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Compact of Free Association for Micronesia: Constitutional and International Law Issues

Since 1947, the United States has administered a United Nations trusteeship for over 2,000 islands, covering an area as large as the continental United States, and known as Micronesia.[1] As administering authority for the Trust Territory of the Pacific Islands for the last thirty-seven years, the United States has fostered self-government for the people of the islands, and in 1979 provided for the delegation of most governmental functions to their democratically-instituted governments. As a result, the political configuration of the trust territory has been transformed so that it now comprises the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia (a federation formed by the states of Truk, Ponape, Kosrae and Yap), and the Republic of Palau. In a UN-observed plebiscite conducted in 1975, the people of the Northern Mariana Islands approved a covenant with the United States under which that group of islands will become a United States commonwealth upon termination of the trusteeship. In plebiscites conducted in 1983, again with UN observation, the peoples of the other three components of the trust territory approved the future political status of free association as defined in

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[1]The traditional systems of government for these islands were generally not democratic, and the colonial experience under the Germans, Spanish and Japanese was one of subjugation, including dislocation and forced labor. The colonial era ended for Micronesia in 1946 when the U.S. liberated the islands and determined to place them under UN trusteeship rather than treating the islands as a conquered or dependent territory.

the Compact of Free Association signed in 1982 by representatives of the United States and their governments.[2]

This article addresses some of the related constitutional and international legal issues that have arisen in connection with Congressional review of this Compact for the Micronesian islands. Lawyers with international practices should benefit from this analysis and the assessment of its implications, given the trade and development prospects that free association—under the terms of the Compact—holds for this strategic and resource-rich area.

I. The Compact

On March 30, 1984, President Reagan transmitted the Compact of Free Association to Congress.[3] If approved, the Compact will define a new and unique relationship between the United States and two of the constitutional governments of the Trust Territory of the Pacific Islands.[4] Under the Compact, the United States will recognize the authority of the Micronesian associated states to conduct their own internal and foreign affairs, while the United States will retain full authority and responsibility for security and defense matters "in or relating to" the Micronesian states.[5] Once approved and implemented as to all three Micronesian associated states, the Compact will provide the three new governments with economic assistance totalling over $2.5 billion spread out over the initial fifteen-year period of free association and the longer periods of various defense agreements.[6] The assistance which the United States is to provide to the Micronesian states will include the services of the U.S. Postal Service, FAA, CAB, FEMA and the U.S. Weather Service.[7]

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[2]Compact of Free Association, *opened for signature* October 1, 1982 (United States—Federated States of Micronesia, October 1, 1982; United States—Republic of the Marshall Islands, June 25, 1983).

[3]*Id.* For recent report on Compact and history of negotiations, *see* Armstrong and Hills, *The Negotiations for the Future Political Status of Micronesia 1980–1984*, 78 AM. J. INT'L L. 484 (1984).

[4]The Republic of Palau also signed the Compact in 1982, but has not completed its constitutional process for approval of the agreement. *See* Armstrong and Hills, *id.* at 492–493, for explanation of issues delaying Compact approval for Palau. In late 1983, negotiations commenced on possible revisions to the Compact for Palau. In meetings which took place in Guam at the time of the President's visit in April 1984 between Ambassador Fred M. Zeder, the President's Personal Representative for Micronesian Status Negotiations, and Palauan President Haruo Remeliik, the Palauan leader announced the intention of his government to conclude negotiations on a revised Compact and complete the approval process in Palau before November 1984. As a consequence of the state of negotiations with Palau, the Reagan administration has submitted the Compact to Congress for approval as to the Federated States of Micronesia and the Marshall Islands. *See* Letter from President Reagan to the Congress of the United States (March 30, 1984), urging enactment of the Compact of Free Association. 20 Wkly. Comp. Pres. Docs. 44–445.

[5]Compact, *supra* note 2, at Section 311.

[6]*Id.* at Title Two, Art. I.

[7]*Id.* at Title Two, Art. II.

Given the Compact's pledge of the full faith and credit of the U.S. with respect to the bulk of the economic assistance package,[8] the continuation of essential federal services, and the stability created by the U.S. defense presence, the Micronesian associated states have great development potential and could play a key role in the Pacific basin business and trade boom that has been forecasted. This potential was recognized during the Compact negotiations, and the Compact contains trade and tax provisions intended to provide incentives for foreign investment—particularly by U.S. citizens and corporations.[9] Because of their location astride ocean shipping lanes and their extensive fishery zones, the Micronesian states will certainly develop as commercial centers and transshipment points. The potential for Asian tourism in Micronesia has been talked about for years, and with careful planning could be realized over the next decade. All of these aspects of Micronesia's political and economic emergence create opportunities for international lawyers who might have an interest in private or public sector practice in the region.

One issue which received a great deal of attention during the Compact negotiations is that of settlement of claims against the U.S. arising from the nuclear testing program conducted in the Marshall Islands between 1946 and 1958. In connection with those tests, the people of Bikini and Enewetak atolls were relocated and in some cases have not been able to return to their contaminated islands. In addition, on March 1, 1954, the 178 people of Rongelap and Utrik were exposed to radioactive fallout from a nuclear test explosion and have suffered health effects as a result.[10] Since those tests were

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[8]*Id.* at Section 236.

[9]*Id.* at Title Two, Arts. IV and V. For example, under Section 255 the provisions of the U.S. Internal Revenue Code which are applicable to the U.S. territories will apply to the Micronesian states. Section 242 provides that products imported into the customs territory of the U.S. will be treated as if they were from an insular possession of the U.S. for purposes of Headnote 3(a) of the Tariff Schedules. *See* Title Two, Art. V for finance and taxation provisions.

[10]The U.S. conducted 66 nuclear proving tests at Bikini and Enewetak. The United States was authorized by the terms of its agreement with the Security Council to conduct military operations and establish bases in the trust territory, as well as to close any area in the trust territory for security reasons. *See* Trusteeship Agreement *infra* note 17 at Arts. 5 and 13. In the context of global disorder and the dislocation of millions of people in 1946, relocation of 167 people from Bikini and 128 people from Enewetak to other islands so that the atomic testing program could be conducted was probably viewed as a necessary and appropriate measure considering the international security implications of the testing program. Nevertheless, in Section 177 of the Compact, the United States assumes responsibility for compensation owing to Marshallese people affected by the testing program for loss or damage to property or person. Interestingly, in hearings before the Senate Committee on Energy and Natural Resources on the Compact, Senator Hatch (R-UT) asked the Reagan administration to consider an arrangement similar to the Compact's Section 177 to settle the so-called "down-wind" cases arising from the nuclear testing program in Nevada. *See* Statement of Orrin G. Hatch, Hearings on the Compact of Free Association (May 24, 1984). Senate Committee on Energy and Natural Resources, 98th Cong., 2d Sess. The Reagan administration has taken the position that the appropriate forum for addressing the domestic nuclear claims is in the courts of the United States.

conducted the U.S. has provided funding for and has administered a health care program, island rehabilitation, relocation assistance, agricultural and food programs and *ex gratia* payments to the affected individuals, and communities.[11] The cost of these measures has been over $150 million.

Under the Compact, the U.S. has agreed to provide an additional $150 million for the establishment of a permanent fund for the payment of Marshallese nuclear claims.[12] Under the agreement, the Marshall Islands government espouses and settles all claims of the Marshallese people arising from the testing program.[13] In addition to a specific schedule of payments to the peoples of Bikini, Enewetak, Rongelap and Utrik during the first fifteen years following its effective date, the agreement establishes a claims tribunal which will be allocated $43.75 million during that initial period for purposes of adjudicating and paying additional claims. The amount of eight million dollars is provided for the establishment and operation of the tribunal. The agreement contemplates that the $150 million fund will be invested and managed so that the corpus will remain intact at the end of the initial 15-year period, and will be available to provide support and long-term relief to the affected communities in addition to the scheduled payments and services called for by the agreement.

