

The Negotiations for the Future Political Status of Micronesia (1980–1984)

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One cannot expect a United Nations "experts committee," operating on a consensus basis, to adopt a binding code of conduct regarding the generation of refugee flows and their management. Nevertheless, the Programme of Work adopted at the group's second session is a sign that the experts may be able to agree on a set of standards against which international behavior can be measured.

LUKE T. LEE\*

### THE NEGOTIATIONS FOR THE FUTURE POLITICAL STATUS OF MICRONESIA (1980-1984)

Fourteen years of Micronesian political status negotiations culminated in 1983 with the final signature of the Compact of Free Association between the United States and the Governments of Palau, the Marshall Islands and the Federated States of Micronesia (FSM).<sup>1</sup> Upon being approved in accordance with its terms and the constitutional processes of the signatory Governments,<sup>2</sup> the Compact will establish bilateral relationships between the United States and the new states emerging from the Trust Territory of the Pacific Islands. Approval of these future political status arrangements will also provide the basis for termination of the Trusteeship Agreement between the United States and the United Nations Security Council.<sup>3</sup> The Compact defines an international political partnership between the United States and the freely associated states that is without precise precedent in international law or U.S. domestic practice.<sup>4</sup> Under the Compact, each freely associated state will enjoy control over its internal affairs and its foreign relations, including competence to enter into international

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<sup>1</sup> Compact of Free Association, *opened for signature* Aug. 26, 1982 (U.S.-Palau, Aug. 26, 1982; U.S.-Federated States of Micronesia, Oct. 1, 1982; U.S.-Marshall Islands, June 25, 1983) (on file at the Office for Micronesian Status Negotiations, Washington, D.C. 20240).

<sup>2</sup> Compact of Free Association, *supra* note 1, §§411, 412. For discussion of the approval process in Palau, the Marshall Islands, the Federated States of Micronesia and the United States, see Armstrong, *The Negotiations for the Future Political Status of Micronesia*, 74 AJIL 689, 690 (1980); Armstrong, *The Strategic Underpinnings of the Legal Regime of Free Association: The Negotiations for the Future Political Status of Micronesia*, 7 BROOKLYN J. INT'L L. 179, 185, 227-28 (1981).

<sup>3</sup> Trusteeship Agreement for the Former Japanese Mandated Islands, approved by the UN Security Council April 2, 1947, approved by the United States July 18, 1947, 61 Stat. 3301, TIAS No. 1665, 8 UNTS 189. For analysis of trusteeship termination, see MacDonald, *Termination of the Strategic Trusteeship: Free Association, the United Nations and International Law*, 7 BROOKLYN J. INT'L L. 236 (1981); cf. Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1 (1980).

<sup>4</sup> See Armstrong, *The Emergence of the Micronesians into the International Community: A Study of the Creation of a New International Entity*, 5 BROOKLYN J. INT'L L. 207, 239-59 (1979); Clark, *supra* note 3, at 38-64, 71-74; MacDonald, *supra* note 3, at 240-49; P. LEARY, *THE NORTHERN MARIANAS COVENANT AND AMERICAN TERRITORIAL RELATIONS* (Institute of Governmental Studies Research Report 80-1, University of California, Berkeley, 1980); Leibowitz, *United States Federalism: The States and Territories*, 28 AM. U.L. REV. 449 (1979).

agreements.<sup>5</sup> Mutual security arrangements, set forth in the Compact and its separate agreements, provide for a U.S. defense umbrella during the life of free association and long-term exclusion of third-country military forces, should any or all of the freely associated states opt for independence at some future date.

The United States has administered the Trust Territory of the Pacific Islands (TTPI) since 1947 pursuant to the Trusteeship Agreement. The Reagan administration is the fourth administration to consider the issues of termination of the trusteeship and the institution of a new political status for the TTPI. The Nixon administration commenced the negotiations in 1969. The Ford administration completed one portion of the political status negotiating process in 1976 by concluding an agreement with the Northern Mariana Islands under which those islands will become a United States Commonwealth when the trusteeship terminates.<sup>6</sup> Palau, the Federated States of Micronesia and the Marshall Islands, the other political bodies that constitute the TTPI, insisted instead on the political status known as free association which, while forming the basis for a close and enduring political relationship, would maximize internal self-government and ensure autonomy sufficient to enable them to establish their own international legal personality. The Ford administration began the negotiations for free association and the Carter administration continued them.

The cornerstones of free association were laid at the conclusion of the Carter administration. The Statement of Agreed Principles for Free Association (the Hilo Principles),<sup>7</sup> signed in 1978, established the parameters of the relationship and the Compact, initialed by the signatory Governments in 1980,<sup>8</sup> set forth much of the substance of free association as it had evolved through the negotiating process. While the initialed Compact set forth the basic governmental, economic, security and defense aspects of the prospective relationship, only 5 of 17 implementing agreements associated with the Compact had been concluded by the time of the 1980 presidential elections.<sup>9</sup> Negotiation of the remaining related agreements was suspended after the election of President Reagan, to permit the new administration to review United States policy with respect to Micronesia and to chart its own course.

