Our Island Friends: Do We Still Care? The Compacts of Free Association with the Marshall Islands and Micronesia

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I. INTRODUCTION

1944 was an important year for the people of Micronesia. Most obvious to them was the fact that the Japanese who had ruled over them since World War I (initially under a League of Nation's mandate), were being driven out of the Micronesian islands by the armed forces of the United States of America.

Second, and less noted in Micronesia at the time, the United Nations Charter was being drafted at Dumbarton Oaks in the District of Columbia. For the world in general, the key provisions of the charter were the peace keeping mechanisms, centered around the Security Council. But of equal importance to the people of Micronesia were those provisions dealing with decolonization. Much of Micronesia had been someone's colony since Spanish galleons had begun to use the islands as a way station on their early trips to and from Asia. The people of Micronesia would soon learn that the UN Charter promised to change that.

The first step in the UN process of decolonization, as set forth in the Charter, was the creation of a "Trusteeship." Micronesia would soon (in 1947) become a trust territory (The Trust Territory of the Pacific Islands) with its recent liberator and new friend (the United States of America) as trustee. Under the Trust Agreement, the United States was to prepare the people of Micronesia for self-determination. When the people were well enough informed to make a choice, they were to be offered three alternatives; independence, integration (to become a full-fledged part of the trustee nation, in this case the U.S.) or free association (the status discussed herein).

The people of that portion of the Mariana Islands that were part of the Trust Territory (all of the Marianas except for Guam, which was already a U.S. Territory), chose integration. They became and remain the "Commonwealth of the Northern Mariana Islands", a permanent part of the United States.

The people of the Marshall Islands and the Caroline Islands voted for "free association," and will be the primary focus of this article. For reasons that we will discuss, they chose to go into the status as three separate entities; the Republic of the Marshall Islands, the Federated States of Micronesia (comprising the eastern and central portions of the Carolines) and the Republic of Palau (situated at the western end of the Carolines).

Constitutions were adopted by the three nascent nations, and ultimately in the 1980's a compact of free association was proposed for each. The compacts with the Federated States of Micronesia (FSM) and with The Republic of the Marshall Islands (RMI) were approved by the people of each nation respectively, and by the Congress and President of the United States. They went into effect on November 3, 1986, pursuant to a proclamation of U.S. President Ronald Reagan declaring an end to the Trusteeship. Although critics of the U.S. held the matter up for five years,[1] the U.N. admitted the Marshall Islands and the Federated States of Micronesia to full

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[1]During the Cold War the Soviet Union and its allies objected to the end of the Trusteeship on the grounds that the U.S. had maintained too close ties and too much control over the free

membership as sovereign nations on September 17, 1991.

Certain key provisions of the compacts of free association were to be re-negotiated after fifteen years and that was done in the early 2000's. The primary focus of this article is to examine these newly amended compacts, and the initial experience the FSM and RMI have had with them.

The people of Palau also approved their original compact of free association in the 1980's. However, protracted litigation in the Palau Supreme Court kept the Palau Compact from going into effect until 1994.[2] When it was finally and officially approved by both sides it was to run for a longer term. So there is no "new" compact with Palau for us to discuss, although Palau is already preparing for renegotiation of its compact.

II. THE HISTORY OF MICRONESIA

The people of Micronesia are a diverse people, although they share some common ancestors and ethnicity, and since WWII have consciously tried to strengthen their common bond in what they call "The Micronesian Way."

Within the FSM, the four federated states each have different primary languages. English is the language of government and business since nearly everyone learned it during the Trust Territory days. The indigenous people of the Marshall Islands all seem to have come from a common background and speak a common language although, spread out over two huge, and widely separated chains of atolls, they have developed dialects that are in some cases not mutually intelligible. They also use English extensively in business and government.

A. The Federated States of Micronesia

To discuss the history of the Micronesian people in the context of an article requires not only generalizations, but also the use of examples of historical and current experience rather than a comprehensive description of the cultures of every island.

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association states (FASs). Some of those nations had hoped to bring this matter up when the U.S. asked the UN's permission to dissolve the trust. But the U.S. took the position that it did not need permission and simply proclaimed it dissolved and the RMI and FSM free and independent, in the relationship of free association with the U.S.. This further angered the critics. But as the Soviet Union collapsed, the opposition to admitting the FASs to the UN collapsed as well. Furthermore, the nations that were concerned that the U.S. had too much control over the FASs realized the futility of showing their displeasure by trying to force the FAS's back into a trusteeship where the U.S. would have complete control over them.

[2] This litigation is discussed further, *infra*.

1. Pohnpei

The historical culture of the people of Pohnpei, one of the four states of the FSM and the one where the capitol is located, has been well described by anthropologists including the late Dr. Dan Hughes and Dr. Glenn Petersen[3]. Much of it was reconstructed from the oral traditions of the Pohnpeians, which go back seven or eight hundred years. Anthropologists have found in that history the roots of a cultural system that still exists on Pohnpei today.

Seven hundred years ago Pohnpei was ruled by a succession of kings known as the Saudeleur Dynasty. The Saudeleurs were believed to have built the ancient city of Nan Madol, sometimes called "the Venice of the Pacific." Today at Nan Madol are the magnificent ruins of a city built on canals. Especially impressive is the ancient temple and burial house. It is constructed of large octagonal-shaped stones of great weight and how the building of it was accomplished is a mystery to this day. When the burial chamber was opened by a German archaeologist in the late Nineteenth Century, it was found to contain 18 skeletons, believed to be those of kings, suggesting that the city flourished for several centuries.

According to Pohnpei oral tradition, the Saudeleurs were tyrants, and five centuries ago, they were overthrown by the semi-legendary Isokelekel. Although Isokelekel cared deeply for his people, because of his status (Pohnpeians considered him sacred) it was difficult for his subjects to approach him about everyday problems. But Isokelekel had a light-hearted son, Nahlapanien, who became the intermediary between Isokelekel and the people.

This became the model for the traditional leadership structure that still exists in Pohnpei today. In each of the five provinces there is a high chief, known as the "Nahnmwarki," and just below each Nahnmwarki is a slightly lower-ranking chief, known as the "Nahnken," who acts as an intermediary between the Nahnmwarki and the people.

This structure is still very important on Pohnpei, just at the traditional structure is still revered in the other states of the FSM and in the Marshall Islands. In "*The Law of United States Territories and Affiliated Jurisdictions*," I discuss how an attempt by a Pohnpeian judge to jail a Nahnmwarki for contempt of court resulted in acts of civil disobedience that shut down the court and caused the jailors to fear for their safety.[4] The late Dr. Dan Hughes and I interviewed a number of Pohnpei residents, shortly after the case. While most Pohnpeiians, including chiefs, that we interviewed disapproved of the disrespect which (they agreed) the Nahmwarki in question had shown the court, and they disapproved of the civil disobedience, all surveyed thought that the courts should treat chiefs with the utmost respect and that jailing a chief should be resorted to only in the most extraordinary circumstances. Most felt those circumstances existed in this case, but a few did not.

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[3]See, Stanley K. Laughlin, THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS (Lawyers Cooperative Press 1995) and SUPPLEMENT (Westlaw1997) (hereinafter cited as LAUGHLIN, U.S. TERRITORIES) at 70-73, and sources cited therein.

[4]LAUGHLIN, U.S. TERRITORIES, *supra* note 2 at 539-541.

Furthermore, the Constitution of the FSM recognizes the role of traditional leaders, and as well gives special recognition to customary law.[5]

2. Yap

Dr. Richard A. Marksbury described the traditional socio-political structure of Yap, another of the four states of the FSM, as follows:

> "Inherent in the traditional sociopolitical structure of Yap was a land tenure system in which land parcels were ranked and placed within a hierarchical structure. The primary means for determining the rank of land parcels was their particular position in the Yapese dichotomy of *tabugul*, 'ritually sacred or pure', and *taqay*, 'contaminated or polluted.' Land parcels, and in turn entire villages, were assigned a rank and place in the island-wide social structure according to their degree of 'purity' or 'pollution'. This means of categorization was not restricted to land since the Yapese dichotomized most of the natural world in the categories of relative 'pureness' and 'pollution.' As a consequence, individuals, food, places, and material goods were assigned a position in this hierarchical

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[5]Article Five of the FSM CONSTITUTION provides:

> ***"Section 1.*** Nothing in this Constitution takes away a role or function of a traditional leader as recognized by custom and tradition, or prevents a traditional leader from being recognized, honored, and given formal or functional roles at any level of government as may be prescribed by this Constitution or by statute.
>
> **Section 2.** The traditions of the people of the Federated States of Micronesia may be protected by statute. If challenged as violative of Article V, protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action.
>
> ***Section 3.*** The Congress may establish, when needed, a Chamber of Chiefs consisting of traditional leaders from each state having such leaders, and of elected representatives from states having no traditional leaders. The constitution of a state having traditional leaders may provide for an active, functional role for them."

Article Eleven, section 11 provides**:**

> ***"*Section 11.** Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia. In rendering a decision, a court shall consult and apply sources of the Federated States of Micronesia."

order."[6]

Hughes and Lingenfelter noted the relationship between this system of landed estates, and what is sometimes called by Westerners a Yapese "caste" system, and *mitmit* or ceremonial gift exchanges which constitute public recognition of the rank and relationship of villages. Involved in these exchanges are the famous "stone money" which the Yapese quarried in Palau and brought to Yap.[7]

3. Chuuk

Hughes and Ligenfelter note that the islands of Chuuk (Truk) have far less social stratification than many other Micronesian societies including Palau, Yap and Pohnpei (Ponape). According to them, "rank is important [in Chuuk] as elsewhere in Micronesia, but the social stratification and its separate classes is not highly developed.[8] The authors go on to point out that on Chuuk (Truk), the residential pattern is matrilineal. They say,

> "the resulting lineage constitutes a land holding and work group, which is a basic unit of Trukese [Chuukese] society. After marriage, a man assumes obligations of labor towards his wife's lineage, while still being obligated to perform similar tasks for his own (his mother's) lineage. Pressure from such competing and sometimes conflicting obligations may be partly the cause of the relative instability and impermanence of Trukese marriage as some authors have noted."[9]

Chuuk villages consisting of one or more lineages are grouped into relatively independent districts. In pre-contact times, as many as 18 districts were found on one island in the lagoon. The district chief was the leader of the senior lineage of the district. The rank of a lineage of a district was related to the time of settlement in the district, size of land holdings and number of lineage members.[10]

4. Kosrae

The smallest state in the FSM is Kosrae. It has a population of slightly over 5,000. During the trust territory days, Kosrae, (then spelled Kusaie) was a part of the Pohnpei district.

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[6] Richard A. Marksbury, *Legislating Social Order: An Example from the Yap Islands*, 53 OCEANIA at 19 (1982).

[7] DANIEL T. HUGHES AND SHERWOOD G. LINGENFELTER, POLITICAL DEVELOPMENT IN MICRONESIA, at 8-11 (Ohio State University Press 1974).

[8] *Id.* at 11.

[9] *Id.*

[10] *Id.* at 11-13.

It did, however, have its own language and its own system of traditional leaders.

It is reported that at the time of contact with the West, Kosrae was united under a single high chief. The nobility lived on the island of Leluh, situated in a bay on the east side of the main island. There were about 18 title holder under the paramount chief, each one governing a particular section of Kosrae.[11]

Protestant missionaries were very successful on Kosrae and the Christian religion still plays a large part in daily life there. The preservation of its traditional culture has led to some success in Kosrae promoting itself as a specialized tourist destination. Until recently, Kosrae was generally looked upon in the FSM as a well-governed state. However, it has recently encountered financial difficulties which have created doubts in some critics about whether that is still true.

B. The Marshall Islands

The Marshall Islands consist of 29 atolls and 5 islands just east of the Caroline Islands. They comprise a total land area of approximately 180 square kilometers[12] and a population of about 61,815[13] people. A single language is spoken throughout the Republic, although dialects exist that are mutually unintelligible[14] Traditional Marshalese society is organized around matrilineal kin groups. As with most of Micronesia, the Marshalese society was stratified, with the land and other communal resources under the control of chiefs.

In the traditional structure, the highest rank is that of Irojilaplap, a paramount chief or king. An Iroijedrik is an hereditary subchief who serves as an intermediary between the paramount chief and the commoners. Irojedrik are found only in the eastern or Ratak chain. An Alap is an elder of commoner linage and a Dri Jerbal is a person who works the land. In theory, the Iroijlaplap, or paramount chiefs, own title to all the lands and the kajur, or commoners, work it at the Iroij sufferance.[15] However, the current Marshall Islands constitution suggests that the Iroij holds the land jointly with the commoners who work it. [16]

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[11] James G. Peoples, *Political Evolution in Micronesia*, 32 ETHNOLOGY 1, 5 (1993).