II. Constitutional and Domestic Law Issues Posed

As the preceding general description of the Compact indicates, the proposed free association relationship raises numerous questions of law and policy. As the U.S. constitutional process for approval of the Compact proceeds, it is appropriate to address certain concerns which have been expressed with respect to the procedure the Executive Branch followed in negotiating the Compact, as well as those procedures it proposes be followed in approving the Compact and seeking termination of the trusteeship. Questions have been posed as to whether or not the policy of the present Administration—as well as the three preceding administrations—to seek termination of the trusteeship based on negotiated political status agreements has adequately taken into account Congressional interests and responsibilities with respect to trusteeship affairs. Concerns have also been expressed regarding the constitutional implications of Compact approval in the context of the federal government's legal and political relationships with United States territories.[14]

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[11]*See* U.S. Public Laws 88-485, 94-34, 94-367, 95-26, 95-74, 95-134, 95-348, 95-465, 96-126, 96-205, 96-514, 96-597, 97-100, 97-257.

[12]*See* Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association (on file at the Office for Micronesian Status Negotiations, Washington, D.C. 20240).

[13]*Id.* at Art. X. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

[14]Prior to discussing these issues in some depth below, it is interesting to note that these

A. TERRITORIAL CLAUSE ISSUE

Members of Congress and interested observers have expressed that, pursuant to the territorial clause of the U.S. Constitution,[15] Congress rather than the President should provide for governance of Micronesia in the future to ensure the orderly formulation and implementation of United States policy relating to Micronesia. The contrary view is that due to the unique status of the trust territory, the authority of the political branches of the U.S. government over trusteeship affairs derives from constitutional sources other than the territorial clause, and that the decision to negotiate a new political status for the peoples of the trust territory represents a constitutionally proper exercise of the President's authority to conduct foreign affairs.[16] Moreover, it is suggested that the territorial clause issue is more

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concerns and questions are being raised primarily in the House of Representatives, where the leadership of the concerned committee has indicated that the exhaustive schedule of hearings on the Compact which have been underway since last spring will prevent early House action of the Compact. In the Senate, on the other hand, deliberations on the Compact have not focused on the same questions which have been raised in the House. As a result, the atmosphere in the Senate seems more favorable to early action on the agreement and prompt implementation of the democratic mandate of the Micronesian plebiscites.

There is a high degree of bipartisan interest in and support for the Compact in both Houses of Congress. The fundamentals of free association and much of the substance of the Compact were negotiated by President Carter's chief negotiator, Peter Rosenblatt. However, President Reagan's representative to the status talks, Ambassador Fred Zeder, is given credit as the tough but creative negotiator who tackled the thorny outstanding issues and completed the agreement. Thus, both political parties have a stake in the Compact and can be expected to share in taking credit for delivering on self-determination for the Micronesians.

[15]Congress is recognized as having plenary authority over territories and possessions of the United States under Article IV, Section 3, Clause 2 of the Constitution, which reads: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . ." In light of the territorial clause members of Congress have on numerous occasions questioned the propriety of Executive branch initiatives relating to the administration of territories—including the trust territory. *See*, Statement of Ron de Lugo, Delegate to Congress from the Virgin Islands, Hearings on Budget of the Government of the United States for Fiscal Year 1985, Trust Territory of the Pacific Islands, (Feb. 7, 1984), Subcommittee on Public Lands and National Parks, House Committee on Interior and Insular Affairs, 98th Cong., 2d Sess.; also, Statement of Jonathan M. Weisgall, Legal Counsel for the People of Bikini, *Id.*, for an interesting analysis of this issue. *See* Letters of Senator James A. McClure and Representatives Udall and Lujan, *infra* notes 46 and 47, with respect to Congressional oversight of Executive branch actions affecting territories.

[16]The President's foreign affairs authority derives from the treaty-making power granted under Article II, Section 2 of the United States Constitution, and it is recognized that the President is the sole organ of the federal government in the field of international relations. U.S. v. Curtiss-Wright Export Corporation, N.Y. 1936, 57 S.Ct. 216, 299 U.S. 304, 81 L.Ed. 255. U.S. v. Pink, N.Y. 1942, 62 S.Ct. 552, 315 U.S. 203, 86 L.Ed. 796. Negotiations with representatives of foreign citizens regarding political status agreements which will provide the basis for terminating an agreement between the United States and the Security Council of the UN clearly involves primarily foreign policy interests. *See* note 43 and part II.B. *infra*, regarding applicability of territorial clause to trusteeship affairs. Even where the territorial

academic than of real constitutional substance. By proceeding on the premise that the negotiated instruments which will provide the basis for termination of the trusteeship will be subject to Congressional acceptance as was the instrument of its creation, the Executive Branch has ensured that the constitutional authority of the Congress and the President will be exercised with respect to trusteeship termination in an entirely proper and complementary manner.[17]

Specifically, with respect to agreements establishing future political status arrangements which will be in effect upon termination of the trusteeship, it is submitted that negotiation of appropriate status agreements by a representative of the President and their subsequent approval by both Houses of Congress is the correct constitutional procedure to be employed. This negotiation and approval process is firmly rooted in United States constitutional practice with respect to Congressional-Executive agreements, of which the Trusteeship Agreement and the Northern Mariana Islands Commonwealth Covenant are both relevant examples.[18] Thus, for the executive branch to negotiate the Compact and submit it for approval in the form of a Joint Resolution does not infringe upon Congressional authority to make policy for United States territories, but rather accords with the allocation of constitutional authority over trusteeship affairs which has been established through the separate and combined actions of both branches of government in creating and providing for administration of the trusteeship. Supporting this view is the development and implementation of the Trusteeship Agreement and Congress' role in that process.

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clause is clearly applicable, the President is not foreclosed from acting on behalf of the United States or undertaking policy initiatives with respect to territory or property of the United States. United States v. Midwest Oil Co., 236 U.S. 459 (1914).

[17]The Congressional approval process contemplated for the Compact is essentially the same as that employed to approve and enact the Trusteeship Agreement for the Former Japanese Mandated Islands, approved by the United Nations Security Council April 2, 1947, and by the United States July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189, (hereinafter "Trusteeship Agreement"), under which the United States assumed the role of administering authority for the trusteeship. The joint resolution of July 18, 1947, authorized the President to approve the Trusteeship Agreement following its approval by the Security Council. The draft joint resolution submitted to Congress by President Reagan would approve the Compact, noting its approval by the peoples concerned.

[18]Like the Trusteeship Agreement, the Covenant to Establish the Commonwealth of the Northern Mariana Islands in Political Union with the United States of America was approved in the form of an Executive-Congressional agreement, U.S. Pub. Law 94–241, 90 Stat. 263 (1976), *reprinted* at 48 U.S.C. 1681, note. For discussion of constitutional practice relating to such agreements, *see* McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. (1945) 181, 203–206 and 14 Whiteman, DIGEST OF INTERNATIONAL LAW, 234–240, (1968); also, for views of U.S. Supreme Court respecting international legal and U.S. constitutional status of international agreements other than Article II treaties, *see* Weinberger v. Rossi, 456 U.S. 25 (1982).