At the outset of 1981, the Reagan administration conducted a comprehensive review of the Carter documents and the Micronesian policy of the three preceding

<sup>5</sup> Compact of Free Association, *supra* note 1, Preamble, cl. 6, and Title 1, Arts. I and II. The full internal self-government and foreign affairs capacity recognized in these provisions is limited only by the requirement that the freely associated states will refrain from actions that the United States, after consultations with the Government or Governments concerned, determines to be incompatible with U.S. authority and responsibility for defense and security matters.

<sup>6</sup> In 1975 the people of the Northern Mariana Islands approved the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, Proclamation No. 4534, 3 C.F.R. 56-57 (1978), *reprinted in* 48 U.S.C. §1681 (1976). Though many aspects of the legal and political relationship established under the Covenant have been implemented under U.S. law, the Northern Mariana Islands remain a part of the Trust Territory.

<sup>7</sup> Statement of Agreed Principles for Free Association, *reprinted in* 72 AJIL 882-83 (1978).

<sup>8</sup> See Armstrong, *Strategic Underpinnings*, *supra* note 2, at 183-84.

<sup>9</sup> See Compact of Free Association, *supra* note 1, Title 4, Art. VI, §462, for a list of all separate agreements concluded pursuant to specific provisions of the Compact.

administrations.<sup>10</sup> In October 1981, the Reagan administration formally presented its conclusions to the three Micronesian Governments at a multilateral session conducted at Maui, Hawaii.<sup>11</sup> The United States informed the Micronesian Governments that it was prepared to accept the initialed Compact as the basis for conclusion of the political status negotiations, provided that the remaining subsidiary agreements could be negotiated to the satisfaction of the signatory Governments. The United States further reaffirmed that it would seek termination of the Trusteeship Agreement on the basis of free association at the earliest possible date.

The conclusions of the Reagan administration's policy review were based on the assessment that free association, as defined in the initialed Compact, would establish the basis for a stable relationship between the United States and Micronesia. Politically, the Micronesians would emerge from the trusteeship in charge of their own internal and external affairs. Economically, the Compact would provide the Micronesians with sufficient unrestricted grant funds and programmatic assistance to establish development policies based upon their own social, political and economic priorities rather than Washington's. The 15-year period of Compact funding was seen as a means to enable the new states to conduct long-term fiscal planning and economic development programs. From the defense standpoint, the Compact would ensure a strategic status quo in the Pacific basin—an essential requirement from the perspective of U.S. strategic defense and, concomitantly, from the perspective of offering the Micronesians a politically stable environment in which to undertake internal political and economic development. These strategic requirements would be secured under those provisions of the Compact which establish U.S. authority and responsibility for defense and security matters for an initial 15-year period, and by U.S. military operational rights as set forth in three bilateral separate agreements. The Reagan administration also reiterated the requirement for a mutual security arrangement whereby the United States would undertake to defend the freely associated states for an indeterminate period, and the new states would undertake to deny foreign military forces access to their areas.<sup>12</sup>

The Reagan administration further concluded that under the Compact the Micronesians would achieve a new political status which, with the democratically expressed approval of the people of the emerging states, would meet the international criteria for legitimacy under the UN Charter and under international law,<sup>13</sup> and which would be consistent with the obligations of the United States

<sup>10</sup> See Statement of Ambassador Fred M. Zeder II, the President's Personal Representative for Micronesian Status Negotiations, before the Subcomm. on East Asian and Pacific Affairs of the Senate Comm. on Foreign Relations, 97th Cong., 2d Sess. 7 (Dec. 10, 1982).

<sup>11</sup> See Statement of James L. Buckley, Under Secretary of State for Security Assistance, Science and Technology and Chairman of Interagency Group on Micronesia, and Message from President Reagan to People and Leaders of Palau, the Marshall Islands and the Federated States of Micronesia, Micronesian Political Status Negotiations, Maui, Hawaii, Oct. 3, 1981 (on file at Office for Micronesian Status Negotiations, Washington, D.C. 20240).

<sup>12</sup> See Statement of Noel C. Koch, Principal Deputy Assistant Secretary of Defense for International Security Affairs, Micronesian Political Status Negotiations, *id.*

<sup>13</sup> See J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 370-84 (1979).

under the Trusteeship Agreement to foster the development of the Micronesians toward self-government, or independence, in accordance with the freely expressed wishes of the people.<sup>14</sup>

Thus, with the Reagan administration's policy review complete, the negotiations recommenced in the fall of 1981. The negotiators, however, soon discovered that during the hiatus in the negotiations incident to that policy review the political dynamics that had forged a consensus among the three Governments during the waning days of the Carter administration had changed as the leadership in each of the new nations began to refocus on resolving issues specific to their areas.

