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Free Association for Micronesia and the Marshall Islands: A Transitional Political Status Model

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I. INTRODUCTION

From 1986 to 2003, the United States was party to a treaty of international political association with two Pacific island micro-states that had been under U.S. administration from 1947 to 1986, pursuant to the trusteeship provisions of the United Nations Charter. The economic and defense provisions—both central elements of the association—were set to expire in 2003. These provisions were, however, renewed by international agreements that will extend the life of the association based on an amended treaty.

The terms of the renewal agreements reflect the history of the islands as strategically vital to the United States, as well as the dependence of the island people on U.S. economic assistance. Even more so than the original 1986 treaty of association, the terms of the amended treaty reveal that the parties have agreed to gradually reverse and ultimately end certain significant features of political integration between the islands and the United States. Thus, free association serves as a transitional political status that enables a former territory to achieve separate sovereignty, nationality and citizenship on the international plane outside the U.S. constitutional system. Under the free association model, the island governments and people first determine for themselves that they prefer sovereignty rather than integration with the United States. Then, the treaty of association becomes the instrument that terminates policies and programs implemented during the territorial period. This Article recounts the evolution of the American model of free association as a transition to international status. Importantly, it distinguishes free association from domestic territorial status.

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II. Periodic Renewal and Terminability of Compact of Free Association

In 1984, President Reagan proposed to the U.S. Congress that the political status of two emerging nations in the U.S.-administered Trust Territory of the Pacific Islands (TTPI) be resolved by adopting a proposed Compact of Free Association (CFA).[1] These emerging nations were the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI). In his message to Congress recommending ratification of the CFA, President Reagan emphasized that the CFA included defense provisions "of great importance to our strategic position in the Pacific,"[2] and that ending U.S. administration of the island territories under the United Nations trusteeship system would "fulfill our commitment . . . to bring about self-government."[3]

Over two years later, after more than twenty Congressional hearings before two U.S. Senate committees and five U.S. House of Representatives committees, the CFA for the FSM and the RMI was approved by Congress and signed into law by President Reagan.[4] Without ignoring the disposition of U.S. interests in the Panama Canal Zone by treaty, this was the first successful completion of a political status resolution process for any area administered under the U.S. territorial model since Alaska and Hawai'i were admitted to the union in 1959. The United States continues to administer five inhabited territories that have local governments organized under federal statutory law, but which have not achieved full self-government or a constitutionally defined permanent political status.[5]

The political, legal and administrative framework for free association under the CFA continues until one or both of the parties terminates it.[6] General provisions of the CFA are a hollow shell without the economic assistance and defense provisions that define the mutual national interests at the core of the association. These provisions are set to expire periodically and may only continue if the parties so agree.[7] Under the original 1986 CFA, these provisions

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[1] *See* Howard L. Hills, *Compact of Free Association for Micronesia: Constitutional and International Law Issues*, 18 INT'L LAW. 583 (1984) [hereinafter Hills, *Compact*].

[2] President's Message to Congress Transmitting Proposed Legislation to Approve the Compact of Free Ass'n Between the United States and the Trust Territory of the Pacific Islands, PUB. PAPERS (Mar. 30, 1984).

[3] *Id.*

[4] Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986).

[5] These inhabited territories are American Samoa, Guam, Puerto Rico, Northern Mariana Islands and U.S. Virgin Islands.

[6] § 201, 99 Stat. at 1801 (Title One, Government Relations); *see also id.* at 1827 (Title Four, General Provisions, Article IV).

[7] *See id.* at 1813 (Title Two, Economic Relations); *see also id.* at 1822 (Title Three, Security and Defense Relations).

were scheduled to expire in 2001, unless extended by mutual agreement through a structured consultation and negotiation process.[8]

Congress had anticipated the expiration of economic assistance and defense provisions, as well as the prospect of a mutual proposal to renew those CFA provisions in some form. It requested that the Government Accounting Office (GAO) evaluate implementation of the CFA from 1986 to 2000, as well as the overall efficacy of the free association model under the treaty. The GAO report concluded that the CFA had succeeded in establishing self-government and protecting U.S. national and international security interests, but it had failed to realize certain economic development goals.[9]