1. *The Trusteeship Agreement*

The Trusteeship Agreement between the United Nations Security Council and the United States was negotiated by representatives of the President in the context of an historical series of foreign policy initiatives with respect to the status and disposition of areas detached from enemies as a result of World War II, as well as areas formerly under League of Nations mandates. The principles expressed in the Atlantic Charter with respect to disposition of territory,[19] and the adherence of the United States and twenty-five other nations to those principles in the Declaration of Washington,[20] laid the foundation for inclusion in the United Nations Charter of provisions establishing the international trusteeship system.[21] The United States delegation to the 1945 San Francisco Conference of the United Nations recognized that the Micronesian islands—as both an area detached from the enemy and a formerly mandated territory—would properly be subject to disposition in accordance with the trusteeship provisions to be included in the UN Charter. At the same time, America's experience in the islands during the war made it clear that disposition of the islands, formerly under Japanese mandate, involved special national security considerations for the United States. Thus, the United States proposed that trusteeships for strategic areas be designated as such, and that the functions of the United Nations relating to trusteeships for areas designated as strategic be exercised by the Security Council rather than the General Assembly.[22] This arrangement for strategic trusteeships was incorporated into Chapter XII of the United Nations Charter, and on that basis President Truman proposed on November 6, 1946, that the mandated islands be placed in trusteeship and designated as strategic under terms agreeable to the Security Council and the United

[19]Atlantic Charter, Joint Declaration by the President of the United States and the Prime Minister of the United Kingdom August 14, 1941, (55 Stat. 1603; Executive Agreement Series 236). By this declaration the United States affirmed that all peoples should be restored to their "sovereign rights and self-government," and that no "territorial changes" should occur except in accordance "with the freely expressed wishes of the peoples concerned."

[20]Declaration of the United Nations, signed at Washington, January 1, 1942, (55 Stat. 1600; Executive Agreement Series 236).

[21]*See* Article 77, Charter of the United Nations and Statute of the International Court of Justice, Signed at San Francisco, June 26, 1945, ratified by U.S. Senate July 28, 1945, Approved by President August 8, 1945, entered into force October 24, 1945 (59 Stat. 1031; Treaty Series 993).

[22]*See* Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, The Secretary of State, June 26, 1945, pp. 126–132, *reprinted* at, 1 Whiteman, *Digest of International Law* 734–739 (1968). Also, *see* Bunche, "*Trusteeship and Non-Self-Governing Territories in the Charter of the United Nations*," XIII Bulletin, Department of State, No. 340, Dec. 30, 1945, pp. 1037, 1043; also, Vol. II, *United States Naval Administration of the Trust Territory of the Pacific Islands* (1957) pp. 66–68. For more detailed explanation of UN functions relating to the trusteeship *see* note 67 *infra*.

States.[23] On February 17, 1947, a draft trusteeship agreement was transmitted to the Security Council by the United States representative.[24]

The negotiations and debate which took place in the Security Council regarding the draft agreement bear directly upon our views today about the status of the Trusteeship Agreement and the islands themselves in the context of U.S. constitutional law. The question of the status of the trust territory under the U.S. Constitution and our laws was specifically discussed in connection with Security Council review of Article 3 of the agreement, which reads:

> 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 desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.[25]

The record of Security Council deliberations with regard to this provision reflects that the words "as an integral part of the United States" had appeared after "subject to the provisions of this agreement" in the original United States draft. This language was consistent with language contained in the trusteeship agreements for non-strategic areas which had recently been approved by the General Assembly, and the United States expressly acknowledged that the words "integral part" did not "imply sovereignty over the territory."[26] However, at the request of the Soviet Union that phrase was deleted prior to approval of the agreement by the Security Council. In agreeing to this amendment the United States Representative to the Council, Senator Warren R. Austin, made the following remarks:

> . . . In employing the phrase "as an integral part of the United States," in article 3, my Government used the language of the original mandate and also the language used in six of the agreements recently approved by the General Assembly. It does not mean the extension of United States sovereignty over the territory, but in fact it means precisely the opposite.
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> There has, however, been some misunderstanding on this point and, for the sake of clarity, the United States Government is prepared to accept the amendment suggested by the Soviet Union, and to delete the phrase. In agreeing to this modification, my Government feels that for record purposes it should affirm that its authority in the trust territory is not to be considered as in any way lessened thereby. My Government feels that it has a duty towards the peoples of the trust territory to govern them with no less consideration than it would govern any part of its sovereign territory. It feels that the laws, customs and institutions of the United States form a basis for the administration of the trust territory compatible with the spirit of the Charter. For administrative, legislative and jurisdictional

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[23]*See* 1 WHITEMAN, DIGEST OF INTERNATIONAL LAW, pp. 769–770 (1968).

[24]*Id.*

[25]U.S. T.I.A.S. 1665; 61 Stat. 3301, 3302; 8 U.N.T.S. 189, 192.

[26]Draft Trusteeship Agreement for the Japanese Mandated Islands, op. cit., pp. 4–5; U.S. Delegation Doc. US/S/119, p. 2.

> convenience in carrying out its duty towards the peoples of the trust territory, the United States intends to treat the trust territory as if it were an integral part of the United States. . . .[27]

Upon completion of this and other similar exercises in the formulation of its provisions, the Trusteeship Agreement was agreed upon and approved by the Security Council on April 2, 1947.

After concluding the international negotiating process and obtaining Security Council approval of the Trusteeship Agreement, the President submitted it to Congress. In 1947 members of Congress had serious concerns with respect to creating the trusteeship, just as some members now have concerns regarding its termination. There were members of Congress who wanted to conclude a treaty of peace with Japan under terms which would enable the United States to annex the formerly mandated islands then occupied by the United States,[28] while others were concerned that United States security interests might be compromised by placing the islands under an international legal regime. These and other similar concerns, and the rationale which led members of Congress to support approval of the Trusteeship Agreement notwithstanding certain doubts, found expression on the floor of the House of Representatives on July 11, 1947. On that occasion Congressman Mansfield of Montana made the following remarks:

> . . . Insofar as my own personal views on the mandates are concerned . . . I would prefer to have the United States assume complete and undisputed control . . . We need these islands for our future defense, and they should be fortified wherever we deem it necessary. We have no concealed motives because we want these islands for one purpose only and that is national security. Economically they will be a liability, socially they will present problems, and politically we will have to work out a policy of administration. No other nation has any kind of a claim to the mandates. No other nation has paid the price we have. These views of mine are not new nor are they the results only of my recent investigative trip to the Pacific. Rather, my stand has been accentuated by what I have seen and I am more firmly convinced than ever of our great need for control of the mandates.
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> If, however, it does become necessary to create a trusteeship for these islands, I would favor the proposals made by our State Department and President Truman which would place the mandates under the United Nations with the consideration that they should be cataloged as a strategic area outside the control of the Trusteeship Council. On this basis, supervision would be exercised by the Security Council which has jurisdiction over such strategic areas in the interests of collec-

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[27]U.N. Security Council Off. Rec., 116th Meeting, Mar. 7, 1947, p. 473. The materials cited on this point are discussed at 1 WHITEMAN, DIGEST OF INTERNATIONAL LAW (1968) pp. 777–778.

[28]When the Treaty of Peace with Japan was signed at San Francisco on September 8, 1951, U.S. T.I.A.S. 2490; 3 UST 3169; 136 U.N.T.S. 45, it contained the following acknowledgement that the formerly mandated islands had been placed under the trusteeship system:

> "Article 2. . . (d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan."

> tive security. But, and this is important, the United States has a veto over the Security Council should it ever want to assert effective control . . . It is worth remembering also, that until a treaty of peace is signed with Japan we have no legal title to the mandates.[29]

Thus, the Trusteeship Agreement had certain advantages for the United States. First annexation of the occupied islands would not have been consistent with United States policies and commitments under the Atlantic Charter or the United Nations Charter. The lack of a peace treaty with Japan underscores the fact that the United States acquired no claim of sovereignty over the islands by virtue of its post-war occupation.[30] In this light, the full authority over the islands which the United States would acquire under the Trusteeship Agreement presented a convenient and legitimate means of protecting our national security interests and enabling this country to assume effective control over the islands in a manner consistent with United States policy and international law. Article 15, of the proposed agreement, pursuant to which the terms of the agreement may not be altered or terminated without United States' consent, seemed to ensure that the United States' position in the islands would not change until we desired that it should.[31] No doubt members of Congress also found these negotiated features of the strategic trusteeship arrangement attractive, and on July 18, 1947, Congress authorized approval of the agreement.