The Marshallese, pressured by domestic interest groups, concentrated on the use by the U.S. military of the Kwajalein Missile Range and on settlement of claims that arose out of the nuclear testing program conducted by the United States in the Northern Marshall Islands between June 30, 1946 and August 18, 1958.

The Federated States of Micronesia, under increasing pressure from the four constituent states, focused on the need to complete various infrastructure development projects prior to embarking upon the new relationship. Consequently, the FSM negotiators determined not to participate further in status negotiations until FSM demands for pretermination transition funding were met. The negotiations with the FSM were further complicated by that Government's reluctance to accept the indeterminate duration of the mutual security arrangement, which the Reagan policy review stressed as being a firm United States requirement. On this latter issue, the FSM negotiators had determined that any U.S. defense authority that exceeded the 15-year duration of economic assistance would compromise FSM bargaining power in future negotiations for economic assistance after expiration of the initial term of the Compact.

Palau, beset by a budget deficit and hamstrung by a massive strike of government employees demanding higher wages, focused on achieving economic recovery by recasting the financial arrangements under the economic assistance program, which constitutes the quid pro quo for U.S. rights to contingency use of military operating areas in Palau. Simultaneously, the Palauan negotiators were confronted by the fact that their Constitution contains provisions requiring approval by three-fourths of the votes cast in a referendum on any agreement that authorizes "use, testing, storage or disposal of nuclear, toxic chemical, gas or biological weapons intended for use in warfare."<sup>15</sup> Since the Compact authorizes the Government of the United States to exercise full authority and responsibility for security and defense matters in or relating to Palau, and since the United States has a worldwide policy of neither confirming nor denying the presence or absence of nuclear weapons, reconciliation of the Compact and the Palauan Constitution became the subject of intense debate. The United States, as administering authority of the trusteeship, considered itself to be seized with knowledge of the requirements of the Palauan Constitution. Therefore, the United States concluded that in implementing the Compact as to Palau

<sup>14</sup> UN CHARTER art. 76, para. b; Trusteeship Agreement, *supra* note 3, Art. 6, para. 1.

<sup>15</sup> Republic of Palau CONST. art. II, §3.

it could not rely on the principle of international practice providing that a state (i.e., Palau) may not invoke, as invalidating its consent to be bound by the terms of an international agreement, the fact that such consent has been expressed in violation of a provision of its internal law regarding competence to conclude treaties.<sup>16</sup> The United States thus required, as a condition precedent to free association, that Palau make a showing that, under its Constitution, the United States has authority to carry out its defense responsibilities under the Compact in a manner consistent with its policy of neither confirming nor denying the presence of any particular weapons aboard its ships, aircraft or installations in Palau.<sup>17</sup>

It soon became clear to negotiators for all four Governments that the process of bringing the three states along in tandem, which had facilitated the negotiations during the Carter administration, had outlived its utility. Consequently, during 1982, and until their conclusion, the negotiations were conducted on an exclusively bilateral basis.

#### *Multilateral Separate Agreements*

While the last year and a half of negotiations proceeded on a bilateral basis, final overall agreement and signature was achieved only after completion of negotiations regarding the following six Compact-related separate multilateral agreements and an additional implementing agreement regarding fiscal procedures.

*Extradition.* All four Governments signatory to the Compact entered into an agreement on extradition and law enforcement that establishes procedures for the extradition of prisoners and for mutual assistance and cooperation in the pursuit, capture and imprisonment of fugitives from justice.<sup>18</sup> The agreement also provides that sentences imposed by courts of the freely associated states on citizens of the United States may be served in U.S. penal institutions, and vice versa. The arrangements established for extradition and transfer of prisoners are essentially the same as those between the United States and other foreign countries.

*Federal Programs.* The Compact signatories also entered into a multilateral Federal Programs and Services Agreement, which details the provision of assistance relating to postal service, weather reporting, civil aviation safety and economic regulation, disaster relief, and education and health services to the freely associated states by United States federal agencies.<sup>19</sup> This agreement also establishes the legal status of the U.S. agencies in the freely associated states.

<sup>16</sup> See Vienna Convention on the Law of Treaties, Arts. 27 and 46, *reprinted in* 63 AJIL 875 (1969), 8 ILM 679 (1969).

<sup>17</sup> See letter from Ambassador Fred M. Zeder II, the President's Personal Representative for Micronesian Status Negotiations, to President Haruo I. Remeliik, Republic of Palau, dated April 21, 1983.

<sup>18</sup> Agreement on Extradition, Mutual Assistance in Law Enforcement Matters and Penal Sanctions Concluded Pursuant to Section 175 of the Compact of Free Association, May 24, 1982, U.S.-Marshall Islands; Aug. 26, 1982, U.S.-Palau; Oct. 1, 1982, U.S.-FSM.

<sup>19</sup> Federal Programs and Services Agreement Concluded Pursuant to Article II of Title Two and Section 232 of the Compact of Free Association, Aug. 26, 1982, U.S.-Palau; Oct. 1, 1982, U.S.-FSM; June 25, 1983, U.S.-Marshall Islands.