[12] Daniel C. Smith, *The Marshall Islands, Tradition and Independence*, in POLITICS IN MICRONESIA at 56 (Suva, Fiji 1983).

[13] May 2007 estimate, CIA World Fact Book

[14] NORMAN MELLER, THE CONGRESS OF MICRONESIA at 106 (Honolulu 1969).

[15] NORMAN MELLER, CONSTITUTIONALISM IN MICRONESIA at 82 (Institute for Polynesian Studies 1985).

[16] CONSTITUTION OF THE REPUBLIC OF THE MARSHALL ISLAND, Article X, Sec. 1 (2). See the explanation in LAUGHLIN, U.S. TERRITORIES, *supra* note 2 at supplement section 23:2 (Authored by the Hon. Carl Ingram, Justice, Supreme Court of the Marshall Islands.)

The Marshall Islands constitution additionally recognizes the role of traditional leaders by creating a Council of Iroij, which has significant governmental powers.[17] The constitution also gives recognition to customary law.[18]

C. Contact with the West; Spanish Port, Japanese Mandate, UN Ward

After contact with the West, the histories of the Federated States of Micronesia, the central part of the Caroline islands, and that of the Marshall Islands, to the east of the Carolines, were more similar to each other, as they were to the rest of Micronesia, because the colonizing powers often were the same.

The history of Micronesia from the time of its first contact with the West until World War II was largely one of colonial exploitation.[19] The Spanish were the first to colonize Micronesia, beginning in the 16th century, although the times and the degree of colonization vary greatly from one place to another.[20] The Spanish had considerable success in converting the population to the Roman Catholic faith.[21] At the end of the 19th Century Spain ceded Guam to the United States. This was a result of the Spanish-American War. Spain then sold the rest of Micronesia to Germany for $5 million dollars. The German tenure in Micronesia was short lived. During World War I, while Germany was engaged militarily in Europe and unable to fight on another front in the Pacific, the Japanese took over Micronesia. After the war, Japan was given a Class C mandate over Micronesia by the League of Nations. Although the Japanese were supposed to treat Micronesia as a protectorate, almost from the beginning they began to use the islands for their own benefit, subordinating the needs of the local people to the aims of Japan, and in particular to the aims of the Japanese military. From the 1930's on the Japanese operated the islands in disregard of the League. In 1935, Japan withdrew from the League of Nations after the League condemned the Japanese government for its invasion of Manchuria. Japan then closed Micronesia to the outside world and fortified many of the islands, later to use them as

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[17] *Id*. at Article III.

[18] *Id.* at Article I, Sec. 1 (1).

[19] The histories of each of the parts of Micronesia affiliated with the United States are discussed in separate chapters of LAUGHLIN, U.S. TERRITORIES, *supra* note 2. See Chapter XXI for the Commonwealth of the Northern Mariana Islands. See Chapter XXIII for the Republic of the Marshall Islands. See Chapter XXIV for the Republic of Palau (Belau). See Chapter XXV for the Federated States of Micronesia. Guam (geographically a part of Micronesia) is covered in Chapter XX.

[20] *Id.*

[21] Protestant missionaries also had a significant impact in later years, particularly on Kosrae. *Id.* at Section 25.1.

bases during World War II.[22]

During that war, major battles were fought throughout Micronesia. Kwajalein in the Marshall Islands was taken by United States forces in February of 1944. The same month a major sea battle was fought in Truk in the Caroline Islands (now Chuuk, a state of the Federated States of Micronesia), where a large segment of the Japanese fleet was sunk. In June of 1944 a major battle raged when U.S. Marines invaded Saipan in the Northern Mariana Islands. On September 15, 1944 U.S. forces invaded Peleliu in Palau. That turned out to be a particularly bloody battle.[23] American forces bypassed many of the islands of Micronesia, opting simply to isolate them after the U.S. Navy had gained control of the surrounding seas. Nevertheless, the cost of the Micronesian campaigns in terms of dead and wounded was substantial for the Americans, and calamitous for the Japanese. A total of 7,353 Americans died and 25,042 were wounded.[24] Japanese casualties were estimated to be ten times that. After the war, American forces continued to occupy Micronesia as captured enemy territory. However, as early as December 1945 the American Commander there, Admiral Raymond Spruance in his "14 Points", stated the following:

> "It is desired that the inhabitants of the occupied territories be granted the highest degree of self-government that they are capable of assimilating. They shall be encouraged and assisted to assume as much as possible of the management of their own affairs and the conduct of their own government."[25]

The United States military leaders, having seen an enemy use Micronesia as a base to attack the U.S. and then having ousted that enemy from Micronesia at a high cost in American lives, were extremely reluctant to leave the islands for anyone else's military exploitation. The U.S. military did not want to have Micronesia used against it again. On the other hand, President Truman was eager to support the fledgling United Nations and its trusteeship program and to demonstrate the U.S. commitment to the rule of law. As the late Dr. Norman Meller stated:

> "The genesis of the Trust Territory of the Pacific Islands was embodied in a temporary truce between the military hawks of the United States, ascendent at the conclusion of World War II, and the one-world advocates who correctly foresaw a future intolerance of colonies, particularly those secured through force of arms."[26]

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[22] See, generally, RAFAEL STEINBERG, ISLAND WARFARE (Time-Life Books 1978).

[23] See LAUGHLIN, U.S. TERRITORIES, *supra* note 2 at 504.

[24] *Palau: a Challenge to the Rule of Law in Micronesia*, Report of a Mission to Palau by the American Association for the International Commission of Jurists at 8 (1988).

[25] *Id*. at 9.

[26] MELLER, *supra* note 13, at 51.

The UN Charter provided the solution. In 1947 all of Micronesia, including that part of the Caroline Islands which is now the Federated States of Micronesia, and all of the Marshall Islands were placed in a "strategic" trusteeship with the United States as trustee. It was known as the Trust Territory of the Pacific Islands.[27] The Trust Territory of the Pacific Islands (TTPI) was the only "strategic" trust of the 11 trusteeships created by the United Nations after World War II. Three island groups of Micronesia consisting of the Carolines, the Marshalls and the Marianas (except for Guam) made up the Trust Territory of the Pacific Islands. It included over 2,000 islands and atolls and a population of around 150,000.[28]

Article 75 of Chapter XXII of the United Nations Charter established the trusteeship program for certain areas of the world to be placed under according to subsequent agreements. Such territories were to be referred to as "trust territories".[29] Article 76 set forth the fundamental purposes of the trusteeship program. They were:

"(a) To further international peace and security;

(b) To promote the political, economic, social, and educational advancement of inhabitants of the trust territories and their progressive development toward self-government or independence as may be appropriate to the particular circumstances of each territory and its people. These goals shall be outlined in the trusteeship agreement, and represent the freely expressed wishes of the people concerned;

(c) To encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. Additionally, there exists a clear goal to encourage the recognition of the independence of the peoples of the world; and

(d) To ensure equal treatment in social, economic, and commercial matters for all members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80."[30]

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[27] See LAUGHLIN, U.S. TERRITORIES, *supra* note 2 , Chapters XX, XXIII, and XXIV. See also, Daniel T. Hughes and Stanley K. Laughlin, Jr., *Key Elements in the Evolving Political Culture of the Federated States of Micronesia*, 6 PACIFIC STUDIES at 71 (1981).

[28] The various groups are more specifically described in the chapters pertaining to them. See LAUGHLIN, U.S. TERRITORIES, *supra* note 2. Chapter 21 for the Commonwealth of the Northern Marianas. See Chapter XXIII for the Marshall Islands. See Chapter XXIV for Palau (Belau). See Chapter XXV for the Federated States of Micronesia.

[29] UNITED NATIONS CHARTER, Chapter XII, Article 75 (1944).

[30] *Id.* at Chapter XII, Article 76 (1944).

Article 77 set forth the categories of territory that might be created into a trusteeship. They included (a) territories now [during World War II] handled under [League] mandate; (b) territories which may be detached from enemy states as a result of the Second World War; and (c) territories voluntarily placed under the system by states responsible for their administration.[31] Micronesia clearly fell into the second category.

Article 82 of the Charter provided:

> "There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43."[32]

As it turned out the Trust Territory of the Pacific Islands was the only trust territory that was designated strategic. Article 83 of the charter sets forth the special relationship of the U.N. Security Council to strategic trust areas. The article provides:

> "All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council."[33]

Having the Trust Territory of the Pacific Islands designated a strategic trust provided at least two benefits to the United States. First, it allowed the United States to maintain a military presence there and to exclude other militaries from the area. Secondly, the United States probably preferred to have the ultimate UN authority over the trust territory reside in the Security Council. The United States, as a permanent member of the Security Council, has a veto over any actions that body might take.

The charter did provide that the Security Council should call upon the Trusteeship Council for assistance in administering strategic trusts.

> "The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system . . . to political, economic, social, and educational matters in strategic areas."[34]

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[31] *Id.* at Chapter XII, Article 77.(1) (1944).

[32] *Id.* at Chapter 12, Article 82 (1944).

[33] *Id.*, Chapter XII, Article 83 (1) (1944).

[34] *Id.*, Chapter XII, Article 83 (3). (1944).

The charter also provided that a strategic trust should pursue the basic objective set forth for other trusts in Article 76 above.[35]

III. TRUSTEESHIP AGREEMENT

The United States of America and the United Nations Security Council entered into a trusteeship agreement for Micronesia on April 2, 1947. The preamble noted, *inter alia*, that on December 17, 1920 the League of Nations had confirmed a mandate of former German islands north of the equator to Japan, to be administered in accordance with Article 22 of the Covenant of the League of Nations, and that Japan, as a result of the Second World War, had ceased to exercise any authority in those islands.[36] The preamble further recited that the Charter provides for the establishment of an international trusteeship administration and that the Security Council of the United Nations had satisfied itself that relevant articles of the Charter had been complied with.[37] The trusteeship agreement named the area the Trust Territory of the Pacific Islands and designated it as a strategic trusteeship.[38] The United States of America was designated the administering authority[39] and as such was to "have full powers of administration, legislation, and jurisdiction over the territory."[40] The United States on its part agreed to administer the trust in accordance with the relevant articles of the UN charter which we have discussed previously.[41] The agreement stated that the administering authority should "insure that the trust territory shall play its part, in accordance with the charter of the

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[35] "The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area." *Id.*, Chapter XII, Article 83 (2) (1944).

[36] Trusteeship Agreement for the United States Trust Territory of the Pacific Islands, Preamble (1947).

[37] *Id.*

[38] "The territory of the Pacific Islands consisting of the islands formerly held by Japan under mandate in accordance of Article XX of the Covenant of the League of Nations is hereby designated as a strategic area and placed under the trusteeship system established in the Charter of the United Nations. The Trust Territory of the Pacific Islands is hereinafter referred to as the Trust Territory." *Id.* at Article I (1947).

[39] *Id.* at Article II (1947).

[40] "The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider to be desirable, such as the laws of the United States as it may deem appropriate to local conditions and requirements." *Id.* at Article III, (1947).

[41] *Id.* at Article IV (1947). See also, Section 21:2.

United Nations, in the maintenance of international peace and security."[42]

To this end the United States as the administering authority is entitled under the agreement to establish naval, military and air bases and to erect fortifications in the trust territory, to station and employ armed forces in the territory, and to make use of volunteer forces, facilities and assistance from the trust territory in carrying out obligation towards the Security Council.[43]

Article VI of the agreement[44] elaborates on the United States' obligation under Article 76(b)[45] of the United Nations Charter. That is the clause that obliges the administrator of a trust territory to promote the political, economic, social, and educational advancement of the people of such territory, and their "progressive development towards self-government *or* independence." (emphasis added) The agreement provides that the choice between independence or self-government shall be determined by "the freely-expressed wishes of the people concerned".[46] The same article requires the administrator to give the inhabitants of the trust territory a progressively increasing role in the administrative services of the territory to develop their participation in government, and *to give due recognition to the customs of the*

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[42] Trusteeship Agreement for the United States Trust Territory of the Pacific Islands, Article V (1947).

[43] The text of the Charter reads:
"In discharging its obligations under Article 76(a) and Article 84, of the Charter, the administering authority shall ensure the United Nations in the maintenance of international peace and security. To this end the administering authority shall be entitled:

1. to establish naval, military and air bases and to erect fortifications in the trust territory;

2. to station and employ armed forces in the territory; and

3. to make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority [the United States], as well as for the local defense and the maintenance of law and order within the trust territory."

The Trusteeship agreement for the United States Trust Territory of the Pacific Islands, Article V (1947).

[44] Trusteeship Agreement for the United States Trust Territory of the Pacific Islands, Article VI (1947).

[45] United Nations Charter, Chapter XII, Article 76(b) (1944).