2. *Constitutional Sources of Authority*

From the outset, the Trusteeship Agreement was interpreted ambiguously and implemented with a degree of political ambivalence. On one hand, the United States acknowledged that it did not acquire sovereignty over the islands and that the trust territory would not be politically or constitutionally integrated into the United States by virtue of the Trusteeship Agreement. On the other hand, the United States Representative to the Security Council stated clearly on the record of its proceeding that for the purpose of implementing Article 3 of the Trusteeship Agreement "the United States intends to treat the trust territory as if it were an integral part of the United States."

The view of the United States that it had the authority to treat the trust territory as if it were an integral part of the United States is perhaps one

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[29]93 CONG. REC. 8733 (1947).

[30]Fleming v. Page, 50 U.S. (9 How.) 603, 614 (1850); Dooley v. United States 182 U.S. 222, 21 S.Ct. 762, 45 L.Ed. 1074; United States v. Hackabee, Ala. 1873, 83 U.S. 414, 16 Wall. 414, 21 L.Ed. 457; 10 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, 547–548 (1968). Also *see*, Sec. Council Off. Rec. 113th Meeting, p. 413.

[31]In addition to United States ability to veto adverse Security Council action regarding the trusteeship, to which Mr. Mansfield alluded in his remarks, Article 15 of the Trusteeship Agreement states:

> The terms of the present agreement shall not be altered, amended or terminated without the consent of the administering authority.

factor which helped spawn the proposition that Congressional authority over trusteeship affairs derives primarily from the territorial clause. The better view, however, is that the power of Congress to legislate with respect to the trust territory flows from the terms of the Trusteeship Agreement and is an incident of Congressional authority to provide for the implementation of that agreement under Article 1, Section 8 of the Constitution—the necessary and proper clause.

It is not difficult to understand how ambiguity may have arisen in this respect. In ascertaining the proper place to situate trusteeship affairs within our constitutional system it was clear that the trust territory could not be regarded as having the same constitutional status as one of the states. It was inevitable that this new political entity would be regarded as having a constitution analogous to the other policies within our constitutional family which—although not states—are integral parts of the United States; *i.e.*, the United States territories.[32] Since Congressional authority over territories flows from the territorial clause, it was natural enough to assume Congress would act with respect to the trust territory in the same constitutional context.

Though not literally or legally the "territory" or "property" of the United States within the meaning of the territorial clause, the trust territory was in many ways treated as such, and could not conveniently be treated otherwise administratively, as distinguished from legally, given the unique characteristics of United States constitutional federalism. Because trusteeship administration was unprecedented in this nation's constitutional history and practice with respect to territories, in performing its role as administering authority the government of the United States has acted in a manner consistent with its actions concerning the other territories. For example, the committees of Congress which exercise jurisdiction over the territories have been given responsibility for the trust territory, and over the years Congress has passed legislation extending to the trust territory and its citizens many of the domestic programs and benefits provided to United States territories and possessions.[33]

On the other hand, on numerous occasions United States courts have ruled that the trust territory is a foreign area and not under United States sovereignty.[34] While issues regarding application of the United States' Con-

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[32]*See* part IIB *infra* for discussion of constitutional and legal status of trust territory as compared to that of the territories.

[33]*See, e.g.*, Pub. L. No. 97–110 (1981), 95 Stat. 1513, extending certain banking deposit insurance benefits; Pub. L. No. 92–318 (1972), 86 Stat. 350, as amended by Public Law 96–374 (1980), 94 Stat. 1501, extending land grant college aid. Numerous social assistance programs and services have also been extended to the trust territory.

[34]*See* Callas v. United States, 253 F. 2d 838 (2d Cir. 1958); *cert. denied*, 357 U.S. 936 (1958); Gale v. Andrus, 643 F. 2d 828–30 (D.C. Cir. 1980); Commonwealth of the Northern Mariana Islands v. Atalig, 723 F. 2d 682, 684 (9th Cir. 1984).

stitution and laws to the trust territory generally have been correctly decided by reference to terms of the Trusteeship Agreement, the courts also have occasionally, and with sometimes anomalous results, drawn certain analogies between the trust territory and other United States territories.[35] In construing the constitutionality of the Northern Mariana Islands Commonwealth Covenant, the United States law which provides for the transition of the Northern Mariana Islands from trusteeship status to that of an unincorporated U.S. territory, the courts have even applied the Insular Cases territorial clause analysis in a case dealing with a part of the trust territory.[36] Finally, pursuant to Congressional authorization, Presidential Orders and Orders of the Secretary of the Interior, the policy-level responsibility within the United States government for the fiscal and administrative affairs of the trust territory has generally reposed with the same officials within the Department of Interior who have had cognizance of territory affairs.[37]

It has been neither illogical nor inconsistent with the Trusteeship Agreement for the United States, in its constitutional process for implementing that agreement, to administer the trust territory in a manner similar to the way it administers United States territories. This has been consistent with and taken advantage of our government's experience dealing with off-shore, non-state areas. However, in concluding the Trusteeship Agreement, United States negotiators ensured that Congress would not be required to rely upon theoretical postulations about the application of the territorial clause in order to fulfill its institutional responsibility and exercise constitu-

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[35]*See, e.g.*, In re Bowoon Sangsa Co., 720 F.2d 595 (9th Cir. 1983).

[36]*See* Atalig, *supra* note 34, upholding authority of Congress in enacting NMI Covenant to determine extent of application of Constitution to the NMI during the transition from trusteeship to territorial status upon trusteeship termination in accordance with Insular Cases; *i.e.*, Downes v. Bidwell, 182 U.S. 244 (1901); Dooley, *supra* note 30; De Lima v. Bidwell, 182 U.S. 1 (1901); Balzac v. Puerto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903). *See* note 49 *infra*.

[37]At the time of approval of the Trusteeship Agreement on July 18, 1947, President Truman issued Executive Order 9875, which delegated responsibility for civil administration of the trust territory to the Secretary of the Navy. That interim arrangement ended on June 29, 1951, when the President issued Executive Order No. 10265, transferring civil administration to the Secretary of Interior. Arrangements for administration of the islands continued to be prescribed by Presidential order until June 30, 1954, when Congress enacted 48 U.S.C. 1681; 68 Stat. 330, authorizing continued administration in accordance with Presidential orders. By Executive Order No. 11021, effective July 1, 1962, President Kennedy provided for continued administration by the Secretary of the Interior. Under a succession of Interior Secretarial Orders the administrative organization which became the Trust Territory Government was established. On April 25, 1979 the Secretary of the Interior issued Secretarial Order 3039, which provided for transfer of governmental functions to the democratically instituted constitutional governments of Palau, the Marshall Islands and the Federated States of Micronesia pending trusteeship termination. While the TTPI High Commissioner and the High Court continue to retain oversight authority under Secretarial Order 3039, most functions of government have been transferred to the constitutional governments. The legislative function in the TTPI reposed with the Congress of Micronesia from 1964 to 1979, and is now vested in the legislatures of Palau, the Marshall Islands and the Federated States of Micronesia under their constitutions.

tional authority with respect to the trust territory. In addition to the full authority of the United States under Article 3 to make its laws applicable to the trust territory—which in general requires Congressional action—the Trusteeship Agreement itself provides in Article 12 that:

> The administering authority shall enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory.[38]

Inclusion of such a provision in an agreement to be submitted to Congress and approved as a Congressional-Executive agreement certainly suggests, as stated in the House Report on the resolution authorizing approval of the agreement, that the Executive branch recognized that "both Houses of Congress will be concerned in the future with legislation necessary for the governing of the trust territory."[39]