During the pendency of the trusteeship, federal agencies have applied their programs to Micronesia basically as an extension of domestic programs. Although these agencies have all assumed various international responsibilities, such international assistance has primarily been in the nature of technical assistance, usually on a reimbursable basis. Under free association, the domestic analogy becomes unworkable. Extension of a domestic agency's responsibility to a freely associated state would also entail the extension of the agency's legal authority, but such an extension of legal authority would be inconsistent with the concept of a freely associated state's internal self-government. On the other hand, the commitment of the United States to make available programs and services at "the levels equivalent to those available to the Trust Territory of the Pacific Islands during the year prior to the effective date of [the] Compact"<sup>20</sup> represents a commitment far in excess of the technical assistance traditionally provided to foreign nations. Therefore, in each of the substantive areas, new approaches were formulated that would preserve the integrity of the domestic legal system of each recipient Government while U.S. agencies were enabled to provide a full range of services.

For example, under the agreement, the Governments of the freely associated states shall assume responsibility pursuant to their own laws and regulations for all local postal services. The U.S. Postal Service, for its part, shall provide for the international carriage of mail and for conveyance of mail between Palau, the Federated States of Micronesia and the Marshall Islands. In the area of civil aviation, the agreement provides that the Governments of the freely associated states shall exercise independent economic regulatory jurisdiction over air services. The Civil Aeronautics Board, and its successor agencies, shall provide processing of applications from any person seeking authority from the freely associated states to engage in air services in their jurisdiction. The power of ultimate disposition of such applications, however, rests with the Governments of the freely associated states. In recognition of the vital nature of air transportation to island nations scattered over an ocean area the size of the continental United States, the agreement contains special provisions encouraging the growth of a local air transportation system. The agreement creates a distinct classification of "foreign air carrier" (as defined in 49 U.S.C. §1301(22)), to be known as a "Freely Associated State Air Carrier." Such freely associated state air carriers will be eligible to receive subsidy compensation from the United States if a U.S. air carrier is unable to provide essential air transportation linking the islands. The Civil Aeronautics Board is further empowered to authorize freely associated state air carriers to carry local traffic between Guam, the Commonwealth of the Northern Mariana Islands and Honolulu, waiving cabotage restrictions.

*Status of United States Forces.* The Status of Forces Agreement concluded by the four Governments sets forth the legal status of the Armed Forces of the United States, their members and associated civilians while present in the freely associated states.<sup>21</sup> It covers such subjects as movement, entry and departure

<sup>20</sup> Compact of Free Association, *supra* note 1, §221(a).

<sup>21</sup> Status of Forces Agreement Concluded Pursuant to Section 323 of the Compact of Free Association, May 24, 1982, U.S.-Marshall Islands; Aug. 26, 1982, U.S.-Palau; Oct. 1, 1982, U.S.-FSM.

of U.S. forces; utilization of contractors and employment of labor; taxes and customs; criminal jurisdiction; and claims.

The regime established under the Status of Forces Agreement for the exercise of criminal jurisdiction over U.S. personnel while present in Micronesia enables the United States or the Micronesian Governments to exercise exclusive jurisdiction over such personnel where the offense committed is punishable under the law of the Government exercising jurisdiction but not under the law of the other. Where the offense is punishable under the laws of both the United States and the Micronesian Government concerned, concurrent jurisdiction exists but a primary right to its exercise is allocated to the United States if certain categories of offenses are involved, including those committed on U.S. defense sites by U.S. personnel in the performance of official duties, those that endanger U.S. security and those that are punishable by loss of liberty for more than 6 months. In determining if an offense is punishable under U.S. law, the criterion employed is whether or not the act violates laws of the United States applicable to offenses committed outside the territorial jurisdiction of the United States. The signatory Governments also agreed that this jurisdictional arrangement will be reviewed and modified as mutually agreed, on the basis of experience under the agreement and changed circumstances, if any.

*Federal Property.* An agreement on turnover of United States and Trust Territory property to the new Governments sets forth the terms under which the United States will, in accordance with the relevant sections of the Compact and existing U.S. law, transfer such property to the freely associated states.<sup>22</sup> Property for which the United States identifies a continuing requirement in meeting its obligations under the Compact will be retained.

*Telecommunications.* Two multilateral agreements on telecommunications were concluded. In the first, the United States undertakes to represent the interests of the freely associated states before the International Telecommunication Union and in other international forums in matters pertaining to telecommunications until such time as any of those Governments elect to undertake those functions.<sup>23</sup> In the second telecommunications agreement, the United States is authorized to install, operate and maintain military and other U.S. governmental telecommunication facilities in Micronesia necessary for the United States to carry out its defense and security responsibilities and to conduct other activities as required under the Compact.<sup>24</sup>

*Fiscal Procedures.* In addition to these six agreements, which implement specific provisions of the Compact, a separate administrative agreement was negotiated as the approval process went forward and the four signatory governments began

<sup>22</sup> Agreement Concluded Pursuant to Section 234 of the Compact of Free Association, Aug. 26, 1982, U.S.-Palau; Oct. 1, 1982, U.S.-FSM; June 25, 1983, U.S.-Marshall Islands.