Meanwhile, late in the Clinton Administration, the U.S. Department of State and the associated state governments began to negotiate renewal of the expiring defense and economic assistance provisions of the CFA. Failure to resolve differences over critical issues delayed the negotiations into the Bush Administration, triggering a two-year extension of the negotiating period, during which time the economic assistance and defense provisions of the CFA continued as well.[10] The issues complicating CFA renewal negotiations included the level of payments to landowners for military base rights for the Ronald Reagan Missile Testing Range at Kwajalein Atoll in the Marshall Islands,[11] levels of U.S. economic assistance, claims arising from nuclear testing in the Marshall Islands in the 1950s,[12] and restriction of associated state citizen travel and residency privileges in the United States.[13] These difficult issues were brought to resolution due to the approaching expiration of economic assistance and defense provisions. The amended treaties with the FSM and RMI were signed on May 14, and April 30, 2003, respectively. Thereafter, proposed legislation to approve agreements to extend free association and renew the CFA was transmitted to Congress by the U.S. Department of State.[14] Approved by Congress on November 20, 2003, and signed into law by President Bush on December 17, 2003, the "Compact of Free Association Amendments Act of 2003" not only ratified the amended and renewed CFA,

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[8] *See id.* § 231, at 1818.

[9] United States General Accounting Office, GAO/NSIAD-00-216, *Foreign Assistance: U.S. Funds to Two Micronesian Nations Had Little Impact on Economic Development* (Report to Congressional Requesters Sept. 2000), *available at* http://www.gao.gov/new.items/ns00216.pdf.

[10] § 231, 99 Stat. at 1818.

[11] *See id.* § 321, at 1824.

[12] *See id.* § 177, at 1812.

[13] *See id.* § 141, at 1804.

[14] Joint letter from Richard L. Armitage, Deputy Secretary of State, and Gale A. Norton, Secretary of Interior (June 20, 2003) (on file with the University of Hawai'i Law Review).

but also provided for funding and legal authority to implement its newly amended terms.[15]

In light of these recent historic events, this report updates U.S. law and practice with respect to free association as a treaty-based political status model for former U.S.-administered territories. The terms of the renewed CFA clearly demonstrate that under U.S. policy, law and practice, free association is a transitional status model for a U.S.-administered territory that will not be integrated into the U.S. federal political union. Under the amended CFA, the relationship between the United States and both the FSM and RMI will transition from the domestic territorial status model implemented during the trusteeship to sovereign status. During the transition period, the amended and renewed CFA will provide economic support to reverse the process of integration that occurred during the trust territory period. The end result will be the establishment of a bilateral relationship between the United States and each island nation outside the U.S. domestic system of constitutional federalism.

III. FOUNDATIONS OF THE FREE ASSOCIATION MODEL

The United Nations (U.N.) General Assembly has adopted resolutions recognizing free association as a political status option for post-colonial, non-self-governing territories that are not yet prepared for either integration with a sovereign nation or independence.[16] The United Nations has adopted principles for decolonization based on free association. Most importantly, the people of the non-self-governing territory should create free association through a free and informed act of self-determination; they must consent to clearly stated legal terms establishing free association. Next, the former territory should have substantial powers of internal self-government, free from undue interference from the metropolitan power that is party to the association. Also, to ensure that the association is consistent with the right to independence, there must be access to a procedure to terminate the association in favor of separate sovereign and independent nationhood.[17] These international principles must be respected in order to establish an associated state status that is truly non-colonial and non-territorial. In each free association relationship, of course, the specific terms of association are determined and

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[15] Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720 (2003).

[16] G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); G.A Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960); G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc A/5217 (1970).

[17] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 376 (Clarendon Press 1979).

implemented by the national law of the sovereign nations concerned rather than U.N. resolutions.[18]

Through the international decolonization process in the twentieth century, including under the U.N. Charter over the last five decades, eleven former trust territories and many other former colonies achieved sovereignty through integration or separate nationhood.[19] Only five small island micro-states and their former administering powers have found the free association model to be a mutually beneficial framework for managing the transition to non-colonial status. The first case study in free association was the Cook Islands, which has a political relationship with New Zealand that has been recognized as a form of free association.[20] In that case the metropolitan power, New Zealand, has no written national constitution. The status of the associated state is therefore not constitutionally defined. Rather, the association is loosely defined by statute and diplomatic notes as a "voluntary partnership" in accordance with New Zealand law.[21] The New Zealand association with the Cook Islands is based on the British commonwealth model, Her Majesty the Queen is the Head of State and the Cook Islands are within the Realm of New Zealand, with common citizenship and autonomy for indigenous peoples of the Cook Islands.[22]

The international model of free association has also been adapted to the constitutional system of the United States for the three island nations to emerge from the Trust Territory of the Pacific Islands—the FSM, RMI, and Palau.[23] Unlike the New Zealand model, the U.S. domestic law does not

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[18] Hills, *Compact*, *supra* note 1, at 607.