The authority of Congress over trusteeship affairs, and more specifically the authority to treat the trust territory in the same manner as the territories in some respects, is further established by Article 9 of the Trusteeship Agreement:

> The administering authority shall be entitled to constitute the trust territory into a customs, fiscal, or administrative union or federation with other territories under United States jurisdiction and to establish common services between such territories and the trust territory where such measures are not inconsistent with the basic objectives of the International Trusteeship System and with the terms of this agreement.[40]

Congress has not authorized treatment of the trust territory as other than a foreign territory for purposes of United States customs, and has never created any organic union between the trust territory and other United States jurisdictions over which this country exercises sovereignty; though legislation which would have done so has been considered.[41] Nevertheless, commentary accompanying the United States draft Trusteeship Agreement makes it clear that Article 9, like article 3, contemplates that Congress will play its full constitutional role in implementing the provisions of the Trusteeship Agreement.[42]

Finally, implementation of the trusteeship has required regular appropriations and numerous special legislative actions without which the Executive

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[38]U.S. T.I.A.S. 1665; 61 Stat. 3301, 3304; 8 U.N.T.S. 189, 198. The comment accompanying this provision in the U.S. draft agreement stated that: "This article constitutes an international commitment upon the part of the United States to implement by legislation the provisions of the trusteeship agreement."

[39]H.R. REP. No. 889, 80th Cong., 1st Sess. (1947), *reprinted* in 1947 U.S. CODE CONG. & AD. NEWS 1317.

[40]U.S. T.I.A.S. 1665; 61 Stat. 3301, 3302; 8 U.N.T.S. 189, 196.

[41]*See, e.g.*, S 2992, 82d Cong. 2d Sess., The Organic Act of the Trust Territory of the Pacific Islands.

[42]Draft Trusteeship Agreement for the Japanese Mandated Islands, op. cit., pp. 9–10; U.S. Delegation Doc. US/S/119, p.6.

branch could not have efficiently and effectively administered the trusteeship. Clearly, both under the terms of the Trusteeship Agreement and through the express and implied powers of Congress which must be exercised in connection with its implementation—including the necessary and proper clause of Article I, Section 8—the authority for and requirement of Congressional action regulating trusteeship affairs is broadly based.

For these reasons, and in view of the unique constitutional nature of the trusteeship, there seems to be little purpose to be served by attributing congressional authority over trusteeship affairs to the territorial clause.[43] Even less desirable would be the theoretical constitutional dichotomy between congressional authority and that of the President with regard to trusteeship affairs, most particularly in matters involving future political status and trusteeship termination. Rather, Congress and the President should proceed with administration and termination of the trusteeship in accordance with their respective institutional responsibilities and the approach which has been established through almost four decades of constitutional practice relating to the trusteeship.

Thus, just as the President's representatives negotiated the terms for creation and administration of the trusteeship, it is appropriate for the President's representatives to negotiate the terms which will provide the basis for its termination.[44] In both cases, the negotiating process involves

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[43]The Supreme Court has held that the territorial clause applies as an incident of acquisition by the United States of the territory involved. United States v. Kagama, Cal. 1886, 6 S. Ct. 1109, 118 U.S. 380, 30 L.Ed. 228; Sere v. Pitot, 1810, 10 U.S. 332, 6 Cranch 332, 3 L.Ed. 240; DeLima v. Bidwell, *supra* note 36. Arguably, since the United States did not acquire or annex the islands of the trust territory the Trusteeship Agreement must be viewed as an international agreement enacted into law by Congress under the necessary and proper clause (Article I, Section 8) of the Constitution, rather than the territorial clause. While the Supreme Court, in 1948, did state that the territorial clause does not necessarily depend upon an assertion of sovereignty (Vermilya-Brown v. Connell, 335 U.S. 377, 381 (1948)), that case involved enforcement of wage and hour protections for personnel on a U.S. base overseas, and the reference to sovereignty was apparently made in the narrow context of the facts in that case and was not attributed to any established line of cases addressing this issue. Thus, the *Vermilya-Brown* case seems to stand only for the proposition that where the United States by lease or international agreement acquires the right to take possession of and use an area in another country there arises a property interest subject to Congressional authority under the territorial clause. No one would suggest that the authority and responsibility of the United States under the Trusteeship Agreement is limited to the narrow type of property rights which the Court in *Vermilya-Brown* relied upon in concluding—over a vigorous dissent in this 5-4 decision—that an American base in Bermuda was a "possession" of the United States within the meaning of the statute being construed. If applicable at all to the trust territory, *Vermilya-Brown* would seem only to provide a basis for determining the applicability of a specific statute in question to a U.S. base in the trust territory, and certainly should not be cited for purposes of determining the constitutional and legal status of the trust territory.

[44]Four Presidents have appointed personal representatives for Micronesian status negotiations, each of whom has held the rank of Ambassador. President Nixon's representative was Franklin Haydn Williams, who served from 1971 to 1976. Philip W. Manhard served as President Ford's acting representative from 1976 until President Carter appointed Peter R.

United States international relations with the United Nations and the peoples of the islands. The fact that the sequence of negotiations and procedure leading to termination of the trusteeship is the reverse of that leading to its creation (in that agreement and approval of the peoples concerned is a prerequisite for Congressional approval and termination of the agreement with the United Nations) demonstrates that the United States has faithfully and successfully fulfilled its obligations under the trusteeship to promote self-determination for the peoples of the trust territory. Just as Congress in 1947 authorized the President to approve the Trusteeship Agreement which his representatives had negotiated, the President now requests Congress to approve the political status arrangements which have been negotiated and thereby provide the bases for termination of the Trusteeship Agreement.[45]

B. Implications of the Compact for Federal-Territorial Relations

The effort to obtain Congressional approval of the Compact of Free Association comes at a time when the existing legal and administrative regime for governance of United States territories is the subject of congressional policy review.[46] Territorial leaders, members of Congress and commentators are discussing proposals for reorganization of the federal-territorial relationship.[47] It is in this context that numerous questions have arisen regarding the constitutional nature of the free association relationship as defined in the Compact, as well as the impact which its establishment may have upon the legal and constitutional status of United States territories.[48]

The preceding discussion of the legal nature and effect of the Trusteeship Agreement provides the basis for making important constitutional distinc-

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Rosenblatt to the post in 1977. In 1981 President Reagan appointed Fred M. Zeder II to be his personal representative for the negotiations. Presidents Carter and Reagan made their appointments to this post with the advice and consent of the Senate.

[45]*See* Letter from President Reagan to Congress, *supra* note 4.

[46]*See* Letter to Charles A. Bowsher, Comptroller General of the United States, from Senator James A. McClure, Chairman of the Committee on Energy and Natural Resources, United States Senate, (March 25, 1983), requesting the General Accounting Office to "undertake a study of United States policy for the territories and the insular areas under its administration." That study is currently being conducted by the National Security and International Affairs Division of the GAO.

[47]*See* Letter from Representatives Morris Udall and Manuel Lujan, Jr., Chairman and Ranking Republican Member, respectively, House Committee on Interior and Insular Affairs, to Antonio B. Won Pat, Delegate to Congress from Guam, (October 20, 1983), regarding H. Con. Res. 131, calling for President and Governor of Guam to appoint negotiators to discuss future of federal-territorial relations; also, Leibowitz, United States Federalism: States and Territories, 28 Am. U.L. Rev. 449 (1979).

[48]*See* statements of Delgate to Congress from the Virgin Islands, Ron de Lugo, *supra* note 15.

tions between the legal status of the trust territory and that of the United States territories.[49] Under the Compact of Free Association the most basic of these distinctions, between the territories and the freely associated states, will continue to be valid. A thorough understanding of them may be useful in assessing the impact, if any, that the Compact may have upon relations between the federal government and the territories.