[46] Trusteeship Agreement, Article VI (1947).

inhabitants in providing a system of law for the territory.[47] The effect of each of these clauses can be seen in the nearly 30 year history of the United States as trustee in Micronesia. Some may criticize the way in which these obligations were carried out, but there can be no doubt that they had an effect on U.S. policy.

The same charter article also required the United States to promote economic advancement and self-sufficiency of the inhabitants.[48] The United States made less visible efforts in this area, although many believe that the goal itself may have been unrealistic. The same sub-paragraph obligates the trustee to "protect the inhabitants against the loss of their lands and resources."[49] This clause had an effect on the law and the legal system of the trust territories, for the United States was always careful about allowing others to come into the trust areas and made it nearly impossible for outsiders to obtain land in Micronesia. Among the other obligations of the trustee was the duty to protect the rights and fundamental freedoms of all elements of the population, to control the traffic in arms and ammunition, to control traffic in opium and other dangerous drugs, alcohol and other spirituous beverages. The administrator (U.S.) also could, "institute such other regulations as maybe necessary to protect the inhabitants against social abuses."[50]

The agreement obligated the trustee to promote educational advancement, establish a system of elementary education, facilitate vocational advancement of the population, and encourage qualified students to pursue higher education, including training on the professional level.[51]

Article VII of the agreement deals with the trustee's obligation to protect human rights in the trust territory.[52] The charter required the trustee to treat all other nations equally with regard to their access to the trust territory, but none need be treated as well as the trustee treats itself. This equality article did not apply to air transportation in and out of the trust territory which was subject to agreement between the administering authority and the nation of the proposed air carrier.

The administering authority was authorized to constitute the trust territory a part of customs, fiscal or administrative unions or federations with other territories under the United

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47 *Id*. at Article VI (1) (1947) (emphasis added).

48 *Id.* at Article VI (II) (1947).

49 *Id.*

50 *Id.* at Article VI (III) (1947).

51 *Id.* at Article VI (IV) (1947).

52 Trusteeship agreement, Article VII (1947). The obligation is based upon Article 76(c) of the U.N. Charter (1944).

States jurisdiction and to establish common services between such territories and the trust territory.[53] The administering authority was required to take the necessary steps to create the status of citizenship of the trust territory for its inhabitants, and to afford diplomatic and consular protection to inhabitants of the trust territory when they went outside the trust territory.[54] The essence of the trusteeship was that the United States as trustee was to move the trust territory in the direction of self-government or independence. Under the agreement, the choice between independence or self-government in some type of affiliation with the United States was to be left to the "freely expressed will of the people."

Because the entire trust territory was designated a strategic area, the United States was allowed to fortify the area and to exclude others from it militarily. Finally, because it was a strategic area, the trust territory was under the supervisory jurisdiction of the United Nations Security Council rather than the Trusteeship Council and the General Assembly. Article XV of the agreement provided that it could not be altered, amended or terminated without the consent of the administering authority, that is, the United States.[55] This would seem to mean that the United States could remain the trustee of this area until such time as the United States itself was agreeable to terminating the trusteeship. This could have caused some concern the U.S. might stay longer than needed. But, ironically, the issue that later did arise was not whether the United States would stay too long (although they did stay nearly thirty years), but whether the trustee had terminated the trusteeship to soon. (That is, declare its mission over before the UN had a chance to say whether it approved).

IV. ADMINISTRATION OF THE TRUSTEESHIP

The trusteeship agreement was approved by the United States Congress on July 18, 1947. Since the U.S. Navy had been governing Micronesia since the Americans ousted the Japanese during the Second World War, the President of the United States initially designated the Secretary of the Navy as administrator of the Trust Territory. However, in 1951 authority was transferred to the U.S. Department of the Interior. The Secretary of the Interior acted through a High Commissioner. [56]

During the 1950's the United States did relatively little to develop the economy of Micronesia. In the early years, the primary programs for development were low-profile programs of health, education and welfare services. The United States was accused of being miserly with the islands and of doing very little for the economic development of Micronesia,

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[53] Trusteeship Agreement, Article IX (1947).

[54] *Id.* at Article XX (1947).

[55] *Id.* at Article XV (1947).

[56] For a description of the authority of the High Commissioner of the Trust Territory, see the opinion in *People of Saipan v. United States Department of the Interior*, 502 F.2d 90 (9th Cir. 1974).

but others believed that preservation of the traditional culture was also an important goal. Access to the trust territory was restricted and the traditional culture system remained largely intact.
There was some political innovation.[57] This included citizen participation in self-government at local levels.[58]

In the early 1960's, the Kennedy administration inaugurated an extensive program of economic and political development. Steps were taken to streamline the district legislatures, making them less cumbersome and more efficient. The Congress of Micronesia was chartered in 1965 to provide a territory-wide legislative body to participate in policy formation and furnish the foundation for future self-government.[59]

While the Congress of Micronesia attempted to forge a union within Micronesia, the United States began negotiations with the representatives of the Micronesian people for their future political status. The United States, at least originally, encouraged Micronesian unity. Two options were offered, territorial status and free association.[60] Most of the districts leaned toward free association. Early on, however, it became apparent that the Northern Marianas desired a closer relationship with the United States. In a plebiscite held in 1976, the Northern Marinas voted overwhelmingly in favor of becoming a commonwealth of the United States.[61] The constitutional convention that had begun in 1975 continued without the Northern Marianas. But soon separatist movements sprang up in Palau and the Marshalls Islands also.[62] In a referendum on July 12, 1978 both Palau and the Marshall Islands districts voted to reject Micronesian unity under the proposed constitution while the other four districts, Truk (now Chuuk), Yap, Ponape (now Pohnpei), and Kusai (now Kosrae), accepted it. These four became the four states of the original and current Federated States of Micronesia (FSM). The

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[57] See Daniel T. Hughes, *Obstacles to the Integration of the District Legislature to Ponapein Society* in POLITICAL DEVELOPMENT IN MICRONESIA, (Hughes & Lingenfelter, eds., 1974).

[58] Daniel T. Hughes and Stanley K. Laughlin, *Key Elements in the Evolving Political Culture of the Federated States of Micronesia*, 2 PACIFIC STUDIES 71 (1982); U.S. Department of State, *The Evolution of the Former Trust Territory of the Pacific Islands*, Office of Freely Associated State Affairs, (Washington, D.C., 1987); Meller, *supra,* note 12; Meller, *supra,* note 13.

[59] See generally, *id.* See also Part I of LAUGHLIN, UNITED STATES TERRITORIES, *supra* note 2 at Section 3:6.

[60] *Evolution of the Former Trust Territory of the Pacific Islands, supra* note 56 at 1.

[61] That is, they sought and obtained a status similar to that of Puerto Rico. See LAUGHLIN, U.S. TERRITORIES, *supra* note 2, Chapter XXI.

[62] See *Id.,* Chapters XXIII and XXIV.

FSM, Palau and the Marshall Islands each drew up their own constitutions and the United States entered into separate negotiations with each of them. Finally, in 1980 the United States signed separate compacts of free associations with the Federated States of Micronesia, the Marshall Islands and Palau.[63]

V. THE COMPACTS OF FREE ASSOCIATION

The compacts were based upon the so-called "Hilo Principles," agreed upon between the United States representatives and Micronesian leaders in a meeting at Hilo, Hawaii in April of 1978. Negotiations with Palau were completed on August 6, 1982. Negotiations with the Federated States of Micronesia were finished on October 1, 1982 and with the Marshall Islands on June 25, 1983. Plebiscites were scheduled, and the United Nations was invited to observe the voting process. In June of 1983, 58% of the voters in the Marshall Islands plebiscite voted in favor of the compact. That same month, 79% of the voters in the Federated States of Micronesia voted in favor of the compact, although in one state, Ponape (Pohnpei) the vote was, by a small margin, against the compact (51% against). However, since the FSM by this time had constituted itself a federation, Ponape (Pohnpei) was bound by the vote of the federation.[64]

On February 10, 1983, a referendum in Palau produced a 62% majority in favor of the compact. However, the Palau Supreme Court subsequently ruled that the Palau Constitution and the Compact of Free Association conflicted because the Constitution of Palau contained an anti-nuclear provision, whereas the Compact gives the United States the right to bring nuclear powered and nuclear armed vessels and airplanes into the free association state. The Palau court also ruled that the Palau constitution could only be overridden in such a case by a 75% super majority vote. This became the beginning of a process in which eight referenda were held, and over ten years were taken to resolve this difficulty before the compact with Palau was finally approved in 1993.[65]

A. An Analysis of the Original Compacts of Free Association

The essence of free association is that either party can withdraw from the arrangement after giving specified notice. Also, the free association states are completely self-governing internally. However, the United States is pledged to defend them as if they were a part of the United States. In order to implement this promise, the United States has certain military rights in the free association states, including the right to exclude others militarily from the area. While the free association states conduct there own foreign policy, under the compacts they are to do so in consultation with the United States. The United States has the power to veto any action of a free association government which the United States considers inconsistent

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[63] Hughes and Laughlin, *supra* note 56 at 72-73.

[64] See LAUGHLIN, UNITED STATES TERRITORIES, *supra* note 2 at 472.

[65] *Id*.

with its obligation to defend them. In case such a veto is exercised, the only right of appeal the free association states have is to have the matter expeditiously and personally considered by the U.S. Secretary of State and the U.S. Secretary of Defense. Significantly, in the twenty plus years since the compacts first went into effect the U.S. has never used the veto against any free association state. It is possible, however, that the FASs have at one time or another refrained from some action in order to avoid a veto.

Citizens of the free association states are allowed free ingress into the United States and are allowed to settle there.[66] Importantly, the United States agreed to provide substantial amounts of financial aid to the free association states and to extend a number of federal programs to them.

1. In General

The preambles to compacts with FSM and the Marshall Islands note that free association is consistent with international law principles and with the goals of the United Nations Trusteeship program and that consequently it will serve as a basis for termination of the trusteeship. The original compacts of free association between the Marshall Islands and the United States and between the Federated States of Micronesia and the United States are essentially the same and are set forth in the U.S. Free Association Act of 1985. In this section I examine them together, noting where differences occur.

The first article of the compact provides that the people of the free association states, acting through their constitutional governments, are self-governing.[67] The second article provides that the United States recognizes the capacity of the free association states to conduct foreign affairs in their own name and right. This includes the capacity to enter into treaties and other international agreements with other governments or international organizations.[68] The free association states agree to conduct their affairs in accordance with international law and settle disputes by peaceful means.[69] In addition, the free association states agree to consult with the United States in foreign affairs matters in recognition of the responsibility of the United States under the provisions pertaining to security and defense relations in Title III.[70]

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[66] According to some, such migration has created problems for the U.S. Pacific Territory of Guam and the Commonwealth of the Northern Mariana Islands, and even for the state of Hawaii. This resulted in the U.S. Congress providing some "impact funds" for those receiving islands.

[67] Compact of Free Association Act 1985, Article I, Section 111 (1985).

[68] The free association states are not only members of the United Nations but also enter into regional organizations concerned with such things as fisheries. See, Jon Van Dyke, *Regionalism, Fisheries, and Environmental Challenges* , 6 San Diego Int'l L. J. 143 (2004).

[69] Compact of Free Association Act at Article II, Section 121 (1985).

[70] *Id.* at Section 123 (1985).

Article IV enables citizens of the free association states to enter, reside, be employed, attend school, or remain as visitors in the United States.[71] Entry into the United States under Section 141 does not confer the right on a free association state citizen to establish residency necessary for naturalization. However, it does not preclude a FAS citizen from acquiring lawful permanent resident status by other means.[72] The compacts provide reciprocal rights for U.S. citizens in the free association states.[73] Section 144 enables U.S. citizens to accept employment by the FAS governments without losing their U.S. citizenship.[74]

Title III, Article 1, establishes the full authority and responsibility of the United States for security and defense matters in or relating to the Marshall Islands and the Federated States of Micronesia. This U.S. authority and responsibility includes the foreclosure of any third-party country's access to the free association states for military purposes, and the ability to establish military facilities and exercise of military operating rights in accordance with separate agreements authorized by Title III. Fundamentally, the United States has accepted the obligation to defend the free association states as the United States and its citizens are defended.[75] This title also gives the United States the right to conduct military operations and

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[71] *Id.* at Section 141 (1985).

[72] *Id.*

[73] *Id.* at Section 142.

[74] *Id.* at Section 144 (1985).