<sup>23</sup> Agreement regarding the Provision of Telecommunication Services by the Government of the United States to Palau, the Marshall Islands and the Federated States of Micronesia Concluded Pursuant to Section 131 of the Compact of Free Association, Aug. 26, 1982, U.S.-Palau; Oct. 1, 1982, U.S.-FSM; June 25, 1983, U.S.-Marshall Islands.

<sup>24</sup> Agreement regarding the Operation of Telecommunication Services of the Government of the United States in Palau, the Marshall Islands and the Federated States of Micronesia Concluded Pursuant to Section 132 of the Compact of Free Association, May 30, 1982, U.S.-Marshall Islands; Aug. 26, 1982, U.S.-Palau; Oct. 1, 1982, U.S.-FSM.



to focus on the mechanics of implementing the Compact. This agreement prescribes procedures for paying over to the freely associated states the economic assistance grants provided for in the Compact, preparing and submitting annual reports and budget materials as required in the Compact, and carrying out other fiscal management responsibilities under the Compact.<sup>25</sup> The Federated States of Micronesia took the lead in seeking this agreement in response to political pressure from the states of Yap, Ponape, Truk and Kosrae for clarification of the procedures by which state government shares of funds under the Compact would become available first to the FSM and then for partial distribution to the states. While the United States could not properly involve itself in the internal constitutional processes of the FSM with regard to distribution of state funding, the fiscal agreement negotiated does establish clearly the process for making payments to the FSM national Government, conducting audits and administering fiscal affairs under the Compact.

### *Bilateral Separate Agreements*

The United States and each of the other signatory Governments concluded eight bilateral separate agreements called for in the Compact, as well as certain other bilateral agreements related to the Compact.

*Mutual Security Agreements.* All three Micronesian Governments concluded bilateral agreements with the United States that provide for the mutual security of the signatories.<sup>26</sup> Under these agreements, U.S. responsibility and authority regarding security and defense matters in Palau, the Marshall Islands and the Federated States of Micronesia includes the right to deny "access to or use of" the freely associated states by "the military personnel or for the military purposes" of any third country. In addition, the United States recognizes that any attack on the freely associated states would "constitute a threat to the peace and security of the Pacific area and a danger to the United States" that the U.S. Government would take action to meet. The mutual security relationship established under these agreements can be altered or terminated only by mutual agreement.

The Federated States of Micronesia was initially opposed to granting defense authority for an indefinite period while limiting the economic assistance obligations of the United States to a specific period. From the U.S. perspective, the economic assistance package contained in the Compact constituted a significant effort by the United States to support long-term economic development

<sup>25</sup> Agreement concerning Procedures for the Implementation of United States Economic Assistance, Programs and Services Provided in the Compact of Free Association, June 16, 1983, U.S.-FSM. Negotiations on this Agreement have not yet been completed with the Marshall Islands and Palau.

<sup>26</sup> Agreement between the Government of the United States and the Government of the Marshall Islands regarding Mutual Security Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association, May 24, 1982, U.S.-Marshall Islands; Agreement regarding the Military Use and Operating Rights of the Government of the United States in Palau Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association, Oct. 1, 1982, U.S.-FSM. Palau; Agreement between the Government of the United States and the Government of the Federated States of Micronesia regarding Friendship, Cooperation and Mutual Security Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association, Oct. 1, 1982, U.S.-FSM.

in the FSM. The U.S.-FSM bilateral agreement memorialized this long-range understanding, and the United States further agreed to consult with the FSM Government after free association with regard to the economic advancement of the FSM and the need for continued economic assistance. Assuming that free association is terminated and only the mutual security relationship continues, the United States would consider granting further economic assistance to support that relationship.

*Palau's Economic Assistance Agreement.* Palau's negotiators were also concerned about the duration of the U.S. defense authority, and the lack of any economic assistance obligations of equal duration. However, Palau's representatives elected to deal with this issue in a manner that FSM leaders and the Marshallese could have pursued but, for their own reasons, did not. During the final negotiations, Palau arranged for an extension of the term of free association in the Compact from 15 to 50 years. The Compact consequently was amended to provide for an extension of economic assistance grants coextensive with the new 50-year period of free association for Palau. Funding for grants during years 16 through 50 will be derived by investment of the sum of \$60 million in interest-bearing instruments of the United States. A separate agreement between the United States and Palau governs the management of the investment fund whose express purpose is to produce income for the Government of Palau by means of distributions in the 6th, 11th, 16th and all subsequent years of the relationship of free association.<sup>27</sup>

*Separate Agreement with Palau on Harmful Substances.* Palau and the United States also concluded a bilateral agreement in which the two Governments sought to clarify the language of section 314 of the Compact and recapitulate the conditions, restrictions and safeguards applicable to the United States with respect to introduction of certain harmful substances or types of weapons, including nuclear, into Palau. That agreement was presented to the Palauan people as a separate internal referendum on the ballot in Palau's political status plebiscite of February 10, 1983. The voters, however, did not give the three-fourths approval required by the Palauan Constitution for implementation of an agreement granting authority to another nation to introduce nuclear weapons into Palau. While the Compact was approved in the plebiscite, voter rejection of the separate agreement has required U.S. and Palauan negotiators to revisit the issue of compatibility between the harmful substances restrictions of the Palauan Constitution and U.S. defense responsibility and authority under the Compact.