1. *Prior U.S. Practice*

Prior to assumption by the United States of its responsibilities as administering authority under the Trusteeship Agreement, United States constitutional practice with respect to territory other than states was limited to the exercise of jurisdiction over two basic types of territories. The first type was that of dependencies undergoing the transition to statehood. During this nation's continental expansion these territories were generally governed and incorporated into the United States in accordance with procedures developed under the Northwest Ordinance of 1787.[50] The other type of territory familiar in United States constitutional practice is that of the off-shore territories which the United States has annexed by treaty or purchase, beginning at the end of the last century and which it has not "incorporated into the United States," i.e., to which it has not expressly extended the provisions of the United States Constitution. In the Insular Cases, the Supreme Court has defined the constitutional status of these territories as that of "unincorporated territories" under United States sovereignty.[51] The process leading to the acquisition of each of these two types of territories usually involved some action or initiative by the President under the military or foreign affairs powers.[52] However, acts of Congress under the territorial clause have been required to constitutionally effect the transition of territory from the status of a foreign area to statehood,[53] or, in the case of the off-shore territories, to enact measures providing for their governance.[54]

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[49]References in this discussion to the United States territories generally are to the off-shore territories of Guam, Puerto Rico, Virgin Islands, American Samoa and a number of smaller possessions. Under the Covenant to establish the Commonwealth of the Northern Mariana Islands, *supra* note 7 at Sec. 101, the islands of which that component of the trust territory is comprised will become a territory upon termination of the trusteeship.

[50]Northwest Territory Ordinance of 1787, Art. V, appears in Act of August 7, 1789, 1 Stat. 50.

[51]*Supra*, at note 36.

[52]U.S. Const. art. II, sec 2.

[53]*See* Texas v. White, Wall 700 (U.S. 1868).

[54]Constitution of the Commonwealth of Puerto Rico, 48 U.S.C. Sec. 731d (1950); Revised Organic Act of the Virgin Islands, 48 U.S.C. 1541 *et seq.* (1954); Organic Act of Guam, 48 U.S.C. Sec. 1421 (1976). American Samoa is an unorganized unincorporated territory which is governed as directed by the President pursuant to 48 U.S.C. 1661(c). Under Exec. Order No. 10264, June 29, 1951, the President assigned responsibility for administration of American

2. *U.S. Territories and Trust Territories*

Establishment of the Trust Territory of the Pacific Islands under the terms of the Trusteeship Agreement created an entirely new type of political entity to be governed in accordance with our constitutional processes. For in contrast to the circumstances of areas undergoing the transition to the constitutional status of statehood or that of the unincorporated territories, the agreement under which the United States acquired control of the trust territory did not contemplate that the area would become subject to United States sovereignty by operation of its provisions alone,[55] or as a result of United States constitutional measures for its approval and implementation.[56] Rather, in entering into the Trusteeship Agreement, the United States agreed to exercise its rights and authority in a manner consistent with the terms of the agreement and the right of the peoples of the area under United States administration to full political self-determination.[57] Thus, United States ability under the Trusteeship Agreement to exercise governmental authority on behalf of the peoples of the trust territory must be viewed as arising not from integration of the trust territory into our constitutional system as has been done in the case of the territories, but rather as an incident of United States responsibility and authority under the unique and constitutionally unprecedented terms of the Trusteeship Agreement.

Like the Trusteeship Agreement as it now applies to the trust territory, the Compact will not integrate the freely associated states into the United States constitutional system in the same sense that the territories have been incorporated into the federal process for the exercise of this nation's sovereignty. To the contrary, under the Compact, the United States will no longer have the full authority for governmental affairs it has under the trusteeship, and will not have the jurisdiction and legislative power it has now, except where specifically provided by the Compact. The Compact will enable the United States to continue to exercise a precisely delimited degree of governmental authority on behalf of the peoples concerned, who will have and exercise their sovereignty through their constitutional governments.

Samoa to the Secretary of the Interior (*see* 16 FR 6419). The executive, legislative and judicial functions of government are provided for under Secretary of the Interior Order No. 3009, dated June 27, 1978.

[55]*See* e.g., Treaty of Paris, Dec. 10, 1898, United States-Spain, 30 Stat. 1754, T.S. No. 343.

[56]*See* Constitution of the Commonwealth of Puerto Rico, *Id.* providing for Congressional approval of constitution of Puerto Rico under terms consistent with the United States Constitution applicable; also, Northern Mariana Islands Commonwealth Covenant *supra* note 13 at Sec. 101, providing for extension of United States sovereignty to the Commonwealth upon approval and full implementation of the agreement.

[57]Trusteeship Agreement, *supra* note 17 at Article 6.

3. *Trusteeship Agreement and Compact*

In this context, it is interesting to note that there are two fundamental differences between the Trusteeship Agreement and the Compact. First, the Trusteeship Agreement is between the United States and the Security Council and provides for United Nations functions in relation to administration of the trusteeship, while the Compact—which will provide the basis for terminating the United Nations role—is directly between the United States and the peoples of the islands exercising their sovereignty through their constitutional governments.[58] Secondly, the Trusteeship Agreement can be terminated only with the agreement of the United States, while the Compact can be terminated in accordance with terms mutually agreed upon and set forth in the provisions of the Compact and its related agreements.[59] However, United States authority to prevent any threat to international peace and security in the Micronesian region will be preserved under the Compact and can be terminated only by mutual agreement of the United States and the Freely Associated States. Thus, underlying the very differences just described, there is a fundamental similarity between the two in that the overall security and defense authority of the United States established under the trusteeship will continue after trusteeship termination in accordance with the terms of the Compact, and can not be terminated without the agreement of the United States.[60]

The political status of the trust territory and, prospectively the freely associated states, is distinct from that of our territories as a matter of constitutional and international law. The territories are under United States sovereignty;[61] the off-shore territories are American soil and their peoples are United States citizens or nationals. Though the status of some of the United States territories regularly receives comment in the context of United Nations decolonization proceedings, political developments in the off-shore possessions indicate no support for any move to "internationalize" political status issues in the territories. Indeed, territorial leaders seem to be operating under a popular mandate to keep federal-territorial relations "in the family."[62]

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[58]Compact of Free Association, *supra* note 2 at Section 111.

[59]*Id.*, at Section 441, *et seq.*

[60]*See, Id.*, at Section 462 for list of related agreements which, *inter alia*, provide for long term United States authority and responsibility for regional security and defense, including specific military operating rights, as well as United States authority to deny to the armed forces of third countries access to the freely associated states. Under the provisions of the Compact these security and defense arrangements would survive termination of free association and remain in effect in accordance with the terms of the related agreements. United States authority to deny third country access for military purposes cannot be terminated without United States agreement.

[61]*See supra* note 55.

[62]*See, e.g.*, UN Chronicle, Vol. XXI, No. 1, January 1984, Report of Fourth committee (Decolonization), pp. 61–64, noting that 75 percent of the Guamanian people voting in a 1983

Those concerned with the potential impact of the Compact upon the territories must recognize that because of the controlling nature of the political and legal distinctions, the political status arrangements which the United States makes with the peoples of the trust territory do not create a precise or binding constitutional precedent which must be followed in federal relations with the territories. Arguably, these legal distinctions provide the basis for separation of policy and practice.

However, Congress' current policy review with respect to the territories and the Compact of Free Association is an historic opportunity to weave into whole cloth the somewhat disparate strands of United States' policy and law applicable to the different types of territories and political entities having a legal governmental relationship to our federal government. The history of this nation's constitutional practice with respect to territories is one of adaptation to changed circumstances.[63] The political coming of age of the peoples of the trust territory and redefined aspirations of the peoples of the territories require a reassessment of our relations with the different types of non-state polities in the United States' political family and a translation of the distinctions which exist between them into viable legal constitutional relationships and practice.