[19] In a November 6, 2003 address to the National Endowment for Democracy, President Bush pointed out that from 1970 to 2000, the number of countries classified by the United States and U.N. as democracies went from approximately 40 to 120, including many former colonies that achieved a recognized form of full self-government without going through the U.N. trusteeship system. President George W. Bush, Remarks at the 20th Anniversary of the National Endowment for Democracy United States Chamber of Commerce (Nov. 6, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html (last visited Mar. 13, 2003).

[20] G.A. Res. 2064, U.N. GAOR, 20th Sess., Supp. No. 14, at 56-57, U.N. Doc. A/6014 (1965).

[21] COOK ISLAND CONST. (Constitution Act, 1964) (Kirk/Henry Exchange of Letters, 1973), *available at* http://mfat.govt.nz/foreign/regions/pacific/cookislandsdeclaration/cooksindependence.

[22] New Zealand also has a free association relationship with Niue. *See* NIUE CONST. (Constitution Act, 1974).

[23] Compact of Free Association with Palau, Pub. L. No. 99-658, 100 Stat. 3672 (1986) [hereinafter *Palau Compact*]. Palau is a third associated state under a subsequently approved Compact.

provide the legal framework for establishment of free association.[24] Indeed, the CFA does not enter into force by operation of U.S. law alone, but must also be approved in accordance with the constitutional process of the associated states in the exercise of their national sovereignty. For example, in 1986, the RMI National Parliament ratified the CFA under the terms of Nitijela Resolution No. 62 (N.D. 2).

In the U.S. constitutional context, sovereign free association is defined and sustained not by the territorial clause powers of Congress,[25] but through the treaty-making and foreign policy powers of the federal government based on separate sovereignty, nationality, and citizenship for the United States and the associated state.[26] There is no other constitutional foundation for free association to exist within the federal system or under the U.S. Constitution.[27] This conclusion is consistent not only with the terms of the CFA itself but also with the U.S. political system.[28] The U.S. federal courts also recognize that the CFA and status of free association evolved out of the Trusteeship Agreement between the United States and U.N. as an international arrangement for administration of the islands,[29] rather than domestic territorial status under U.S. national sovereignty.[30]

The legal history of the CFA demonstrates how the international theory of free association works in the U.S. legal context. Specifically, all three branches of the U.S. federal government have recognized that the political status of the FSM and the RMI under U.S. administration pursuant to the U.N. trusteeship system was not a domestic constitutional relationship under the

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[24] Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 471, 99 Stat. 1770, 1834 (1986); Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 471, 117 Stat. 2720, 2794 (2003) (with FSM); *see id.* § 471 at 2834 (with RMI).

[25] U.S. CONST. art. IV, §3, cl. 2.

[26] Hills, *Compact*, *supra* note 1, at 587-88.

[27] *Id.* at 607; *see generally* John Armstrong & Howard Hills, *The Negotiations for the Future Political Status of Micronesia*, 78 AM. J. INT'L L. 484 (1984) (discussing the culmination of negotiations for Micronesian political status).

[28] Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 201, 117 Stat. 2770, 2758 (2003).

[29] Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189.

[30] Juda v. United States, 6 Cl. Ct. 441, 456 (1984).

> After 1947, United States authority in the Trust territory implements a Trusteeship Agreement with the United Nations, and the United States administration of the Trust Territory is based upon the President's treaty power conferred in Article II, section 2, clause 2 of the Constitution. The United States has not administered the Trust territory under the authority conferred in Article IV, section 3, concerning regulation by Congress of territories or other property belonging to the United States.

Id.