[75] *Id.* at Title III, Article 1, Section 311 (1985). Section 311 and 312 provide:

> "Section 311
>
> (a) The Government of the United States has full authority and responsibility for security and defense matters in or relating to the Marshall Islands and the Federated States of Micronesia.
>
> (b) This authority and responsibility includes:
>
> (1) the obligation to defend the Marshall Islands and the Federated States of Micronesia and their peoples from attack or threats thereof as the United States and its citizens are defended;
> (2) the option to foreclose access to or use of the Marshall Islands and the Federated States of Micronesia by military personnel or for the military purposes of any third country; and
> (3) the option to establish and use military areas and facilities in the Marshall Islands and the Federated States of Micronesia, subject to the terms of the separate agreements referred to in Sections 321 and 323.

activities in the free association states as necessary for the exercise of its authority and responsibility for security and defense matters.[76]

Title III also provides that the free association states will not impair the ability of the United States to exercise its authority and fulfill its responsibility for the security and defense of the area. To this end, the free association states agree to refrain from actions which the U.S. determines to be incompatible with U.S. security and defense roles as defined in the compact. To ensure that any United States determination requiring a free association state to refrain from particular action be made on the basis of full information, the U.S. will consult with the free association state prior to making any final determination. The free association states in turn are entitled to raise with the Secretaries of State and of Defense of the United States, personally and on an expeditious basis, any concerns which may arise from a U.S. action under this provision.[77]

Title III also provides for separate agreements to be concluded between the United States and the free association states with respect to the establishment and use of military areas and facilities by the U.S. in the free association states in connection with the U.S. security and defense responsibilities in the area.[78]

2.Termination

The compact provides three means by which it can be terminated. It may be terminated by mutual agreement between the U.S. and a free association state. The U.S., in such a situation, must act by legislation. That is, the President may not act without the

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> (c) The Government of the United States confirms that it shall act in accordance with the principles of international law and the Charter of the United Nations in the exercise of this authority and responsibility.
>
> Section 312
>
> Subject to the terms of any agreements negotiated in accordance with Sections 321 and 323, the Government of the United States may conduct within the lands, waters and airspace of the Marshall Islands and the Federated States of Micronesia the activities and operations necessary for the exercise of its authority and responsibility under this Title."

[76] *Id.*

[77] *Id.* at Section 313 (1985).

[78] *Id.* at Title I, Article 2, Section 321 (1985).

concurrence of the Congress.[79] The U.S. may initiate unilateral termination, in which case prior notice of no less than six months is required. In this case also the U.S. must act by legislation. That is, the President cannot unilaterally terminate the arrangement without concurrence of the Congress.[80] Finally, unilateral termination can be initiated by a free association state. However, a free association government must conduct a plebiscite on termination in accordance with its constitutional processes. A majority vote in favor of termination will be required for it to occur. A plebiscite can only be conducted upon three months prior notice to the United States and termination pursuant to affirmative vote to end the agreement would not become effective until at least three months after certification of the results to the United States and notification that termination will occur.[81]

Somewhat different obligations are imposed upon the parties depending upon how the free association agreement is terminated. In general, in the case of unilateral termination the benefits are smaller and the obligations greater on the party that causes the termination.[82]

3. Palau

The Compact of Free Association with Palau is in essence the same as those with the Federated States of Micronesia and with the Marshall Islands. Some of the language has changed slightly but the substance is for the most part the same. The environmental protection

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[79] *Id.* at Title IV, Article 4, Section 441 (1985). The issue of whether the U.S. President can, without the consent of Congress, terminate an international agreement, has been a subject of debate at least since the case of *Goldwater v. Carter*, 444 U.S. 996 (1979). In that case Sen. Barry Goldwater tried unsuccessfully to have the Federal courts prevent President Carter from unilaterally terminating a mutual defense treaty with the Chinese Nationalist (Taiwan) Government. The Supreme Court declined to interfere with the President's action but produced no majority opinion (it produced five opinions and one additional judge concurred in result only). Perhaps emboldened by the *Goldwater* case, President Reagan terminated several international agreements without seeking the consent of Congress. These included U.S. membership in UNESCO, acceptance of compulsory jurisdiction of the International Court of Justice and a treaty of friendship with Nicaragua. See THOMAS FRANK AND MICHAEL GLENNON, FOREIGN RELATIONS & NATIONAL SECURITY LAW at 404 (2d ed. 1993). It was no doubt with these events in mind, that the Compacts provided that termination of the compacts by the U.S. would require legislation, thus assuring the involvement of Congress.

[80] Compact of Free Association Act, Title IV, Article 4 at Section 442 (1985). See discussion in preceding footnote.

[81] *Id.* at Section 443.

[82] *Id.* at Title IV, Article 5 (1985). For a discussion of the status of free association under international law see Chimene Keitner and W. Michael Reisman, *Free Association, the United States Experience ,* 39 TEXAS INT'L L. J. 1 (2003).

provisions are more extensive in the Palau agreement.[83] The financial arrangements are somewhat different, including that the United States agrees to more "up front" payments to Palau and that the obligation runs for a longer period of time.[84]

VI. IMPLEMENTATION OF THE ORIGINAL COMPACTS

On May 28, 1986 the United Nations Trusteeship Council adopted a resolution calling for termination of the trusteeship. On October 23 of that year the United States informed the United Nations Secretary General, the Security Council and the Trusteeship Council that with the exception of Palau, the United States had complied with the Trusteeship Council resolution. On November 3, 1986, President Ronald Reagan signed a proclamation declaring the trusteeship to no longer be in effect for the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia and the Republic of the Marshall Islands. The Northern Mariana Islands had become a United States commonwealth, and the FSM and the Marshall Islands were recognized by the U.S. as independent, free association states. Several nations, including the U.S.S.R., objected to the Security Council's prior approval not having been sought or obtained. For that reason, some nations refused to recognize the FSM and the Marshall Islands and at first they were not seated in the United Nations. Some nations withheld political recognition of the governments of the Federated States of Micronesia and of the Marshall Islands until 1990 when after the change in Cold War politics, the United Nations Security Counsel approved the Compacts of Free Association, the termination of the trust territory and the FSM and the Marshall Islands were seated in the United Nations.

The problem with Palau and the conflict between their Compact of Free Association and the anti-nuclear provisions in the Palaun constitution continued on for ten years through eight referenda. Each referendum produced a vote in favor the Compact ranging from 63% to over 73%, but none reached the magic 3/4 that the Palau Supreme Court had decided was necessary. In 1994, the Palau courts agreed, after two constitutional amendments of the clause that required a 2/3 vote, that a simple majority would suffice to override the nuclear-free provisions. The Palau-U.S. compact was finally valid in both nations.[85]

VII. EXPERIENCE UNDER THE ORIGINAL COMPACTS

As explained in the preceding part the United States' transition plan for the three free association states was to allow them to establish governments that were up and running by the time the Trust Territory was terminated and the status of free association achieved. This was done, but nevertheless the new nation-states emerged from the Trusteeship with a certain

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[83] Compact of Free Association with Palau, Title I, Article 6 (1985).

[84] *Id.* at Title II.

[85] For a full description of the Palau compact controversy, see LAUGHLIN, UNITED STATES TERRITORIES, *supra* note 2 at 506-508.

amount of "nation building" left to do. One of the most difficult tasks in nation building is to achieve a situation where the people think of themselves as a nation and think of their government as "legitimate."[86] The problem is especially difficult in federations such as the FSM. The four Federated states each had and have different native tongues and while they were all Micronesians, the citizens of each state thought of themselves as a distinct people. The late Dr. Dan Hughes and I wrote an article in 1982[87] in which we compared the situation in the FSM to that of the early American Republic. In the early days of our Federation, people thought of themselves as Virginians, or citizens of Ohio or Kentucky, before they thought of themselves as citizens of the United States. In the U.S., that attitude did not change entirely until after a bloody civil war. Fortunately, the FSM (despite the occasional harsh word) is working things out in a more peaceful manner.

Regional problems developed in the Marshall Islands as well. Some were directly related to compact funds and other payments from the United States. As noted earlier, one of the principal reasons that the Marshall Islands desired to enter into the status of free association as a separate entity (separate from the rest of the Federated States of Micronesia), involved the missile test range at Kwajalein Atoll. The U.S., at that time, was paying $9 million a year in rent for Kwajalein. (It is as of now 15 million and scheduled to continue rising.) Going into free association separately meant that the money would stay in the RMI, but other issues still remained. One issue was whether this money would be used for benefit the Marshall Islands as a whole, or to compensate displaced people from Kwajalein. In large part, the latter was chosen but it has involved paying much of the money to the chiefs of Kwajalein and Ebeye. (Much of the money is paid to several large land owners and it is dependent on them to let it trickle down to the displaced people.) This was a judgment based upon custom and tradition, backed up by political power. It is difficult for most Marshallese to think of Kwajalein as belonging to anyone other than the high chiefs or *iroj* of that island. A substantial portion of the rental payments does filter down to the people of who formerly lived on Kwajalein and their descendants. But since this takes place in the traditional government sector, rather than the formal one, the actual percentage that "filters down" is impossible to know. The chiefs, as we will note further, *infra,* have taken an active role in negotiating the rental payments from the U.S.

The Kwajalein lease is only indirectly related to the Compacts. The Compacts could exist without the Kwajalein lease and the lease without the compacts. But they have always been seen as related issues. The U.S., for example, in comparing the amount of money given RMI with that given to FSM, likes to include the rent for Kwajalein on the RMI side of the equation. Needless to say, the RMI does not. The RMI sees this as a separate payment for use

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[86]See LAUGHLIN, UNITED STATES TERRITORIES , *supra* note 2, Preface by Dr. Jerry K. Loveland at p. xv. In his Preface, the late Dr. Loveland went into the meaning of "legitimacy" in political theory.

[87] Hughes and Laughlin, *supra* note 56.

of a specific area that should not be considered part of the compact payments.[88] But more than anyone else, the chiefs have sought to tie them to the Compact.[89] At times the chiefs have said that they want the U.S. to stay on Kwajalein and hope that the rental payment question can be resolved. At other times they have claimed that they would prefer to have possession of the island, and that they are eager to take it back if negotiation fails. On one occasion they attempted to sail boats in the Kwajalein Lagoon to demonstrate their eagerness to come back. Many people think this was largely a bargaining ploy and that the chiefs, who have been off the islands and receiving the rental payments for most of their lives, would prefer to continue to receive the money.

Another bone of contention was the disbursement of the money the U.S. has paid, and is the still paying because of the damage and suspected damage done to the people of several Islands in the northern part of the Marshall Islands, Bikini and Eniwetok among others, which were used to test the hydrogen bomb and for a series of other nuclear tests. When the original compacts went into force, the U.S. agreed to pay an additional 150 million dollars, as what the U.S. thought was a final settlement of the matter. At the time this is being written, the Marshall Islands is claiming the U.S. should pay more. Not just a little more, but several times more than the total amount that has been paid since the tests began up until now, including the 150 million "final" payment made during the original compact. What the RMI is now seeking is over three billion dollars.

As noted, there were disputes over whether this money should go to individuals or paid to the Marshall Islands government for the general use of the people of the RMI. To the extent that it went to individuals, questions arose as to which individuals that should be.[90]

VIII. DID THE FSM AND THE RMI ACT IRRESPONSIBLY UNDER THE ORIGINAL COMPACT?

During the fifteen years leading up to the revisions of the Compacts, there were a number of cases of corruption or alleged corruption and waste in both the FSM and the RMI. Whether these were worse or more frequent than what happens in national, state or locals governments or the private sector, in the United States and elsewhere, is perhaps debatable. One respected FSM Senator (who himself was never implicated in any misconduct) conceded

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[88]The prospect of keeping the Kwajalein payment for itself, it will be recalled, played a significant role in the RMI choosing to enter free association as a separate entity rather than as a part of the FSM. If the U.S. includes Kwajalein payments in calculating the RMI share when it compares RMI and FSM for the purpose of fairness between the two, then one of the RMI purposes for staying separate comes to naught.

[89]This they apparently see as increasing their bargaining power.

[90]Since the nuclear tests began almost sixty years ago and ended over fifty years ago, a substantial number of the people who lived in the Marshall Islands during the tests are no longer alive.

that the FSM government had been guilty of some mismanagement, but argued that the U.S. had not properly trained FSM government officials and personnel during the Trust Territory days in the period leading up to free association.[91]

In the FSM, the most notorious examples of mismanagement were in the State of Chuuk where allegations of waste and corruption were rampant; Governors were impeached, officials charged with crime, and the state constantly on the brink of bankruptcy. But the national government has had its problems also, including, e.g., a former Speaker of the FSM Congress being indicted for fraud involving government funds. In the RMI, locals and outsiders complained that the schools were in a bad state despite substantial compact money aimed for education. There were other issues as well. For example, in the RMI there were allegations that foreign nations had bribed officials to let them pay lower than owed catch fees on tuna taken in RMI waters, and the RMI was charged by international bodies with facilitating money laundering. On the bright side, there seems to be general agreement that many of these problems have been addressed, often successfully, when current President Note took office.[92]

Nevertheless, all of this led to talk both within and without the freely associated states, about "accountability." There was more concern initially within the FAS's than without. The people of the FSM and RMI were, not surprisingly, the first ones to notice that Compact funds were not producing the anticipated results. In the United States, Micronesia is not, unfortunately, a common topic of daily conversation or media coverage. In terms of the overall U.S. budget, the total amount of money wasted or stolen in Micronesia was the

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[91]Senator Isaac Figir of Yap State, in *I Say No, FSM Senator Pleads for Compact II Rejection,* PACIFIC MAGAZINE (Feb. 1, 2003). Having spent time in the FSM during the period when the FSM government was in operation but the Trust Territory had not yet been terminated I have mixed feelings about complaint. Undoubtedly, there is some truth to it. During the period in question FSM Chief Justice Edward King was the only American in a high government position in permanent residence on the island of Pohnpei, and he was an employee of the FSM government, not of the United States. Officials of the Trust Territory dropped by the islands from time to time but they were not enthusiastically welcomed. The attitude many FSM officials seemed to convey (politely, of course) was that they preferred to be left on their own to learn by trial and error. Even Chief Justice King felt that he had to tread lightly when it came to making suggestions, and there was more than a little resentment against some that he did make.