Although no attempt is made here to resolve the policy issues involved, Congressional consideration of the Compact and the state of federal-territorial relations provides an opportunity to clarify the precise legal nature of relations between the territories, the trust territory or its successors and the federal government. From such a basis, programs and policies appropriate to the status of these various political entities may be formulated. For example, the freely associated states will enjoy many benefits of association with the United States which until now only the territories have received, while other aspects of the relationship between the United States and the territories will not be compatible with the political status of free association. While certain features of free association may seem attractive to the territories, the Covenant establishing the NMI Commonwealth clearly represents a more appropriate model than the Compact for reorganizing or

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political status referendum voted for continued status as a United States territory. Also, see Crawford, *infra* note 74 at 371–372, regarding UN recognition of Puerto Rico's political status as a United States territory.

[63]The Records of the Federal Convention of 1787 (M. Farrand ed. 1937) reflect that the territorial clause as finally included in the Constitution was intended to prevent disputes between the states or between the states and the federal government over disposition of the Western territories. The Insular Cases, *supra* note 36, demonstrate that constitutional practice regarding territories is evolutionary as the United States establishes relations with new types of territories. As discussed in part II.A.1 *supra*, the history of the Trusteeship Agreement demonstrates that the President and Congress are able to respond in a creative manner to unprecedented foreign affairs policy requirements such as those posed by United States interests following World War II in administering islands not under this nation's sovereignty.

improving legal and political relations between the territories and the federal government.[64]

III. International Legal Aspects

In addition to being unprecedented in United States constitutional practice, the free association relationship defined in the Compact is unique in international practice as well. Free association is an internationally recognized political status available to the peoples of non-self-governing territories as a basis for termination of their non-self-governing status.[65] The Compact of Free Association will establish a political relationship between the United States and the freely associated states. It will constitute a valid basis for international recognition that the Federated States of Micronesia and the Marshall Islands have entered into the political status of free association with the United States.

A. Bases for Termination of Non-Self-Governing Status

Three basic political status options are internationally recognized as valid bases for termination of non-self-governing status: emergence as an independent state, incorporation into an independent state, or free association with an independent state. The principles and requirements associated with these three avenues for termination of non-self-governing status have been established through the international practice of states with respect to non-self-governing territories, including the UN General Assembly's adoption of resolutions addressing these matters.[66] Of those resolutions, perhaps the most authoritative in the present context is Resolution 2625 (XXV) of October 24, 1970, the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, which specifically recognizes free association as one of the legitimate political statues available to non-self-governing territories. While measures of the General Assembly are not directly applicable to a trust territory designated as "strategic" under Article 82 of the UN Charter, the distinctions which must be drawn between the strategic trusteeship and other trusteeships and non-self-governing territo-

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[64]The NMI Commonwealth Covenant, at Sections 105 and 904, represents a creative and innovative approach to the issues of federal supremacy, international affairs and organic legislation which have been sources of friction in federal-territorial relations. New approaches to immigration and taxation isues are also possible.

[65]G.A. Res., 2625, 25 U.N. GAOR Supp. (No. 28) 121 U.N. Doc. A/8028 (1970); G.A. Res. 1541, 15 U.N. GAOR Supp. (No. 16) 29, U.N. Doc. A/4684 (1960).

[66]*Id.* Also, *see* G.A. Res. 1514, 15 GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1960); G.A. Res. 742, 8 U.N. GAOR, Supp. (No. 17) 21, U.N. Doc. A/2630 (1953).

ries relate primarily to the allocation of functions between the General Assembly and the Security Council, and do not run to the forms of self-government available to their peoples.[67] Consequently, there is no reason to doubt the relevance of Resolution 2625 in discussing the future political status process in the Trust Territory of the Pacific Islands, even though it is the only strategic trusteeship. Accordingly, the three political status options recognized as being available to nonself-governing territories generally must be viewed as forms of self-government available to the peoples of the Pacific islands trusteeship.

The Compact of Free Association was negotiated within the framework of the Hilo Principles,[68] which define a valid basis for the United States and the peoples of the trust territory to enter into the relationship of free association.[69] The Compact represents mutual agreement between the United States and the constitutional governments of the Federated States of Micronesia (FSM) and the Marshall Islands as to the specific terms of free association.[70] Approval of the Compact by the peoples concerned in UN-observed plebiscites provides the basis for international recognition of the free association relationship defined in the Compact as a valid political status for the FSM and the Marshall Islands upon termination of the trusteeship.[71] In instituting self-government for the peoples of the trust territory and terminating the trusteeship in favor of a new political status, the controlling principle under international law is that the form of self-government and political status established be in accordance with the freely expressed wishes of the peoples concerned.[72]

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[67]Chapter XI and Article 85 of Chapter XII of the UN Charter enable the General Assembly to take cognizance of matters relating to both non-self-governing dependent territories which were not placed under trusteeship and the ten trust territories established under Chapter XII but not designated as strategic under Article 82 of the Charter. Chapter XII, Article 83, of the UN Charter designates the Security Council as the body which exercises the functions of the United Nations relating to trusteeships designated as strategic. In accordance with Article 83 of the UN Charter and S.C. Res. 70, 4 U.N. SCOR (415th mtg.) 12, U.N. Doc s/inf/3 Rev. 1 (1949), the Security Council has been assisted in performing its functions relating to the strategic trusteeship by the UN Trusteeship Council.

[68]Statement of Agreed Principles for Free Association, signed by the United States and Representatives of the peoples of the Trust Territory, April 9, 1978, at Hilo, Hawaii.

[69]*See* Armstrong, *The Emergence of the Micronesians into the International Community: A Study of the Creation of a New International Entity*, 5 BROOKLYN J. INT'L L. 207, 226–227, 260–261 (1979).

[70]Compact of Free Association, *supra* note 2 at Article VII, Title Four.

[71]The Compact was approved by the people of the FSM by 78 percent on June 21, 1983, and by the people of the Marshall Islands by 58 percent on September 7, 1983. The Compact was approved by the governments of the FSM and the Marshall Islands in accordance with their constitutions on September 2nd and 20th, respectively, 1983.

[72]This principle was expressed in the Atlantic Charter, *supra* note 19, and was fundamental in formulation of the provisions of the UN Charter establishing the trusteeship system (Chapter XII, Article 76). *See* 1 WHITEMAN, DIGEST OF INTERNATIONAL LAW, 731-745 (1968). Also, *see* G.A. Res. 1514, *supra* note 65, which by its language applies to trust territories but must in light

B. The Compact and Free Association in International Law

For purposes of discussion and analysis it may be instructive to measure the Compact against the theoretical standards which have been suggested by legal scholars examining in the abstract free association as a political status. For example, Professor Crawford[73] has recommended that the following criteria be applied in determining the legitimacy of a free association relationship: (1) the association must be freely chosen by the peoples of the territory; (2) the terms of association must be clearly and fully set forth, in a form binding on the parties; (3) the associated territory must have substantial powers of internal self-government; (4) the reserved powers of the metropolitan state (which will usually be those of foreign affairs and defense) should not involve substantial discretions to intervene in the internal affairs of the associated state; and (5) there must be a procedure for termination of the association which should be as accessible to the associated state as to the government of the metropolitan state and which can be viewed as a continued expression of the right of the peoples concerned to self-determination.[74]

Without necessarily adopting these broadly-stated principles, the Compact of Free Association effectively satisfies each of these suggested criteria.

(1) By its own terms, the Compact cannot come into effect until, *inter alia*, it has been approved by the peoples concerned.[75] This requirement has already been satisfied.[76]

(2) The terms of the free association relationship defined in the Compact are set forth in clear statements of controlling principles and detailed treatment is given to every foreseeable facet of the relationship.