Territorial Clause, Article IV, Section 3, Clause 2 of the U.S. Constitution.[31] Consistent with the non-applicability of the Territorial Clause to the former trust territory islands, negotiation of the CFA was not a federal-territorial matter in the domestic legal or constitutional context. Rather, the CFA was negotiated by the United States, the FSM, the RMI, and Palau within the framework of the Hilo Principles.[32] Section 3 of the Hilo Principles was ambiguous about the "constitutional arrangements" for implementing free association because the international principles of that status had never been adapted to the U.S. constitutional system. That ambiguity ended when seven committees in the U.S. Congress held more than twenty hearings on the proposed CFA. Those committees approved it as an international agreement under the foreign relations authority of the President and the international affairs jurisdiction of Congress, rather than under the Territorial Clause.[33] The result is that in U.S. constitutional and international practice, free association is separate nationhood and an international association between sovereigns. This is clearly stated in the CFA Preamble. It provides that the constitutions of the nations that are party to the association remain the supreme law for each nation, and that the CFA is a treaty which is subordinate in each nation's legal system of their respective national constitutions.[34] Consequently, sovereign free association as adopted by the United States and its associated states is not a form of domestic political union under the U.S. Constitution. Rather, it is an international association that is classified as a foreign affairs matter assigned to the U.S. Department of State for all government-to-government political status matters.[35]

The U.S. model of free association is governed by international agreements where each party to the association retains fully the right to independence without association at any time. For example, Section 442 of the recently amended CFA for the FSM and RMI states the following:

> [T]his Compact, as amended, may be terminated by the Government of the United States in accordance with its constitutional processes. Such termination shall be effective on the date specified in the notice of termination by the

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[31] *Id.*; *see* Hills, *Compact*, *supra* note 1, at 590-91; *see also Hearing on Puerto Rico Status, U.S. House of Representatives, Comm. on Resources*, Serial No. 105-16, 113 (1997) (statement of Fred M. Zeder II).

[32] Agreed Principles of Free Association, Apr. 9, 1978, U.S.-Micr.-Marsh. Is.-Palau, *reprinted in* 72 AM. J. INT'L L. 879, 882-83 (1978).

[33] Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 221, 99 Stat. 1770, 1773 (1986).

[34] *See* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720, 2758 (2003); *see also id.* § 443 at 2788; *see also id.* § 471 at 2794.

[35] *See id.* § 105(b), at 2744-47. Only the federal programs being phased out from the trust territory period are coordinated by the Department of Interior. *See id.*

> Government of the United States but not earlier than six months following delivery of such notice.[36]

Like the original termination provision in Section 443 of the CFA approved by U.S. Public Law 99-239 in 1986, under Section 442 and Section 452 of the CFA as amended by U.S. Public Law 108-188, some elements of economic assistance and U.S. defense rights can continue after termination under terms of separate agreements. However, the free association relationship itself ends if either government exercises its unilateral right of termination.

Because the U.S. model of free association fully and faithfully implements the principle that each party must be able to terminate the association consistent with the right of independence, the FSM, the RMI and Palau have all been admitted as full member states in the U.N. Under Chapter I, Article 2(1) of the U.N. Charter, a political status consistent with independence is a criterion for membership. Thus, with the admission of the U.S.-associated states to the United Nations in 1990, the U.N. recognized that the American model of free association is actually based on an underlying status of independence, which is consistent with Chapter III, Article 4(1) of the U.N. Charter.

IV. FREE ASSOCIATION UNDER AMERICAN LAW

While the 1986 original CFA for the FSM and the RMI was a multilateral agreement between the United States and those two nations, it actually defined two bilateral associations. Accordingly, the amended and renewed CFA approved by Congress under Public Number 108-188 in 2003, terminates the original CFA as a multilateral compact and creates two bilateral compacts.[37] As noted above, the United States also has a renewable CFA with Palau under U.S. Public Law 99-658,[38] taking effect in 1994 and continuing in force, as may be further agreed, until 2009.[39] The bifurcation of the CFA for the FSM and the RMI puts those two associated states on a bilateral footing fundamentally the same as Palau. This allows the United States and each of

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[36] *See id.* § 442, at 2788.

[37] *See id.* § 201(a), at 2757.

[38] *See* Compact of Free Association with Palau, Pub. L. No. 99-658, 100 Stat. 3672 (1986).