[92]Today, there is some concern that the reform movement may have lost steam.

proverbial drop in the bucket, and it caused practically no public stir on the mainland[93]. Nevertheless, the U.S. government had an interest. The U.S. government has been criticized, both from within and internationally, for not producing a better living standard in what was formerly their Trusteeship and now is a nation freely associated with the U.S.. Compact funds represent a rather large *per capita* expenditure in terms of the populations of the FSM and RMI. Nevertheless, education in the FASs seems to be marginal at best, housing and medical care seem to be deficient and these islands that are often characterized as "paradise", seems something less than that in terms of living conditions.

That is not to say that many people in these tropical isles want all of what many on the mainland consider "necessities" in terms of superhighways, cars, electronic equipment, appliances, high-rise office building, towering condos or sprawling homes. Far from it. But in certain ways the living standards of many residents of the FAS's seem to be less than what even those who would choose a simple, natural lifestyle might desire. There is an unmistakable air of what most would call poverty in the islands.

IX. STRUCTURING ACCOUNTABILITY

As one might expect, there were disagreements over how much money should be paid under the compacts. That was anticipated and was the prime reason re-negotiation of portions of the compacts was required by the compact's own terms. This, of course, had been anticipated and the compacts themselves called for re-assessment and adjustment of some of these sums after fifteen years. But incidents of waste and corruption also led to concern with how the money was being spent. This came to be called the issue of "accountability." Hardly had the word been spoken, however, than the question emerged, accountable to whom? If it meant accountable to the United States that raised questions of sovereignty. Can an independent nation be required to account to another nation for how it spends its money, and still consider itself sovereign and independent? On the other hand, if it meant accountable only to the governments of the FAS's themselves, would not that simply lead to business as usual?

With respect to the accountability issue, a large thorn in the side of the U.S. Department of the Interior, part of the executive branch, was the U.S. Government

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[93]People in the state of Hawai'i are somewhat more aware of Micronesia, but even there the knowledge of the average citizen concerning current events in Micronesia is skimpy at best.

Accountability Office[94], (an arm of the U.S. Congress formerly known as the General Accounting Office.) The GAO, from about 2000 on, produced a series of reports that were highly critical of how the FASs handled their money and of the U.S. Department of the Interior for not keeping closer tabs on the FASs. This much activity by the GAO regarding these relatively small budget matters seems to have been unlikely unless it was urged on by one or more members of the U.S. Congress. People in the FASs have strong ideas, but no one wants to say on the record, which members of Congress it might have been.

As the talks on the revisions progressed, the theory emerged that the dilemma could be solved by creative drafting. A committee or similar body would be formed containing representatives of both the U.S. and the FAS's, and the FAS's would be accountable to that body. That was done, but as we shall see, the tone of the early meetings of these committees ran from tense to combative.

During the course of the compact negotiations, the United States sought, in some cases successfully, to re-open parts of the original compacts that did not by their terms expire after 15 years. Many people in the FSM and RMI felt this was improper and unfair. Many Micronesians believed that the U.S. was using its bargaining position to re-open things that had been thought of as resolved. One of these was the provision under which mail could be sent between a FAS and the United States for the same price as mail sent between U.S. states (or territories.)[95] This was seen as a significant benefit to the FAS, because many FAS citizens have relatives in the states and obtain products from the states. The cost, while not insignificant, was not large in terms of relationship to the entire aid package. Many people thought the first time the U.S. raised the isssue, that it. was just using the mail rates as a bargaining chip. But in fact the U.S. followed through and under the new compacts it will cost the FAS's more money to correspond and engage in commerce with the United States[96].

Sometime during the course of the initial Compact the idea arose of creating a Trust

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[94]On July 7, 2004 the U.S. General Accounting Office changed its name to the Government Accountability Office. Thus the acronym stayed the same although the name changed. Since this name change came in the middle of a period when the GAO was producing reports about the free association states, we will generally use the acronym to avoid confusion.

[95]Compacts of Free Association, Article IV, Section 12 (1985).

[96]Part of the impetus for the U.S. negotiators taking hardline on this issue may have come from the U.S. Postal Service which apparently believed it was being required to subsidize the FAS's out of its own budget.

Fund that would eventually make the FASs financially independent.[97] The appeal of the idea is understandable. It is hard for a nation to feel completely independent so long as it is financially dependent on another nation. At the same time, given the limited resources of these islands, it seems unlikely that they can support their current populations by their own enterprise, certainly not at the level they have come to expect.[98] Yet the figures are formidable. As with an individual, given the vicissitudes of investing and the unpredictability of interest rates and prices, creating a trust fund that will assure financial well-being in perpetuity requires a great deal of money and good luck.[99]

The idea of the trust funds for the FSM and the RMI, were that FAS's would be financially independent in twenty years. Before the Compacts were even signed, some experts were predicting failure.[100]

A. Negotiating the "New" Compacts

The Compacts between the U.S. and the F.S.M. on the one hand, and the U.S. and the R.M.I. on the other, were negotiated separately. However, they were negotiated over the same time span. The U.S. team in both cases was made up of the same people. Each of the freely-associated states had its own team. Selection of the team members was taken very seriously by

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[97]Just when this idea arose is not entirely clear. The idea of using trust funds for specific purposes in the FAS's, such as compensating the victims of the hydrogen bomb testing, had been around for a long time. But the idea of a trust fund that could make the entire nation independent seems to have emerged later. I assume that it arose in the late 90's. In the mid-nineties there seemed to be no mention of it, and then shortly after 2000, it seems to have been taken for granted that it was going to happen.

[98]As I mentioned earlier in this section, even that standard leaves something to be desired.

[99]Of course, it was assumed that the RMI and the FSM would develop their own economies as much as possible (e.g., promote private enterprise, find new sources of tax revenue such as from foreign vessels fishing in their waters, etc.) and thus that the trust fund income would only need to replace the U.S. aid. That, however, in certain ways made the problem even more difficult. Include those factor, and now the designers of the fund must not only predict the prices, interest rates and return on investments over the next twenty years, but also must guess at how successful the FAS's will be in developing their own economies.

[100] U.S. GAO, *An Assessment of the Amended Compacts and Related Agreements,* GAO-03-890T (June 18, 2003) at 14.

the two FAS's.[101]

Negotiations on the Compact amendments with the FSM began in November of 1999, and involved at least a half-dozen separate "rounds", in such places as San Francisco and Honolulu. There were moments of accord and moments of hostility. As noted, there were times when the U.S. re-opened parts of the Compact that were settled and not expiring. FSM negotiators believed at first that this was being done to create bargaining chips. But in some of those cases, such as the postal rates issue, the U.S. actually insisted on making a change detrimental to the Micronesians, in a portion of the Compacts that was not scheduled for re-negotiation.

B. Accountability and the Compacts as Amended

During the negotiations, the topic of accountability came up early and often. As noted, in the years leading up to the compact negotiations, the U.S. Government Accountability Office (GAO)[102], an arm of the U.S. Congress, issued several reports that were critical not only of the governments of the FSM and the RMI, but of the United State Department of the Interior as well. As early as 2000, the U.S. Special Negotiator for the Compact revisions [103] was asked to respond to these criticisms, during an appearance before a subcommittee of the U.S. House of Representatives.[104] In doing so, he defended the Department of the Interior

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[101]The FSM Congress, for example, elected its delegates to the negotiations. They were sworn in at a solemn ceremony. They met a number of times with themselves and with other FSM leaders to prepare for the negotiating sessions with the U.S. team. The U.S. team was made up of person who worked in various capacities for the Office of Insular Affairs in the U.S Department of the Interior. Undoubtedly, the U.S. team was dedicated and competent. However, it is an inevitable part of the free association arrangement that the details of the relationship will seem more important to the smaller nation.

[102]Formerly the Government Accounting Office, *supra* note 91.

[103]Mr. Allen Stayman.

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Regarding criticisms of the FSM and RMI, see U.S. GAO, *U.S. Funds to Two Micronesian Nations Had Little Impact on Economic Development*, GAO/NSIAD-00-216 (September 21, 2000), 52, 56, 77; regarding criticisms of the Department of the Interior, see U.S. GAO, *Better Accountability Needed Over U.S. Assistance to Micronesia and the Marshall Islands*, GAO/RCED-00-67 (May 31, 2000), 20-23.

against charges that it had failed to control waste and misuse of compact funds, by pointing out that under the original compacts the U.S. had very little control over how the money was actually spent.[105]

By 2002, the U.S. and both the FSM and the RMI had agreed in principle to the creation of accountability mechanisms.[106] It appears that they may have done so with different degrees of enthusiasm. Whether this contributed to variations in the way mechanisms have worked since they were put in place, is a question that can lead to interesting speculation.[107] More significant were the slight variations in the structures of the

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[105]Ibid. Both the FSM and the RMI were quite aware of these criticisms by the GAO. However, as we shall see, the FSM and the RMI reacted differently to them.

[106]See *Round-6 Yields Substance for Compact II*, (September 6, 2002) at *http://www.fsmgov.org/press/pr09060a.htm*

[107] As noted, the climates of the original meetings of JEMCO and JEMFAC were affected by the previously-mentioned series of reports by the U.S. Government Accounting Office (an arm of the legislative branch) concerning the FSM and RMI under the old compacts and assessments of the new compacts. On the surface, it seems that the FSM may have taken offense at these reports more than did the RMI. There were a number of reasons for that. RMI was praised in the later reports for the improvements it had made, although originally RMI probably had further to go. In the 1990's RMI was labeled by international organizations as a major site of money laundering. Corruption in some parts of the government was seen as rampant. However President Note, when he was elected in the early years of the new century, made considerable strides toward cleaning up the RMI government, and earned the GAO's praise for it.

So the Marshall Islands probably had bigger problems with waste and corruption to begin with than the FSM , but the fact that the current government of the RMI was given credit for trying to clean it up, made the reports more palatable to them.

The FSM's response to the reports was more combative. FSM government officials accused the GAO of emphasizing the negative aspects of FSM self-government., while ignoring the positive. Peter Christian, the FSM's chief negotiator for the Compacts, said that the Congress (and the GAO by extension) had no institutional memory of the relationship between

mechanisms. As noted, the FSM and the U.S. on the one hand, and the RMI and the U.S. on the other, pursued parallel but separate negotiations. That produced similar but not identical compacts. If I may use an analogy that is somewhat strained, the two compacts are similar to half-siblings. One parent of each is the same, contributing to their similarities, but the other parent is different, resulting in their differences. To follow this analogy further, it could be added that even the common parent (the U.S.) did not contribute exactly the same thing to each offspring. The U.S. bargained somewhat differently in the two cases. The "offspring" included JEMCO for the FSM and JEMFAC for the RMI. That is, the Joint Economic Management Committee (JEMCO) for the Federated States of Micronesia and the Joint Economic Management and Financial Accountability Committee (JEMFAC) for the Republic of the Marshall Islands.

Under the Compacts, both JEMCO and JEMFAC were set up with a majority of U.S. representatives. But, while JEMCO decides issues by a majority votes, the documents creating JEMFAC requires decisions by consensus , which apparently has been interpreted by the committee to mean by unanimous vote.[108] The latter has apparently produced a better result, at least from the perspective of the freely associated states. In the first meeting of JEMCO, the U.S. majority pushed through a number of contentious measures by 3-2 votes, much to the resentment of the FSM. The "consensus" standard of JEMFAC required a much more cooperative approach. Indeed, it would seem to be more consistent with the "Micronesian Way", mentioned earlier.[109]

C. The New Compacts as Applied

Micornesia and the U.S., no memory about Micronesia's loyal support and pro-U.S. attitude for over half a century. A respected FSM senator pointed out that to some extent at least, deficiencies in the FSM's ability to govern itself could point to a deficiency in the way the U.S. carried out its duties as trustee for the area under the U.N. mandate, duties that included preparing the societies for self-government.