On July 1, 1983, the United States and Palau attempted to resolve this long-standing dilemma by signing an agreement that representatives of both Governments viewed, in light of the results of the February 10 plebiscite, as reconciling the Constitution and the Compact.<sup>28</sup> However, this agreement was

<sup>27</sup> Agreement between the Government of the United States and the Government of Palau regarding Economic Assistance Concluded Pursuant to Section 211(a)(2) of the Compact of Free Association, Nov. 23, 1982, U.S.-Palau.

<sup>28</sup> Agreement between the Government of the United States and the Government of Palau regarding the Putting into Effect of the Compact of Free Association by the Government of Palau and Amending the Military Use and Operating Rights Agreement, July 1, 1983, U.S.-Palau.

not approved in accordance with Palau's Constitution, and the Palauan Government has subsequently adopted the position that as a matter of internal constitutional interpretation, nonapproval of the section 314 agreement in the internal referendum had the effect of negating approval of the Compact by the voters in the February 10 plebiscite. In subsequent bilateral talks, the United States has expressed its view that the people of Palau have approved the Compact in a valid act of self-determination in accordance with the Trusteeship Agreement. Nevertheless, the United States also informed Palau that it will not proceed with approval or implementation of the Compact with respect to Palau until compatibility between the Compact and Palau's Constitution is achieved under mutually agreed terms. Thus, governmental approval of the Compact with respect to Palau will apparently proceed no further in Palau or the United States until a new approach to reconciliation of the Compact and the Palauan Constitution is devised.

*Marshall Islands Nuclear Claims Settlement.* Reaching an agreement to settle the claims of the Government and citizens of the Marshall Islands arising from the U.S. nuclear testing program there proved to be one of the most problematic issues encountered during final negotiations on the Compact.<sup>29</sup> The agreement that was finally concluded and signed on June 25, 1983<sup>30</sup> contains three basic elements:

(1) a claims fund of \$150 million will be provided to the Marshall Islands Government and invested in interest-earning bonds, notes or other redeemable instruments to create a potentially permanent endowment for payment of nuclear claims;

(2) the proceeds of the fund will be utilized for payments to persons known to be affected by the nuclear testing program (specifically, the people of Bikini, Enewetak, Rongelap and Utirik), and to fund a Marshallese claims tribunal to pay unknown or currently unknowable claims, and for medical care and other assistance to the Marshall Islands; and

(3) in exchange for establishment of this settlement fund, the Marshall Islands Government espouses and settles all claims of its citizens arising from the nuclear testing program.<sup>31</sup>

This arrangement was agreed upon after a full year of negotiations to revise an initial agreement signed on May 30, 1982. When the terms of the revised agreement were accepted by the Marshall Islands, signatures were withdrawn from the first agreement.

*Marine Jurisdiction Agreements.* Both Palau and the FSM entered into bilateral agreements with the United States regarding marine jurisdiction.<sup>32</sup> These

<sup>29</sup> Between 1946 and 1958, the United States conducted 66 nuclear and thermonuclear detonations in the Marshall Islands: 23 at Bikini and 43 at Enewetak. Section 177 of the Compact calls for a separate agreement settling all claims of the Marshall Islands Government and Marshallese citizens arising from that testing program.

<sup>30</sup> Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association, June 25, 1983, U.S.-Marshall Islands.

<sup>31</sup> *Dames & Moore v. Regan*, 453 U.S. 654 (1981); 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW §§37 and 38 (1967).

<sup>32</sup> Agreement between the Government of the United States and the Government of the Federated States of Micronesia regarding Aspects of the Marine Sovereignty and Jurisdiction of

agreements set forth the claims of Palau and the FSM over their respective marine territories, including internal waters, territorial seas and the superjacent airspace, and provide that such claims will be asserted and enforced "to the extent permitted by international law." This formulation of marine jurisdiction ensures that in interpreting and applying territorial provisions of their Constitutions, Palau and the FSM will make no claims that violate internationally accepted principles. Provisions in both the Palauan and FSM Constitutions could have resulted in archipelagic claims inconsistent with international practice and U.S. policy. These interpretive agreements preclude such claims.