[39] Citations in this article to the CFA, as amended by P.L. 108-188 in 2003, may be to either the FSM or RMI version of the renewed Compact. Most cited sections are identical or similar. Similarly, many cited sections of the 1986 original CFA remain the same or nearly so in the renewed CFA of 2003, and citations may be made to the 1986 CFA for purposes of explaining the original purpose or the evolving form of the provision. This reflects the fact that the CFA is (1) not a treaty of indefinite duration, but of a temporary nature, (2) a close political relationship terminable at the pleasure of any party, and (3) a trilateral status model implemented through three bilateral agreements.

the three associated micro-states to continue or terminate their relationship on a purely bilateral basis—without the vestiges of multilateralism left over from the time when the United States governed the FSM, the RMI and Palau in a manner similar to the U.S. domestic insular territories allowed under the U.N. trusteeship system.[40]

The original CFA of 1986, and the amended and renewed CFA of 2003, were both ratified by Congress as a Joint Resolution rather than a simple treaty. This is because the CFA also enacts the domestic federal law necessary to define and implement U.S. rights and responsibilities under the amended CFA.[41] The original CFA in fact included many domestic U.S. federal programs and services first extended to the FSM and RMI when they were administered like other U.S. territories under the U.N. trusteeship.[42] Nevertheless, both the 1986 CFA and the 2003 amended and renewed CFA are international agreements and treaties. Negotiation and implementation of both are thus the responsibility of the U.S. State Department as the foreign policy and international organ of the U.S. federal government.[43]

In addition to the lead role of the U.S. State Department in managing the free association relationship, other departments and agencies that normally operate only in the United States also operate in the FSM, the RMI and Palau. Accordingly, Congressional committees with jurisdiction over domestic programs also oversee CFA affairs. For example, subject to annual appropriation by the U.S. Congress, the U.S. Postal Service, the U.S. Weather Service, the Federal Communications Commission, the Department of Transportation (FAA), and other federal services still operate in the associated republics.[44] However, domestic federal programs and services under the original CFA are being phased out under the 2003 amended and renewed

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[40] Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, art. 3, T.I.A.S. No. 1665, 8 U.N.T.S. 189 (providing "the administering authority shall have full powers of administration, legislation, and jurisdiction over the territory . . . and may apply to the trust territory, subject to any modification the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate"); *see also id.* at Article 9 (providing "the administering authority shall be entitled to constitute the trust territory into . . . administrative union . . . with other territories under U.S. jurisdiction").

[41] Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 221, 99 Stat. 1770, 1816 (1986); *see also* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 221, 117 Stat. 2720, 2776-77 (2003).

[42] *Federal Programs and Services Agreement Concluded Pursuant to Sections 221, 224, 225, and 232 of the Compact of Free Association: reprinted in* 181 *et seq., Hearing on S. 98-1067 Before the Senate Comm. on Energy and Natural Resources*, 98th Cong. (1984), *microformed on* CIS No. 97-5331-44 (Cong. Info. Serv.).

[43] Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945); § 105(b)(6), 117 Stat. at 2745.

[44] *See id.* § 221, at 2776-77.

CFA, along with direct financial grant assistance that will end when the twenty-year extension expires.[45]

Clearly for the FSM, the RMI, and Palau, the free association model serves as a "soft landing" from dependency as the domestic features of the CFA are allowed to lapse. Those domestic elements of the 1986 CFA are viewed by Congress as vestiges of the territorial model for administration left over after the end of the U.N. trusteeship. Free association is not a constitutionally permanent status. It is based on separate sovereignty, nationality, and citizenship. Therefore, the free association model as practiced by the United States must be seen and understood as a transitional arrangement put into place when the peoples concerned voted against further integration with the United States.[46] While the terms and conditions may vary, in the United States, free association has proven a political "half-way house" to full independence without association. It is a mechanism to reverse the integration that occurred during the trust territory period, so that true separate nationhood can be achieved in accordance with indigenous political, social, and economic capacities.[47] The legal framework of free association under the CFA can continue indefinitely or be terminated at will by either party at any time.[48] Thus, Congress retains full national powers to determine at regular intervals if the free association formula continues to serve the U.S. national interest, and to modify or even terminate it as deemed necessary.