So, from the beginning it appears that the U.S. and the FSM delegations to JEMCO approached their duties more warily than did the RMI and the U.S. delegates to JEMFAC

[108]Since there are only five members of the Committee, three from the U.S. and 2 from the Marshall Islands and since the delegation always vote together, if "consensus" means anything more than a majority (which by definition it would) it has to mean unanimous.

[109]The initial chair of JEMCO and JEMFAC was, and of this writing is, David Cohen.

In order to understand how this difference came about it is necessary to compare the underlying documents that created JEMCO and JEMFAC. The paragraph of the Compact amendments requiring the establishment JEMCO states:

> "The Governments of the United States and the Federated States of Micronesia shall establish a Joint Economic Management Committee, composed of a U.S. chair, two other members from the Government of the United States and two members from the Government of the Federated States of Micronesia. The Joint Economic Management Committee shall meet at least once each year to review the audits and reports required under this Title, evaluate the progress made by the Federated States of Micronesia in meeting the objectives identified in its plan described in [certain other sections of the Compact], identify problems encountered, and recommend ways to increase the effectiveness of U.S. assistance made available under this Title. The establishment and operations of the Joint Economic Management Committee shall be governed by the Fiscal Procedures Agreement."[110]

The Compact continues:

> "The Government of the Federated States of Micronesia shall report annually to the President of the United States on the use of United States sector grant assistance and other assistance and progress in meeting mutually agreed [upon] program and economic goals. The Joint Economic Management Committee shall review and comment on the report and make appropriate recommendations based thereon."[111]

JEMFAC is set up with almost identical language in the Compact with the Republic of the Marshall Islands (see footnote).[112]

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[110] Compact of Free Association Between the United States and the Federated States of Micronesia, Title II, Section 213.

[111] *Id.* at Section 214.

[112] "Section 214--Joint Economic Management and Financial Accountability Committee "The Governments of the United States and the Republic of the Marshall Islands shall establish a Joint Economic Management and Financial Accountability Committee, composed of a U.S. chair, two other members from the Government of the United States and two members from the Government of the Republic of the Marshall Islands. The Joint Economic Management and Financial Accountability Committee shall meet at least once each year to review the audits and reports required under this Title and the Fiscal Procedures Agreement, evaluate the progress

The compacts incorporate by reference the Fiscal Procedures Agreement to determine the procedures to be used by the JEMCO and JEMFAC.[113] Once again, in regard to JEMCO and JEMFAC the Fiscal Procedures Agreements between the U.S. and FSM and the U.S. and RMI are quite similar.[114] The Fiscal Procedures Agreements repeat much of what has been said in the Compacts themselves so far as the establishment of the committees, their composition (three U.S. delegates, two from the other side), each contains a paragraph that provides that decisions of the respective accountability committee with respect to sector grant allocations[115] are binding, and that the U.S. may withhold

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made by the Republic of the Marshall Islands in meeting the objectives identified in its framework described in subsection (f) of section 211, with particular focus on those parts of the framework dealing with the sectors and areas identified in subsection (a) of section 211, identify problems encountered, and recommend ways to increase the effectiveness of U.S. assistance made available under this Title. The establishment and operations of the Joint Economic Management and Financial Accountability Committee shall be governed by the Fiscal Procedures Agreement.

"Section 215--Annual Report

"The Government of the Republic of the Marshall Islands shall report annually to the President of the United States on the use of United States sector grant assistance and other assistance and progress in meeting mutually agreed program and economic goals. The Joint Economic Management and Financial Accountability Committee shall review and comment on the report and make appropriate recommendations based thereon. Title II, Article I, Sections 214, 215, the Compact between the United States and the Republic of the Marshall Islands."

[113] "Agreement Concerning Procedures for the Implementation of United States Economic Assistance Provided in the Compact of Free Association, as Amended, Between the Government of the United States of America and the Government of the Federated States of Micronesia, signed 27 Feb. 2004 at Palikir, Pohnpei, FSM , published by the Congress of the Federated States of Micronesia. (Hereinafter "FPA-FSM); "Agreement Concerning Procedures for the Implementation of United States Economic Assistance Provided in the Compact of Free Association, as Amended, Between the Government of the United States of America and the Government of the Republic of the Marshall Islands.", Consolidated Treaties and International Agreements, 2004-3 CTIA 77 (Oceania Press 2004) (hereinafter "FPA-RMI").

[114]FPA-FSM, Art. III, FPA-RMI, Art.III.

[115] That is, decisions on how the compact money will be spent.

payments if the FAS government overrides such decision.[116]

But there is a significant difference in language in another part of the Compact with the RMI. Title Two of each compact deals with "Economic Relations." Section 211 of the RMI compact is captioned Annual Grant Assistance. Unlike its FSM counterpart, section 211(a) contains the following sentence:

> "Consistent with the medium-term budget and investment framework described in subsection (f) of this section, the proposed division of this amount among the identified areas *shall require the concurrence of both the Government of the United States and the Government of the Republic of the Marshall Islands*, through the Joint Economic Management and Financial Accountability Committee described in section 214." [emphasis added][117]

Section 211 (f) provides:

> (f) Budget and Investment Framework.--The Government of the Republic of the Marshall Islands shall prepare and maintain an official medium-term budget and investment framework. The framework shall be strategic in nature, shall be continuously reviewed and updated through the annual budget process, and shall make projections on a multi-year rolling basis. Each of the sectors and areas named in subsections (a), (b), and (d) of this section, or other sectors and areas as mutually agreed, shall be accorded specific treatment in the framework. *Those portions of the framework that contemplate the use of United States grant funds shall require the concurrence of both the Government of the United States and the Government of the Republic of the Marshall Islands*. [emphasis added][118]

These are rather subtle differences. The comparable provisions in the FSM-U.S. compact require the FSM to submit a proposal and the U.S. decide whether to concur in it.[119] By

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[116]FPA-FSM, Art. III, Section7, FPA-RMI, Art.III, Section 7.

[117]COM-RMI, title II, Art. 1, sec. 211(a).

[118] *Id.* at Section 211 (f).

[119] "Section 211 - Sector Grants

(a) In order to assist the Government of the Federated States of Micronesia in its efforts to promote the economic advancement, budgetary self-reliance, and economic self-sufficiency of its people, and in recognition of the special relationship that exists between the Federated States of

analogy, one might think of the appointment of Federal judges, including Supreme Court justices, under the Constitution of the United States. The situation of the FSM is analogous to that of the President, in that he names a candidate and the Senate consents to the candidate. Suppose, by analogy, the U.S. constitution were amended to provide that Federal judges, rather than being appointed by the President and confirmed by the Senate, should be selected by concurrence of both the Congress and the President. (A system more analogous that under the RMI compact.) On the surface it might seem to strengthen the hand of the Senate because they are now made co-equal in the selection process. But it could actually help the President So far as the Compacts are concerned, the difference seems to have improved the position of the Marshall Islands, the one that in the analogy was in the place of the President. How can that be? On the surface it appears counterintuitive. The reason is that now the other party (the U.S. in the compact case being in the position analogous to that of the Senate) now must also take full responsibility for failure to reach an agreement. To follow our judgeship analogy further, it has been demonstrated over the terms of several presidents that the Senate does not consider it their problem when a judgeship remains vacant because they have turned down the President's nomination. It usually seems to be the Senates position (no matter which party dominates) that the failure is solely that of the president, in his inability to nominate a satisfactory (to them) candidate. But if the Senate had the joint responsibility of coming up with an acceptable candidate, they could not just sit back an implicitly tell the President, " you

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Micronesia and the United States, the Government of the United States shall provide assistance on a sector grant basis for a period of twenty years in the amounts set forth in section 216, commencing on the effective date of this Compact, as amended. Such grants shall be used for assistance in the sectors of education, health care, private sector development, the environment, public sector capacity building, and public infrastructure, or for other sectors as mutually agreed, with priorities in the education and health care sectors. *For each year such sector grant assistance is made available, the proposed division of this amount among these sectors shall be certified to the Government of the United States by the Government of the Federated States [**2772] of Micronesia and shall be subject to the concurrence of the Government of the United States....*" [emphasis added]COM-FSM, Tit. II, Art. 1, Sec. 211.

(c) "Development Plan.--The Government of the Federated States of Micronesia shall prepare and maintain an official overall development plan. The plan shall be strategic in nature, shall be continuously reviewed and updated through the annual budget process, and shall make projections on a multi-year rolling basis. Each of the sectors named in subsection (a) of this section, or other sectors as mutually agreed, shall be accorded specific treatment in the plan. *Insofar as grants funds are involved, the plan shall be subject to the concurrence of the Government of the United States."* [emphasis added]. Id. at sec. 211(c).

produce someone we like or this seat will be empty until your term is over, and you will be blamed the failure to appoint."

By the same reasoning in the U.S.-RMI compact situation, the U.S. cannot sit back like an ancient Roman emperor turning thumbs up or down on the RMI's proposals. The U.S. must take equal responsibility for coming up with an acceptable plan.

Also, it appears from some of the reports of the meetings of JEMCO (the FSM's committee) that the U.S. delegation takes the view that if they reject the FSM proposal on a particular matter they may then adopt a proposal of their own by majority vote. [120]

At present, David Cohen is United States Department of the Interior Deputy Assistant Secretary for Insular Affairs and serves as the chair of both JEMCO and JEMFAC. Cohen was quoted in Pacific Magazine for June 2007 as saying:

> "I believe that Compact II can give children in the Marshall Islands and the FSM a much better future, but only if we're all pulling in the same direction and agree that the deal we all signed is the deal that we're all going to make a success."[121]

However, I have had the opportunity to talk with some of the people who have represented the FSM and the RMI in the JEMCO and JEMFAC, and they were by no means sure things were getting better.[122] While the RMI reportedly was relatively satisfied with the result, there was still feeling that the U.S. was not treating them as a fully equal partner. In the case of the FSM the feeling were even more pronounced. A definite feeling of being pushed around and dissatisfaction with a number of outcomes.

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[120] By this interpretation the U.S. delegation to JEMCO has more power than the Senate has under of our analogy.

[121] Giff Johnson, *Living With Tough Love, Can FSM and RMI Do More Than Tread Water?,* PACIFIC MAGAZINE, June 29, 2007.

[122] For the purpose of maintaining confidentiality, the sources are not named. That is generally my practice throughout this article, unless the source is publically on record as taking that position.

As of late 2007, the U.S. position viz-a-viz the FASs as been characterized as "tough love". So what can and should be done? At the very least (even in the context of tough love) the FSM should be accorded the same courtesy as RMI of having things decided by consensus, rather than by majority vote, on a fiscal committee that has a built-in permanent U.S. majority. But an attitude change should be in order also. The proper use of foreign assistance is an important issue for both the donor nation and the donee. Obviously, the donee will not get the benefit if the aid is not used wisely. The donor, even leaving out altruism, has an interest. The donor nation will not be building good will with the people of the donee nation if the aid does not in fact produce benefits for them. Furthermore, in a situation such as these former parts of a U.S.-administered Trusteeship, where the U.S. has taken on a sort of special obligation to the donee nations, it will be subject (indeed it is subject) to criticism if it fails to produce satisfactory results in the donee nation.

Thus it is not unreasonable for the donor and the donee to both be interested in insuring that aid money is properly spent.[123] "Properly", though, raises an interesting question. No person or organization ever spends ever penny of their money in the most productive way possible. That would require a perfect business and investment sense that obviously never has and never will exist. At the other end of the spectrum, another definition of "properly" would be simply that the money is expended honestly. Unwise (from the committee members' perspective) expenditures would be "proper" so long as they were made honestly and in good faith without any ulterior motive. Clearly, the American delegation to the accountability committees conceives it's role much more broadly than insuring propriety in that sense. But just where the line between insuring responsible economic behavior and taking over is not clear. Perhaps the U.S. should err a bit more on the side of acknowledging the sovereignty of these smaller nations.

The problem of defining the proper role of the Americans on JEMCO and JEMFAC can be illustrated by an issue that seems to have come up in both committees but again is more of a thorn in the side for the FSM. It has to do with leasing or otherwise acquiring rights to land needed for public buildings where there is little or no written documentation of ownership. Registration of deeds and other efforts to establish written confirmations of title to land is relatively new in most Pacific islands. Even where it is in existence compliance by indigenous and other local people is sporadic at best. So when the island governments needs to acquire land or land rights for such things as a school

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[123] This is entailed in most definitions of accountable.

building, they often find it necessary to acquire it from a person whose ownership is established mainly by traditional understandings. Not surprisingly, lawyers from the states are going to be concerned about this, even to the point of thinking it is "improper." But the Micronesians governments ask, "how else can we do it?" The dilemma is real and the U.S. delegations must recognize that is real. Understandably, there are fears that if you pay someone who lacks documentation for his land title, you could be paying the wrong person and conceivably the true owner will show up later and demand payment also. But having a needed school building go unbuilt for two years is not an acceptable answer to the problem.