(3) The freely associated states will be fully self-governing under their constitutions. The United States will retain no direct authority over their internal affairs except where security and defense matters are involved.[77] In addition to full internal self-government, under the Compact the freely associated states will have authority over their foreign affairs. This authority is to be exercised on the basis of government-to-government consultation

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of Article 83 of the Charter—be read as inapplicable to the strategic trusteeship. Nevertheless, even in the context of this strongly-worded resolution calling for acceleration of the process for termination of the non-self-governing status of dependent and trust territories, recognition is given to the principle that this goal must be accomplished "in accordance with the freely expressed will and desire" of the peoples concerned.

[73]Dr. James Crawford, Barrister and Solicitor of the High Court of Australia, Senior Lecturer in Law, University of Adelaide.

[74]J. Crawford, The Creation of States in International Law, 376 (1979).

[75]Compact of Free Association, *supra* note 2 at Sec. 411.

[76]*Supra* note 71.

[77]Compact of Free Association, *supra* note 2 at Sections 111, 311 and 352.

and cooperation, but the separate authority and responsibility of the freely associated states in this area is clearly established.[78]

Under the Compact, the freely associated states will arguably exercise greater authority over their internal affairs, particularly as affected by foreign affairs matters, than, for example, the Cook Islands. The significance of this comparison lies in the fact that the Cook Islands is a freely associated state recognized as internally self-governing by the international community.[79] Under the Cook Islands free association arrangement with New Zealand, the latter retains final authority and responsibility for defense and external affairs. Consequently, in theory Cook Islands' authority is limited to control of internal affairs which involve neither defense nor external affairs issues. In light of the inter-relationships between internal and external affairs in such areas as trade and economic development, it would seem that the Cook Islands is, at least in principle, without final authority in many areas where internal and external affairs overlap. In contrast, under the Compact both internal and external affairs will be within the scope of freely associated state authority under the Compact, except where defense interests are directly involved. Since the Cook Islands is internationally recognized as having achieved "full internal self-government" in free association with New Zealand,[80] it would seem that the same result would necessarily obtain with respect to the freely associated states under the Compact.

(4) To ensure that the separate authority and responsibility of the United States and the freely associated states under the Compact can be exercised in a compatible manner, the freely associated states agree to refrain from actions that the United States determines, after consultations with the government concerned, to be incompatible with United States authority and responsibility for defense matters.[81] This mechanism provides the most narrowly drawn procedure possible given the full authority and responsibility of the United States under the Compact for security and defense matters in the freely associated states.

This procedure appears to grant to the United States a lesser degree of discretion to intervene in the freely associated states than has been established under the Cook Islands association with New Zealand. For in the case of the Cook Islands, the Queen is the Head of State in right of New Zealand. Executive authority is vested in her and exercised through the Prime Minis-

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[78]*Id.* at Sections 121–127

[79]G.A. Res. 2064, 20 U.N. GAOR, Supp. (No. 14) 56–57, U.N. Doc A/6014 (1965). A similar free association relationship between New Zealand and Niue was also approved by the General Assembly, G.A. Res. 3285, 29 U.N. GAOR, Supp. (No. 31) 98, U.N. Doc. A/9631 (1974).

[80]*Id.* at G.A. Res. 2064.

[81]Compact of Free Association, *supra* note 2 at Sec. 313.

ter of New Zealand with the advice of a local council. In the exercise of external affairs and defense authority the Prime Minister of New Zealand consults with the Premier of the Cook Islands. In contrast, under the Compact the executive authority of the freely associated state governments, including the foreign affairs authority, is vested in the chief executive of the constitutional government, and exercised by such official in the name of the freely associated state in its own right. Because the freely associated states will have autonomy and authority in areas that are beyond the authority of the Cook Islands, the freely associated states will be engaging in activities on an international plane—as well as internally—in areas which could bring their actions into conflict with United States security and defense functions. In view of the foreign affairs authority which the freely associated states will have a requirement arises for a procedure through which a final and binding determination of prevailing authority can be made. Because of the historical factors underlying the United States decision to place the islands under a strategic trusteeship on the terms set forth in the Trusteeship Agreement—factors which properly affect the terms under which the United States would be prepared to terminate that agreement—it was agreed in the Compact that the authority and responsibility of the United States should prevail where an action of an associated state would have an impact upon and be inconsistent with security and defense interests.[82]

(5) Approval of the Compact's prescribed termination procedures in the 1983 plebiscites and provisions under which the freely associated states may unilaterally terminate the relationship after an internal plebiscite on the issue clearly satisfy the requirement that termination be available to the associated states and that the procedure employed should preserve the people's right to self-determination.[83]

IV. Conclusion

The Compact of Free Association which the President has asked Congress to approve will provide an internationally legitimate and constitutionally appropriate basis for terminating the Trusteeship Agreement and establishing a new political relationship with the peoples of the Marshall Islands and the Federated States of Micronesia in the post-trusteeship period. The Compact was negotiated by the President's representatives and submitted to Congress in accordance with constitutional procedures with respect to Congressional-Executive agreements which have been recognized by Congress for over a century. The Compact will establish a new type of policy in which

[82]*See* Bunche, *supra* note 22 at pp. 1037, 1043.
[83]Compact of Free Association, *supra* note 2, at Article IV, Title Four.

this nation has governmental authority and responsibility. The distinctions that will exist between the freely associated states and territories under United States sovereignty, however, will require Congress to distinguish between these two types of territories in enacting measures for the governance of the territories and maintaining the close relationship between the freely associated states and the United States.

The relationship between the freely associated states and the United States will be defined by the Compact, and that relationship will not bring the freely associated states under United States sovereignty in the way the territories are. Review of the Compact provides Congress with the opportunity to take an inventory with respect to legal relationships with the territories and perhaps to take new policy initiatives. In some cases the concepts underlying negotiated provisions of the Compact may be appropriate models for addressing the specific concerns of the territories. But just as many of the benefits extended to the territories cannot be extended to the freely associated states consistent with their new status, many of the provisions of the Compact relating to the exercise of freely associated state sovereignty are inherently inconsistent with and inapplicable to the status of the territories.

The Compact defines a free association relationship consistent with international practice. It is unique amongst international precedents in that it provides for associated state autonomy and authority in foreign affairs. While that separate authority is subject to the so-called "defense veto," such a veto is logically and legally a prerequisite for United States recognition of the foreign affairs authority of the freely associated states. Thus, it is expected that the free association relationship defined in the Compact will not only withstand the scrutiny of the international community, but will be recognized as a creative and enlightened approach to international association between independent states and emerging sovereign peoples.

The establishment of free association in a region which geographically links the U.S. and friendly nations of Asia and the Pacific is an exciting development for international lawyers. The U.S.-Japan-Australia/New Zealand triangle is emerging as a major economic and political system, and Micronesia is strategically located to play an increasingly vital role in that system. Major shipping lines are already taking advantage of excellent port facilities, constructed in Micronesia under a U.S. capital improvement program, for purposes of transshipment of cargo between the West Coast and the Philippines, Japan and Australia.

The freely associated states will also link the United States territories of Guam, the Northern Mariana Islands and American Samoa with Hawaii and the West Coast. This will preserve U.S. influence in one of the largest and richest fisheries and ocean resource areas in the world. Lawyers interested in international business transactions who become conversant in

the unique legal and political relationship which will exist under the Compact will be able to participate in this significant development opportunity.

Investors and businesses from Taiwan, Japan, South Korea, Britain and People's Republic of China have already had economic successes in the region, and American concerns are realizing the prospects for the region. With the implementation of the Compact's economic development program, the competition will become keen, and the opportunities will be great.