Even though the United States has a good record of meeting its obligations and keeping its promises under the CFA, it is significant that during the first seventeen years, all federal programs and services were subject to the annual appropriations process in Congress.[49] The renewal process gave Congress the opportunity to realign the association to meet current U.S. priorities and eventually end annual appropriations that sustained the associated states as they emerged from the territorial trusteeship period.[50] In addition, the "full faith and credit" pledge, which supported U.S. assistance grants under the original CFA,[51] has been converted into a generic pledge to seek annual funding of the CFA by Congress.[52] In short, free association represents a statutory and treaty-based policy to conduct foreign relations with

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[45] *See id.* § 221(a), at 2771-72; *see id.* § 215(a), at 2776-77; *see Federal Programs and Services Agreement* art. XIII § 2 concluded under § 231, 117 Stat. at 2778.

[46] Preamble, 117 Stat. at 2758.

[47] *See id.* at 2757-58.

[48] *See id.* §§ 441-43, at 2788-89.

[49] *Federal Programs and Services Agreement*, *supra* note 42, art. II, §1; *see* Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 462(e), 99 Stat. 1170, 1833 (1986).

[50] §§ 215(a), 216, 117 Stat. at 2774-75.

[51] § 236, 99 Stat. at 1819.

[52] § 233, 117 Stat. at 2778.

a separate nation under international agreements, subject to termination, or renewal, on such terms as may be agreed by Congress.[53]

The lesson of the CFA for the FSM, the RMI, and Palau is that free association must be adapted from abstract international theory to the federal political system, especially if the metropolitan power is the United States. That is precisely what the State Department did in negotiating the original CFA for the FSM and the RMI.[54] The free association model was moved even further in the international realm and away from the domestic territorial model by the 2003 amended and renewed CFA. To illustrate the true face of free association under U.S. law and practice, what follows is an inventory of features of the sovereign free association model approved by Congress under the renewed CFA as amended and renewed by U.S. Public Law 108-188.[55]

V. ECONOMIC ASSISTANCE AND U.S. MILITARY RIGHTS

The features of the 2003 amended and renewed CFA reflect the link between economic assistance and defense relations. The mutual agreement embodied in the CFA is predicated on the reciprocal interests of the parties in the association. For the United States, the logic underlying the association is simple. The cost of preserving a special relationship with a former territorial dependency through economic assistance is justified by the strategic value of the islands and their territorial waters, as well as the specific basing rights acquired under the CFA. The features of the CFA that redeem these mutual interests are as follows:

- As noted above, U.S. obligations to provide government-to-government financial grant assistance continue for an additional twenty-year period. However, grants end altogether in 2024. During the final twenty-year period, each annual economic assistance grant will decrease until being zeroed out in 2024. At the same time, the United States will make annual contributions to a trust fund to provide budgetary resources to sustain the final transition to the period after U.S. grants end.[56]
- Over the twenty-year period of the renewed CFA, the total economic assistance to the FSM will be $2.3 billion. The total for the RMI will be $1.2 billion. On a per capita basis, this is about one-half the level of

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[53] *See id.* §§ 211(a), 215(a) & 231, 117 Stat. at 2771, 2774 & 2777-78; *see also Federal Programs and Services Agreement*, *supra* note 42, art. XIII, §3.

[54] S. REP. NO. 98-1067, at 32-119 (1984) (Statement of the President's Personal Representative for Micronesian Status); *see Zeder Statement at Hearing Rec., U.S. House of Representatives, Comm. on Resources*, Serial No. 105-16, 113 (Mar. 19, 1997).

[55] 117 Stat. 2720.

[56] *See id.* § 211, 117 Stat. at 2771; *see id.* § 215, at 2774.

annual assistance provided under the original CFA during the first fifteen years of free association.[57]