Being "accountable" includes not just preserving funds, but using them when and where they are needed. Keeping them safely tied up in an account when they are needed elsewhere is not being responsible. A story from the Christian Bible comes to mind here. It is the parable of the rich man who went away and divided his money among three of his servants while he was gone.[124] Two invested their trust money and made a profit. But one servant was so concerned about his master's harshness in matters of money, that he buried the money for safe keeping. When the master returned, instead of praising him the master punished the servant for not having invested the money. Of course, the parable was drawing an analogy to spiritual assets, but the American delegation to the accountability committees might profit from a literal interpretation. Protecting the Compact funds by not spending them for needed goods and services is not fulfilling the Committees intended function, and not being "accountable."

X. THE TRUST FUNDS

Both compacts have similar provisions with respect to the establishment of a trust

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[124] Holy Bible, King James Version, *Matthew* 25:14-30 (Parable of the Talents); *Luke* 19:12-27 (Parable of the Pounds) I once heard a psychology lecture about misers that had a similar theme. The speaker was talking about people who die in squalid surroundings in seeming poverty only to have it discovered that they had very large sums of money either hidden on the premises or occasionally in bank accounts. The speaker said that the miser is usually someone who cannot decide that anything is worthy enough to spend their money on, so they spend it for nothing. Ultimately, they create the greatest waste by not using the money at all.

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fund. The idea behind them seemed sensible and one that could benefit both parties. Many within and without the FASs question whether a nation can be truly independent in the political sense so long as it is economically dependent. One can certainly understand why the FAS's would prefer not to be dependent upon aid from the U.S.. On the other side, many in the U.S. government would prefer not to subsidize another nation indefinitely. So the trust fund idea seemed like a win-win proposition. A trust fund would be established for each FAS, both the U.S. and the FAS would make deposits into it on a regular basis. After a certain period of time there would be enough money in the fund that the income from it could replace the U.S. annual subsidy. The FAS's would be financially independent and the U.S. would be relieved of the burden a providing the subsidy. Twenty years in the future was the target date.

As appealing as the idea seemed in conception there were those who thought that it was flawed from beginning. The problem has to do with the numbers. When I first heard of the trust fund idea, I was reminded of a tuition program that Ohio [125] (and a number of other states) adopted or considered a generation ago. The idea was to create a trust fund to pay tuitions at state universities. The original concept was that parents could enroll their child as an infant, and begin paying towards the child's eventual attendance at a state university. Under the original concept, if the parents made the specified, fixed payments until the child was 18, then the child could attend a state university (assuming he or she were academically eligible) without any additional tuition payments.

Although it also sounded like a win-win proposition, the state universities questioned the plan. With people expert in finance on their faculties and administration, the universities realized the difficulties entailed in making such a plan work. Payments might be missed not only by the parents or the state, income on the investments might be less than expected or the principle might diminish or be lost[126], and quite possibly tuition in the

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[125] See Sarah Mills Bacha, *College Tuition Program Allows Credit Purchases in Advance*, COLUMBUS DISPATCH, March 19, 1991, at 4F; Barnet Wolf, *Ohio's Prepaid-Tuition Plan Reeling: Spike in college costs plus bear market push deficit to $321 million*, COLUMBUS DISPATCH, September 18, 2003, at 1A; Denise Trowbridge, *Tuition-plan Changes Cause a Stir*, COLUMBUS DISPATCH, November 7, 2006, at 1C.

[126] As an example of what can happen to even cautiously managed state trust funds, the Ohio State Teachers Retirement Fund lost a large amount of money on their investments in Enron. . *Funds Held Enron Stock as Price Tumbled*, COLUMBUS DISPATCH, February 2, 2002, at 1D.

future would be higher than anticipated. The universities correctly saw themselves as potentially holding the proverbial bag when the trust fund could not produce the going tuition when the time came for the "paid-up" children to enroll.[127]

One way to experience the problem is to imagine that any of us decided to create a trust fund that in twenty years would make it possible for us to quit work and still have an income at least equal to what we have now (adjusted for inflation.) Unless, we were very lucky and willing to scrimp very much for the next twenty years[128], the chances are we could not do it. If it were easy, most people would be retiring in their forties without having to turn to government or employer pensions. The simple fact is that in order to live comfortably off of a trust fund you have to have a lot of money to put in it, and have good luck with your investments. The same is true of nations, even small nations such as the FSM and the RMI.

The problems actually being encountered with the trust funds seem to be the ones that were anticipated. The U.S. has met its deposit obligations but the FAS's, whose payments are more discretionary have not put in as much as they had hoped. The returns on the fund have not been as good as expected. The end result is that the funds are way behind schedule as far as meeting the twenty year goal is concerned.

So, is this a major problem for the free association states? My answer would be no, at least not right now. The FASs got along without a trust fund in the past and they obviously can get along without one now. What it will probably mean is that when the twenty year period is up in 2023, instead of the FSM and the RMI being financially independent, the U.S. and the FAS's will have to negotiate another aid package. The FAS's will have to hope that the U.S. still recognizes their strategic importance or appreciates their friendship and support over the years, or both. Whatever is in the trust funds could serve to give the FAS's some discretionary income and will reduce the burden on the U.S. making it easier to get Congress to agree to continue their support for these valuable and

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[127]Ohio eventually adopted a plan but it does not guarantee that the parent will not have to add money to pay the going tuition.

[128] I am assuming, of course, we are not already independently wealthy in which case we would have no need to do it.

loyal allies.

XI. NUCLEAR CLAIMS-THE MARSHALL ISLANDS

There are two issues of ongoing concern in the Compact relationship with the Marshall Islands that should be discussed. They are the still open issue of nuclear claims, and the rent and terms for the use by the U.S. of the land and water that comprises the missile test range at Kwajalein.

A. Backgound: "Bravo" and Other Nuclear Tests

The nuclear claims involve claims by Marshall Island citizens and government, for damage to life, health and property by the "fallout" and other radiation hazards created by tests of nuclear bombs and devices at Bikini Atoll and Eniwetok Atoll[129] between 1946 and 1958. Sixty-six tests were carried out during that period, some on the surface, some underwater and some in the atmosphere. These included tests of the hydrogen bomb. The second hydrogen bomb test, code-named "Bravo", and carried out at Bikini on February 28, 1954, produced an energy yield that far exceeded expectations. That yield plus an unanticipated wind change caused radioactive fallout over the islands of Rongelap and Utrik. The residents of those two atolls (less than 100 on Rongelap and less that two hundred on Utrik[130]) were subsequently evacuated to Kwajalein for medical treatment, but not before having been subjected to two or three days of exposure to the radiation.

According to the U.S. government figures, since the tests it has spent approximately $521,931,300 on clean-up, relocation and repatriation, medical care and damages arise from the tests. When the U.S. and the Marshall Islands entered into the original compact in 1986, the agreement included what by its terms appeared to be a final settlement of claims arising out of the testing program.

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[129]An additional test was carried out in the open sea about sixty-eight miles west of Bikini.

[130]The populations of Bikini and Eniwetok, under 200 each, had been evacuated prior to the tests.

Section 177 of the Compact incorporated by reference a separate settlement agreement and went on to provide that the agreement

> "constitutes the full settlement of all claims, past, present and future, of the government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program [carried out by the U.S. or its agents]."[131]

The Section 177 Settlement Agreement has what has come to be called a "changed circumstance" provision. This clause says that if damage or injury "arises or is discovered"[132] after the effective date of the Compact, that "render[s] [the agreement] manifestly inadequate", the RMI may request that the U.S. Congress reconsider the matter. The Compact makes it explicit that Congress is not obligated by the agreement to provide additional money but only to consider doing so.

The Article 177 agreement required the Marshall Islands to establish a nuclear claims tribunal to receive and determine the validity of claims based upon the nuclear testing program.[133] Over the fifteen year initial period of the agreement the Nuclear Claims Tribunal for the Marshall Islands was allocated a total of 45.75 million dollars to pay out to persons with valid claims of nuclear injury or damage.[134] By 1997, the eleventh year of the tribunal, it had awarded personal injury compensation in the amount of $63,127,000 dollars or $17, 377,000 over the total amount available.

In 2004 the RMI, alleging changed circumstances, requested an additional $3 billion dollars.[135] Part of the request was to pay claims the Nuclear Claims Tribunal had

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[131]Section 177, Settlement Agreement, Art. IV.

[132]And could not reasonably have been identified earlier.

[133]Section 177, supra, note____.

[134]The money was to be disbursed over the span of the agreement, start with2.25 million annually during the first three years, and 3.25 million annually for the remainder of the 15 years.

[135]It is worth noting that not only is this additional amount twenty times the amount provided by the original compact, but it is roughly six times the total amount spent on clean-up and compensation for the tests since they ended in 1958. Of course, inflation could play a part here.

found valid but which had not actually been paid because the funds ran out. The U.S. State Department in analyzing section 177 and the separate settlement agreement, concluded that there were five elements that needed to be met in order to justify a claim of "changed circumstances":

> a)There must be loss or damage to property and person of the citizens of the Marshall Islands
>
> b)The damage or injuries must result from the Nuclear Testing Program
>
> c)They must have arisen or been discovered after the effective date of the [original] Agreement
>
> d)The injuries were not and could not reasonably have been identified as of the effective date of the Agreement [October 21, 1986].
>
> e)The magnitude of the injuries must render the provisions of the Section 177 Settlement Agreement manifestly inadequate.

To begin with, the U.S. takes the position that the mere fact that the Nuclear Claims Tribunal (NCT) has expended all of the funds available to it and has made awards that have not been paid, does not constitute "changed circumstances" nor is it evidence of changed circumstances. The U.S. points out that it had and has no control over how the NCT determines if a claim is valid or assesses damages or otherwise determines the value of a claim. The NCT is loosely modeled on some American tribunals that assess claims for radiation damage and injuries, but the Marshall Islands Tribunal, according to the U.S., does not follow the same standards as its prototypes. To put it quite plainly, the U.S. believes that the NCT has made too many awards were the proof was dubious or missing altogether. For example, the U.S. contends that there is no scientific evidence indicating that children whose mothers were exposed to fallout (but were not pregnant with them at the time) are in any way affected by their mother's exposure. Yet the NCT, according to the U.S. State Department, apparently adopted a rule that such children should receive an award equal to 50% of the award their mother did or could have received.[136]

But even adjusted for inflation the size of the request is striking in its magnitude.

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. U.S. Department of State, *Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America* (November 2004), http://www.state.gov/p/eap/rls/rpt/40422.htm, Section 6.1: "The scientific community has not found

Two other proof problems specific to the situation in the Marshall Islands also illustrate the differences between the NCT and the U.S. on the question of the claims exceeding the amount of money provided. First, the U.S. contends that scientific evidence gathered during a nationwide study of radiation in the RMI proves that only islands in the northern part of the nation were affected by the tests, specifically islands north of Kwajalein.[137] Yet the NCT has awarded damages to people who lived in other parts of the country without any showing of a connection with the northern islands. In effect, the Nuclear Claims Commission rejected the nationwide study.[138] The U.S. argues that the study has been published in peer reviewed journals and is widely accepted by experts in the field.[139] In essence, the U.S. believes that the RMI and the NCT have no basis for rejecting the nationwide study other than dissatisfaction with its results, and their potential for limiting damage claims.

Secondly, the U.S. contends that most of the items in the RMI "changed circumstances "request involve problems that were or should have been recognized before the date of the final settlement. For example, there is a request for funds to establish a health care system for victims throughout the Marshall Islands. The RMI, in its "changed circumstances" request, asked for a healthcare service integrated with existing RMI health services, to serve the entire RMI population for fifty years. The estimated operating costs is $43,102,644 a year, plus $50,000,000 to cover capital costs, plus travel and housing for the health care workers and patients. The total cost would be around $1 billion dollars or more than six times the total amount of the 1986 agreement. The U.S. maintains that all the arguments for such a system are based on facts that were known or should have been

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transference of nuclear effects to the second generation in humans. However, the Tribunal has awarded the biological children of a mother who was physically present at the time of the testing 50% of amounts offered first generation claimants."

[137] *Id*. at Section 3.1.2: "Relatively little fallout radioactivity reached as far south as Kwajalein Atoll."

[138] The Nitijela, the Marshall Islands legislature, went further and adopted a resolution formally rejecting the nationwide study.

[139] *Id.*

known prior to 1986.[140]

The Marshall Islands and the NCT argue that they have data that supports the idea that cancer throughout the nation is more prevalent than should be expected and therefore it is reasonable to attribute it to the Bravo and other tests.[141] But the U.S. position is that even if that is true, it is at most only a small increment to the problem as known in 1985.