The Palau and FSM marine jurisdiction agreements also establish that, to the full extent permitted by international law, Palau and the FSM have jurisdiction over the nonliving resources of the seabed and subsoil adjacent to their coasts and over the living resources of the seabed, subsoil and water column adjacent to their coasts. Once the Compact of Free Association enters into force, the freely associated states will be competent to become parties to the Convention on the Law of the Sea.<sup>33</sup> These agreements also memorialize the intention of the new states to sign the LOS Convention and the assurances of the United States that it views LOS signature as a decision for the freely associated states to make once the Compact takes effect, regardless of U.S. unilateral policy with respect to the Convention.

After concluding the two bilateral marine jurisdiction agreements, the United States determined not to sign the Law of the Sea Convention and thereafter unilaterally issued a presidential proclamation claiming an exclusive economic zone.<sup>34</sup> It remains to be seen whether the freely associated states will follow the U.S. lead and claim similar zones.

### *Compact Approval Process*

The Compact was negotiated within the framework of the Hilo Principles,<sup>35</sup> which, inter alia, called for submission of the free association agreement to a plebiscite conducted under the observation of the United Nations. After signature of the Compact and at the request of the Permanent Representative of the United States to the United Nations,<sup>36</sup> the Trusteeship Council of the United

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the Federated States of Micronesia, Oct. 1, 1982, U.S.-FSM; Agreement regarding the Jurisdiction and Sovereignty of the Republic of Palau over its Territory and the Living and Non-living Resources of the Sea, Aug. 26, 1982, U.S.-Palau; Agreement between the Government of the United States and the Government of Palau regarding Radioactive, Chemical and Biological Substances, Aug. 26, 1982, U.S.-Palau.

<sup>33</sup> Convention on the Law of the Sea, UN Doc. A/CONF.62/122, Art. 305(1)(d) (1982).

<sup>34</sup> Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983), *reprinted in* 77 AJIL 621 (1983).

<sup>35</sup> *Supra* note 7.

<sup>36</sup> See letter from Ambassador Jeane J. Kirkpatrick, Representative of the United States of America to the United Nations, to His Excellency Mr. Javier Pérez de Cuéllar, Secretary-General, the United Nations, dated Nov. 18, 1982, requesting that a special session of the Trusteeship Council be convened to organize observer missions for the Micronesian plebiscites. See also letter from Ambassador Kirkpatrick to Mr. Paul Poudade, President, Trusteeship Council, United Nations, dated Nov. 18, 1982, regarding scheduling of plebiscites.

Nations authorized three special visiting missions to observe the plebiscites conducted in Palau, the FSM and the Marshall Islands.<sup>37</sup>

Echoing the Hilo Principles, sections 411 and 412 of the Compact together set forth the requirements for approval of the Compact by the signatory Governments and by the people voting in the plebiscites. Governmental approval in all three Micronesian jurisdictions consists of approval of the agreement by the legislative branch of each signatory Government, and in the FSM, by the legislatures of its constituent states.<sup>38</sup>

In order to provide a legitimate basis for termination of the trusteeship, the Governments of Palau, the FSM and the Marshall Islands conducted a U.S.-funded plebiscite education program that would present a full range of issues concerning future political status to the people of the Trust Territory. In the view of the members of the Trusteeship Council, the act of self-determination leading to termination had to afford the people an opportunity freely to express their views on the three basic options available to them under international law and the trusteeship system of the United Nations: integration with a municipal power, independence, or a political status other than integration or independence such as free association. From the outset, the Trusteeship Council made it clear that it desired these three options, in some form, to appear on any plebiscite ballot.

For its part, the United States had no objection to the appearance of other options on the ballot, as long as the ballot presented free association, as defined in the Compact, as a separate question so that all voters could express approval or disapproval of that agreement. While the outcome of voting on any other questions presented on the ballot could provide the basis for subsequent negotiation of another political status, free association as defined in the Compact was the political status on the basis of which the United States was prepared, without further negotiation, to seek the earliest possible termination of the trusteeship. After 14 years of negotiations on free association undertaken at the request of the Micronesians, the United States desired a definitive vote on the Compact.

The views on ballots of the Micronesian negotiators were influenced by internal political factors and, in general, they favored a simple yes or no vote on the Compact in order to obtain the clearest possible mandate from their people. The ballot finally accommodated all the concerns of the United States, the Micronesians and the Trusteeship Council by presenting the issue of Compact approval as a separate question and, in a second question, allowing the voters to express a preference as to independence or a relationship with the United States closer than free association (i.e., some form of integration) should the Compact be rejected.

The first political status plebiscite was the one conducted in Palau on February 10, 1983 in which free association as defined in the Compact was approved by

<sup>37</sup> UN Trusteeship Council resolution of Dec. 20, 1982, UN Doc. T/RES/2174 (1982). Mission representatives were Fiji, France, Papua New Guinea and the United Kingdom. France and the United Kingdom are members of the UNTC.