- The original CFA of 1986, and the 2003 amended CFA (renewed for 20 years), both reflect a gradual reduction of per capita levels of assistance. Specifically, according to GAO testimony in Congress on the CFA renewal legislation, the annual U.S. economic assistance to the FSM under the original CFA dropped from approximately $1,600 per person in 1986 to $850 per person in 2003. In the RMI, the annual per capita value of U.S. assistance dropped from approximately $1,200 to $650, during the same period. This downward trend continues under the 2003 amended and renewed CFA. Specifically, the real per capita funding for the FSM drops from $687 in 2004 to $476 in 2023. In the RMI, the annual per capita value of U.S. assistance drops from $627 in 2004 to $303 by 2023.[58]
- During the twenty-year period of the renewed CFA, the United States will continue to exercise plenary authority in all defense matters in the FSM and RMI.[59] This includes the authority to deny third-country access[60] and the ability to conduct necessary military operations within the lands, waters, and airspace of the associated states.[61] In accordance with these provisions, the current base rights agreement for use of Kwajalein Missile Range until the year 2016 has been extended by fifty years to 2066, with a U.S. option to extend it another twenty years to 2086.[62] The total funding authorized to pay for those base rights over the next eight decades is $3.1 billion. Since the RMI does not have the unencumbered constitutional power to take lands for base rights under eminent domain, the funding for Kwajalein goes to pay lease costs to the landowners where the base is located. Until landowners accept the terms of the new base rights agreement, the additional funding available now will be placed in an escrow account.[63]
- Federal Emergency Management Agency (FEMA) disaster relief programs will continue for only five more years, to be replaced by disaster relief programs based on an international rather than domestic

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[57] COMPACT OF FREE ASSOCIATION: AN ASSESSMENT OF THE AMENDED COMPACTS AND RELATED AGREEMENTS, GAO-O3-988T (July 10, 2003), *at* http://www.gao.gov/new.items/d03988t.pdf.

[58] *Id.*

[59] § 311, 117 Stat. at 2781.

[60] *See id.* § 311(a)(2).

[61] *See id.* § 312; *see id.* § 323, at 2823.

[62] *See id.* § 211(b), at 2773; *see id.* § 321, at 2783; *see also id.* § 323; *see also id.* § 462(b)(6), at 2833.

[63] *See id.* § 103(1)(3), at 2736.

model as may be mutually agreed. If no agreement is reached, then the FSM and RMI will be eligible for disaster relief from the Agency of International Development (AID), which provides humanitarian relief to foreign nations.[64]

- Federal education programs will also be converted from the domestic model established during the territorial period to a more international arrangement. Thus, subject to annual appropriation by Congress, the Individuals with Disabilities Act educational grant programs,[65] as well as some but not all "Pell Grants" under the Higher Education Act of 1965,[66] will remain available from 2004 to 2023. All other federal educational programs will be terminated and replaced by annual cash grants of $12 million for the FSM and $6 million for the RMI for the twenty-year period before federal economic assistance under the CFA ends in 2023.[67]
- The limited fiscal autonomy allowed under the 1986 original CFA is further restricted by the 2003 amended and renewed CFA, through measures that include oversight of associated state government expenditures of U.S. grant assistance by a Joint Economic Management Committee. That oversight committee will include three U.S. members, including the committee chair, and two associated states members.[68] In addition, the local governments of the associated states will be subject to audit by the GAO and Comptroller General of the United States.[69]

VI. IMMIGRATION PROVISIONS

During the negotiations to renew the CFA in 2003, the United States refused to discuss RMI claims for personal injury and land damages arising from U.S. nuclear testing at Bikini and Enewetak during the early years of the U.N. trusteeship. The United States based its refusal on the grounds that the nuclear claims are already governed by a CFA provision which was not expiring.[70] At the same time the United States demanded that the associated states accept new travel and residency restrictions under amendments to provisions of the original CFA that also were not expiring.[71] While the inconsistency of the U.S. position on the negotiability of these issues produced

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[64] *See id.* § 105(f)(1)(A), at 2748-49.

[65] 20 U.S.C.A. § 1400 (1997).

[66] *See id.* § 1070a (1998).

[67] § 105(f)(1)(B), 117 Stat. at 2749-50.

[68] *See id.* § 213, at 2774.

[69] *See id.* § 232, at 2778.

[70] Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 177, 99 Stat. 1770, 1812 (1986).