B. Analysis

I am tempted to say that the main "change in circumstance" is the attitude of people in the United States and elsewhere concerning what the United States did when it established its nuclear testing program in the Marshall Islands in the 1950's and 1960's.

Looking at it from the perspective of the 40's and 50's it appeared to be reasonable. The U.S. was locked in a Cold War and saw itself as the ultimate defender of freedom and democracy. It had developed this new power--thermonuclear--which offered it the chance to control a much more populous enemy.

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[140]The argument for including the cost of a health care system for the entire population in the damage claim is as follows. There is evidence that the radiation from the tests will cause an increase in the incidents of various diseases. While this will be demonstrable statistically, it will be impossible to determine which individual cases are a result of the fallout. So the only way to redress the problem is to provide a health care system for the entire population. Even assuming that the argument is otherwise valid, it would not have been possible for the RMI to make this argument if it accepted the findings of the nationwide study that substantial portions of the RMI population were never exposed to radiation from the tests.

[141] Nuclear Claims Tribunal, *History and Activities* (March 24, 2004), http://www.nuclearclaimstribunal.com. The Tribunal cites to various studies by the National Academy of Sciences' Committee on the Biological Effects of Ionizing Radiation, the U.S. Atomic Energy Commission, and the Radiation Effects Research Foundation which detail the "increased medical and scientific understanding of the biological effects of radiation," and the "evolution of maximum permissible exposure levels," as further evidence of changed circumstances.

We often forget this important distinction between World War II and the Cold War. In WW II, the Allies (the U.S. side) outnumbered the Axis (Germany and Japan with some help from Italy and a few smaller countries.) Winston Churchill wrote in his memoirs that in retrospect it clearly bordered on insanity for Germany and Japan to take on most of the world. In the Cold War, however, it was a different story. By the late 1940's two of the largest nations in the World, Russia and China (plus their allies and satellites) , were aligned against the United States, Britain, half of Europe, and a few other nations with little or no military capacity. [142] It was not at all clear the U.S. side could prevail in a conventional war. To many, nuclear weapons seemed to be an essential part of the "arsenal of democracy."

So the U.S. went to two tiny atolls in the central Pacific, islands it had undertaken to defend, and moved less than 300 people to relatively nearby islands, in order to use their home islands to test weapons that it thought it needed to defend itself and them.. Afterwards, the U.S. spent over a half billion dollars cleaning up the islands and making restitution to the people who were dislocated and to those unintentionally injured. By the standards of the Cold War that seemed rather reasonable.

But by the prevalent view of many in the 21st Century, it seems much less so.[143] To them it looks like this. The U.S. went into a nation that was put in its trust and decided to use their islands as a testing ground for its own weapons. It dislocated people from their native homes, in many cases for the rest of their natural lives, and it harmed or created substantial risk of harm to hundreds or even thousands of other citizens of the trust territory. In a time when juries have been known to award billions of dollars in damages to one person because that person was (in the jury's view) not sufficiently warned that smoking is unhealthy, how much is what was done to the Marshall Islanders worth? Put in this context, an additional $3.5 billion in compensation seems a much more reasonable request.

XII. THE RONALD REAGAN BALLISTIC MISSILE DEFENSE TEST SITE-KWAJALEIN ATOLL

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[142] Japan and West Germany, for example, had been disarmed by the United States after WW II. A good part of the world was "unaligned." In essence, waiting to see who prevailed.

[143] Attitudes in 1986, when the "final" settlement was reached, were somewhere in between.

Another topic that is specific to the Marshall Islands is the question of the lease on the missile test range at Kwajalein Atoll. Kwajalein was the site of a bloody battle late in the Second World War. It was the main Japanese base in the Marshall Islands. In 1964 the U.S. established a missile test range at Kwajalein Atoll. Kwajalein contains the largest lagoon in the world. An atoll is formed when an islands sinks. The coral reef that surrounds the island is then the only thing that remains out of water. Over millennia, the coral that is out of the water breaks down and soil is formed. Seeds and perhaps sometimes birds are carried on the wind and the atoll receives vegetation and perhaps wildlife. The area of ocean inside the reef is called the lagoon. The water in the lagoon is much more shallow than the water outside the reef. This is because the bottom of the lagoon is the old sunken island. Because of its huge lagoon, Kwajalein made an excellent location for a missile test range. Missiles without warheads could be aimed at the lagoon from thousands of miles away, and in many cases retrieved from the lagoon bottom for examination.

Under the terms the strategic trusteeship by which the United States was in the Marshall Islands, the United States could use portions of the Marshall Islands for military purposes that bore some relationship to the U.S. duty to defend the Marshall's. The U.S. has always taken the position that its ability to defend the Marshall's and its ability to defend itself are inseparable.[144] So using Kwajalein for a missile test range seemed consistent with the duty to defend the Marshall Islands as if they were part of the United States. The argument is similar to that used to justify the nuclear tests. In order to defend the United States, the U.S. government believed that it was important to develop ICBMs[145] that would deter a nuclear attack by the Soviet Union. If the United States was to defend the Marshall Islands is if they were part United States, then it was important to the defense of the Marshall Islands that the U.S. develop weapons that would deter a devastating attack on the United States which would likely render it incapable of defending the Marshalls. Hence developing the ICBM was important to the defense of the Marshall Islands.

As noted, there are a number of reasons why Kwajalein is an ideal spot for a test range. Early ballistic missiles test firings often took place at Vandenberg Air Force Base in

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[144] It should be noted that many Marshall Islanders agree. That is why some Marshall Islanders went to Iraq and their friends and relatives believe they were defending the Marshall Islands by being there.

[145] Intercontinental Ballistic Missiles.

California. Kwajalein was far enough away to approximate firing at the Soviet Union. The huge lagoon provides a margin of safety around the target so that a miss of the precise target would not be disastrous. (Usually these test missiles had a remote control system that allowed them to be destroyed in flight if they were heading in a dangerous direction, but the large lagoon reduced the need for doing that.) Finally, the shallowness of the lagoon (relatively speaking) made it possible to send down divers and recover the test missiles for examination. (The test missiles, of course, had dummy warheads and usually did not explode.)

The U.S. relocated the residents of Kwajalein and paid rent to the land owners. Some of the rent was assumed to trickle down to the displaced residents. A number of the residents were relocated to Ebeye, a nearby atoll and many of them obtained employment with the U.S. government at the base on Kwajalein. Over the years, more and more sophisticated equipment was installed on Kwajalein to track and measure the performance of the missiles. An airport was established that is capable of receiving commercial jets as well as military aircraft. (Kwajalein, for many years, has been a regular stop on the Continental Air Micronesia flights to Majuro, RMI, Pohnpei, Kosras and Truk, FSM and Guam.) A town that in some respects looks like a mid-American suburb has been developed on Kwajalein to house civilian employees as well as military personnel.

Kwajalein has not lost its importance to the United States. Today the U.S. military base there is known as the Ronald Reagan Ballistic Missile Defense Test Site and the U.S. is estimated to have about 3 billion dollars invested in the facility there. When research on the anti-ballistic missile missiles (ABMs) resumed under the administration of President George W. Bush, Kwajalein became the ideal place to test them. The ABMs were installed on Kwajalein to try to shoot down dummy missiles aimed at the lagoon on Kwajalein.

The negotiation of the rent for Kwajalein has always been treated as related to but separate from the negotiation over the aid packages in the RMI-U.S. compact. The RMI government does receive some payment for the use of the island and also tries to negotiate on behalf of the land owners. The landowners also have tried to negotiate on their own behalf and in the past have frequently claimed that what the RMI government considers fair compensation is not.

In 1986, shortly before the proclamation ending the Trust Territory and initiating the Free Association status, the United States and the Marshall Islands concluded the Military Use and Operating Rights Agreement (MUORA) which guaranteed the U.S.

access to Kwajalein until 2066.[146] As noted, there seemed to be very little doubt at the time that the Marshall Islands wanted to continue to lease the island to the U.S.. The Kwajalein lease, it will be recalled, was a significant reason (although perhaps not the only reason) why the RMI did not want to remain a part of the FSM.

Under the agreement, the U.S. pays rent, "impact" funds and grants related to Kwajalein. The U.S. does not deal directly with the landowners. Instead it pays a portion designated for the landowners to the RMI government, which in turn distributes it to the landowners. The grants are to compensate for problems of dislocation created by the use of Kwajalein by the U.S.. At the present time the amount of rental payments is approximately 15 million per annum. In connection with the Compact revision the U.S. extended the MUORA agreement through 2066 with an option on the U.S. part to extend it to 2086. Assuming the agreement is extended, the rental payments by the end could top 32 million dollars a year.

At this writing, the Kwajalein landowners have not yet concluded an agreement with the RMI government. It is not clear how this would or could affect the United States. The Constitution of the Marshall Islands, Section 5, does permit taking property for public use if just compensation is paid. Section 5 is quite a bit longer than the comparable section in the U.S. constitution and contains a number of restrictions on the taking power, including the requirement that the taking be authorized by "a law" which seems to suggest that the law must specifically authorize the taking. If the MUORA is looked up as an international agreement, which it obviously is, then international law would probably require the RMI to exercise its own law in order to fulfil its international obligations.

The U.S. is no doubt wise in staying out of direct dealings with the landowners. The rent money is distributed in accordance with traditional land rights, and the U.S. is well advised to let the RMI handle that. From time to time issues are raised about the equity of the payment distribution. Four landowners receive over 1/3 of the rent payments. Some of these large landowners are receiving well over a million dollars personally each year, in a land where the average income is below $5000. However, they are traditional leaders or chiefs, and by tradition they are supposed to use a substantial portion of this

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[146] Agreement Regarding the Military Use and Operating Rights of the Government of the United States in the Republic of the Marshall Islands Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association (1986). See also U.S. General Accounting Office, *Kwajalein Atoll Is the Key U.S. Defense Interest in Two Micronesian Nations*, GAO-02-119 (January 22, 2002), 44.

money for the benefit of those subject to their political jurisdiction. Most of the people I interviewed thought that they did, and there seems to be relatively little discontent with this arrangement.[147]

I was informed on a confidential basis by government sources that the RMI government believes that it has negotiated a very good deal for the landowners, and that the landowners probably understand that. This individual thought that the issue was one of the chiefs wanting it to appear to their people that their chief played an active and successful role in getting a good deal from the United States. The RMI has decided to pay the landowners only the amount required under the 1986 MUORA until they agree to the revised agreement which provides for higher rental. This is designed to give the landowners some incentive to sign the agreement.[148]

XIII. CONCLUSION

Until twenty years ago, the people of Micronesia could not remember a time when they did not have to share their islands with people from the outside world. In general, the people of Micronesia found their time with America more acceptable than most. They welcomed the U.S. in the 1940's as liberators from the oppressive occupation by the Japanese military. At times they aided Americans at considerable risk to themselves. They chose, and still choose, to remain in free association with the United States after they became independent nations.

The United States has a loyal, dependable and brave set of allies in Micronesia. It has a lengthy friendship with people who take friendship seriously. But the U.S. is putting that friendship to a severe test in its current dealing with the FSM and the RMI. In the name of accountability, the U.S. has sometimes acted in a haughty and highhanded manner, disrespectful of hard-won Micronesian sovereignty. It has sometime been overly rigid in its demands that the FSM and the RMI give in on things that are more important to the FASs than to the U.S..

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[147]Or if it was, no one was willing to talk about it.

[148]Starting this year, the RMI has also eliminated the role the landowners had in determining the use of the "impact funds" that the U.S. pays along with the rent. The landowners claim this was also done to increase the pressure on them to accept the new Kwajalein agreement. See *Parliament Stips Landowner Group From Control of $2M Fund,* PACIFIC MAGAZINE, April 12, 2007.

According to the U.S. delegation to JEMCO and JEMFAC they, too, are learning and are striving to have better relations with their Micronesian counterparts.[149] The record on that is not yet clear. Let us hope it is true. An important strategic position and a friendship of sixty years duration should not be destroyed in a misguided effort to show how toughly we can negotiate with small nations whose representatives by virtue of their culture, come to the table with a spirit of cooperation.

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[149] See note 119 and accompanying text *supra.* In his opening statements to the 2006 JEMCO and JEMFAC meeting, David Cohen, U.S. delegate and chair of both Committees asked, "What can we do to help? How can Compact funds best be deployed to support your vision? How can we work together to make your vision a reality?" U.S. Department of the Interior, August 30 & 31, 2006.

U.S. Secretary of the Interior Dirk Kempthorne visited the FSM in June of 2007. On that occasion he said , "The United States is fortunate to have the Federated States of Micronesia as a friend and ally." Secretary Dirk Kempthorne, quoted in PACIFIC MAGAZINE, June 13, 2007

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