. 2007).

When a company has obtained a national foreign investment permit in an area in which the FSM's jurisdiction is exclusive and the company has complied with national laws and regulations in this regard, Pohnpei may not require it to obtain a state foreign investment permit in addition to the FSM permit that it already has. Helicopter Aerial Survey Pty., Ltd. v. Pohnpei, 15 FSM R. 329, 336 (Pon. 2007).

When the court has granted summary judgment on the basis that the plaintiff's helicopters are engaged in fishing, the court need not address the plaintiff's further contention that it is also subject to exclusive national regulation by virtue of the fact that its helicopters are engaged in interstate and international air transport and international shipping. Helicopter Aerial Survey Pty., Ltd. v. Pohnpei, 15 FSM R. 329, 336 (Pon. 2007).

Public hearings are a standard part of the foreign investment permit application process. Smith v. Nimea, 18 FSM R. 36, 45 (Pon. 2011).

A foreign investment permit holder is required to, by the terms of his foreign investment permit, to abide by all laws and regulations applicable to the business(es) that his foreign investment permit allows him to engage in. Lee v. Kosrae, 20 FSM R. 160, 165 (App. 2015).

A Kosrae Island Resource Management Authority sea cucumber permit is the only sea cucumber permit needed so as not to violate either Kosrae State Code § 13.523(5) or § 13.523(6). A foreign citizen also needs a foreign investment permit to engage in a sea cucumber (or any other) business, and the lack of a foreign investment permit or the violation of one or more of its conditions would be charged under the foreign investment statutes, not under § 13.523(5) or § 13.523(6). Lee v. Kosrae, 20 FSM R. 229, 231 (App. 2015).

Under the foreign investment laws requiring noncitizens "engaging in business" to hold a valid foreign investment permit, "engaging in business" includes providing professional services as an attorney for a fee. Pacific Int'l, Inc. v. FSM, 20 FSM R. 346, 349 (Pon. 2016).

Someone providing professional services for a fee, such as an attorney, is not considered to be "engaging in business" unless he or she, while present in the FSM, performs his or her respective professional services for more than 14 days in any calendar year. Pacific Int'l, Inc. v. FSM, 20 FSM R. 346, 349 (Pon. 2016).

A noncitizen attorney, licensed to practice in the FSM since 1985 and a member of the Bar in good standing but currently resident and practicing on Guam, is excepted from the foreign investment permit requirement when he works in tandem with an FSM citizen licensed to practice in the FSM and when his involvement in the case has been from a remote location and, as a result, he has not been present in the FSM rendering professional services for more than 14 days in any calendar year. Pacific Int'l, Inc. v. FSM, 20 FSM R. 346, 349 (Pon. 2016).

Under 55 F.S.M.C. 419(1) and (2), no foreign investment permit is required of a noncitizen attorney when his representation directly involves "contract management activities" that relate to a public contract awarded for a civil works project to implement part of the Infrastructure Development Plan and that is supported by funds through the Amended Compact of Free Association Section 211. Pacific Int'l, Inc. v. FSM, 20 FSM R. 346, 349-50 (Pon. 2016).

An attorney cannot be said to come within the ambit of the 32 F.S.M.C. 204, which otherwise would require a foreign investment permit, when his legal representation, to date, has been conducted *in absentia*, and thus cannot be said to have rendered his professional services "while present in the FSM for more than 14 days in any calendar year" and when the present action involves an Infrastructure Development Plan project and the construction by his client was undertaken pursuant to a contract underwritten with Compact monies. Pacific Int'l, Inc. v. FSM, 20 FSM R. 346, 350 (Pon. 2016).

A corporation's legal inability to engage in business on Pohnpei is not a legal impediment to its ability to own personal property on Pohnpei, although its inability to legally conduct business on Pohnpei could be a persuasive indication that any equipment used to conduct a Pohnpei business was, in fact, not owned by it, but owned by another. Pohnpei Arts & Crafts, Inc. v. Narruhn, 21 FSM R. 366, 368 (Pon. 2017).

The FSM is not required to permit a person's entry into or continued presence in the FSM just because a state government has granted that person a foreign investment permit. Only the national government (Congress) may regulate immigration even though the state governments retain some authority to regulate the business or employment of non-FSM citizens within their state, but, when deciding whether to permit or deny someone's entry or continued presence in the FSM, the FSM must take into consideration that that person has a state-issued foreign investment permit. Macayon v. FSM, 22 FSM R. 544, 552 (Chk. 2020).