[71] *See id.* § 141, at 1804.

considerable frustration for both FSM and RMI negotiators, the U.S. economic assistance set to expire represented somewhere close to three-fourths of associated state per capita Gross National Product (GNP). This restricted the negotiating leverage of the two island governments. Ultimately the United States threatened not to submit any proposal to Congress for renewal of the CFA unless the FSM and RMI agreed to the following terms, which are now the law under the CFA:

- Citizens of the associated states are aliens under U.S. immigration and naturalization law, and are to be treated like other aliens, except for certain special travel privileges, including entry without a visa if in compliance with all other immigration laws.[72]
- Citizens of the associated state may not enter and be employed in the United States without a passport issued by the government of the associated state.[73]
- The United States will deny entry to any person bearing a passport of the associated state if the United States determines that the passport was issued as part of an investment incentive program for citizens from third countries, or otherwise issued for improper purposes not within the legitimate naturalization process of the associated states.[74]
- A person naturalized under the laws of the associated state cannot enter the United States under the CFA unless that person was an actual resident of the associated state for five years before the CFA entered into force. Actual residence is determined by the U.S. government, based on a requirement of physical presence in the associated state for no less than 85% of the five year period.[75]
- A person who brings an infant to the United States from the associated state, as well as the infant, will be denied entry if the U.S. immigration inspectors believe the child is being brought to the United States for adoption under U.S. law.[76]
- The CFA confers permission on citizens of the associated states to be employed in the United States upon admission as a CFA migrant, but the requirement for possession of an unexpired passport issued by the associated state government is mandatory to establish "identity and employment authorization" under U.S. immigration laws.[77]

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[72] *See* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 141(e)(4), 117 Stat. 2720, 2762 (2003); *see also id.* § 141(a), at 2760.

[73] *See id.* § 141(d), at 2762.

[74] *See id.* § 141(c), at 2761-62.

[75] *See id.* § 141(a)(4), at 2761.

[76] *See id.* § 141(b).

[77] *See id.* § 141(d), at 2762.

- The U.S. Immigration and Nationality Act applies fully to associated state citizens, including all grounds for exclusion and deportation based on conviction of a serious crime, in the interest of public health, or inability to show "sufficient means of support in the United States."[78]
- The limited privilege to travel to the United States from the associated state without a visa may be further regulated as deemed necessary by the Attorney General of the United States.[79]
- Birth in the formerly U.S.-administrated territory does not create eligibility for naturalization in the United States. Further, residence in the United States under the CFA does not count as residence for purposes of naturalization as a U.S. citizen.[80]
- Citizens of the associated states residing in the United States under the CFA for more than one year are subject to conscription for involuntary military service in the U.S. armed forces.[81]
- U.S. citizens have the right to reside in the associated states and lawfully engage in occupations without discrimination or treatment less favorable than associated state citizens receive in the United States.[82]

VII. CONCLUSION

The terms for continuation of free association under the CFA as amended and renewed in 2003, have clear and undeniable implications for the freely associated states. Foremost is the practical reality that free association has been defined by the United States as a transitional status, the features of which change in accordance with policy priorities of the metropolitan power. This is reflected in the provisions that will end United States direct financial assistance in 2023, and includes the more restricted immigration privileges. These changes, combined with the U.S. decision to support the associated states' application for U.N. membership, clearly establish that under U.S. law and practice, free association is a treaty-based status that is neither constitutionally defined nor permanent (as in the case of admission to the union as a state). Nor is it a status defined by and subject to the supremacy of federal law (as in the case of U.S. territories under Article IV, Section 3, Clause 2 of the U.S. Constitution). This status formula, defined by international agreement, is consistent with and preserves the right of independence not only for the associated states, but also for the United States as the metropolitan power. This formula is no accident, but results from the require-

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[78] *See id.* § 141(f)(1).
[79] *See id.* § 141(f)(5), at 2763.
[80] *See id.* § 141(h).
[81] *See id.* § 341, at 2784.
[82] *See id.* § 142, at 2763-64.

ment that free association must be an international relationship rather than a domestic political union. The people of the associated state govern themselves as a sovereign nation, not as a territory under the jurisdiction of the U.S. Congress. That is why, from a constitutional perspective, the United States must have the same ability as the associated states to forfeit its rights and choose independence without association at any time. Indeed, as implemented by Congress under the U.S. Constitution, to be non-colonial and non-territorial, free association must preserve each party's ability to terminate it in favor of independence for both parties at any time. In the case of FSM and RMI, the free association model has been a successful transitional association that has sustained the right of succession to sovereign nationhood and eventual independence.