<sup>38</sup> Federated States of Micronesia CONST. art. IX, §4; Marshall Islands CONST. art. V, §(1)(3)(d); Republic of Palau CONST. art. II, §3.



a 62.1 percent majority. Asked to express a preference between independence and a relationship with the United States closer than free association should the Compact be disapproved, 55.6 percent of those who voted on this issue preferred a closer relationship. On June 21, 1983, a plebiscite was conducted in the Federated States of Micronesia. In that vote 79 percent of the people approved free association, while 74 percent of those electing to vote on the second question favored independence if free association were not approved. The last plebiscite, in the Marshall Islands, was conducted on September 7, 1983. The Marshall Islands approved free association by a majority of 58 percent; 70.8 percent of the Marshallese voters left the second question blank in an apparent expression of strong support for free association.

The Governments of the Federated States of Micronesia and the Marshall Islands approved the Compact on September 2, 1983 and September 20, 1983, respectively, as required by its section 411. For reasons mentioned above, the Government of Palau has not yet approved the Compact.

On the basis of the approval by the signatory Governments and the peoples concerned, the executive branch of the United States Government intends to submit the Compact to Congress in the form of a joint resolution.<sup>39</sup> Once adopted by a simple majority of both Houses of Congress and signed by the President, the Compact will become a congressional-executive agreement with the force and effect both of U.S. law and an international agreement or "treaty."<sup>40</sup> The Compact will also be a multi-year authorization for appropriation of the funds to be provided for grants and assistance, in some instances under a pledge of "full faith and credit," to the freely associated states.<sup>41</sup>

### *Terminating the Trusteeship*

The 1947 Trusteeship Agreement prescribes no procedures for its own termination, and there is no real precedent in United Nations practice because this is the only strategic trusteeship ever established.<sup>42</sup> Ultimate responsibility for it in the United Nations therefore resides with the Security Council, whereas in the cases of the other ten trusteeships—all now terminated—the UN body with ultimate responsibility was the General Assembly. Like the General Assembly, the Security Council, under Article 83(3) of the UN Charter, has availed itself of the assistance of the Trusteeship Council in the discharge of its recurring oversight responsibilities.

The Government of the United States has stated its intention to take up the matter of termination of the Trusteeship Agreement with the Trusteeship Council and the Security Council at the appropriate time. In bringing this matter before the appropriate United Nations bodies, the United States will proceed in a fashion consistent with the Charter and with the conviction that no nation or group of nations could in good conscience object to, or attempt

<sup>39</sup> The Trusteeship Agreement itself, *supra* note 3, is an international agreement that was enacted as a public law in the United States in the form of a joint resolution signed by the President.

<sup>40</sup> See *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868); *Weinberger v. Rossi*, 456 U.S. 25 (1982).

<sup>41</sup> See *Armstrong, Strategic Underpinnings*, *supra* note 2, at 216–25, 227.

<sup>42</sup> See 1 M. WHITEMAN, *supra* note 31, at 742, 754, 765–68; see also J. CRAWFORD, *supra* note 13, at 349–50.



to obstruct, the implementation of free exercise of the right of self-determination by the peoples of the Trust Territory. In the exercise of its responsibility as Administering Authority under the Trusteeship Agreement, the United States is bound to assure that the freely expressed aspirations of the peoples of the Trust Territory are realized.

### *Conclusions*

The Trusteeship Agreement committed the United States to promote economic, social and political development in Micronesia and to foster democracy so that the inhabitants of the Trust Territory could achieve the goal of self-determination. The Trusteeship Agreement also designated Micronesia as a "strategic trust" in recognition of its vital importance to the maintenance of regional peace and global law and order. From the beginning, the United States has recognized that its own interests and the interests of the Pacific basin were intrinsically dependent on preserving access of U.S. forces to Micronesia for occasional or emergency use and preventing the intrusion of foreign military forces into the area. From the beginning, the Trust Territory also enjoyed a unique status because its sovereignty was reserved in political trust while the foundation for development was laid. In this vast area of strategic importance vis-à-vis both Asia and the Pacific as a whole, whose people had long been denied the inalienable right to self-determination and whose islands were poor in resources, the United States undertook to fulfill its trusteeship obligations. Though the United States can be correctly criticized for some errors and omissions in its policies that are apparent in retrospect, the basic U.S. commitment to fulfill the objectives of the trusteeship honorably is evident not only in the institutions of democracy that have been established, the physical development that has taken place in the islands and the vastly improved quality of life for most, but also in the fundamental friendship that has been established between the United States and the people of Micronesia. In addition, the fact that the Micronesian status negotiations began, and after 14 years have been concluded, is a significant measure of American and Micronesian efforts to achieve the goals of the trusteeship. During these 14 years, the Micronesian peoples have developed three emerging states and a new U.S. Commonwealth. Under free association, the interdependence of the three emerging states and the United States and their interdependence with each other and the other nations of the Pacific area will provide the basis for regional development and cooperation. Ultimately, the workability of the Compact of Free Association and the nature of the political relations in the region will depend upon the acceptance of the new freely associated states by the world community and the ability of the peoples concerned and their Governments to realize their aspirations within the context of that relationship.

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