

Compacts of Free Association in FSM, RMI, and Palau: Implications for the 2023-2024 Renewal Negotiations

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Introduction

The Compacts of Free Association (COFA) with the Federated States of Micronesia (FSM), Republic of the Marshall Islands (RMI), and Palau have shaped political, economic, and social possibilities for the freely associated states and for the role of the U.S. in the region. In 1986 when the agreements were initially negotiated, they were a route to independence for FSM, RMI, and Palau. The upcoming renewal negotiations will be affected by the greater political autonomy of the freely associated states. This article highlights the important ramifications for the COFAs around human rights, migration, and economic assistance leading up to the 2023-2024 renewal negotiations.

Background

The Compacts of Free Association are the political association agreements between the U.S. and three countries in the Pacific Islands: Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the Republic of Palau. Historically, these states, along with other territories in the region of Micronesia, faced several forces of economic, political, and military colonization. After World War I, the region as a trust territory was administered by Japan. From 1947 to 1994, the region, as the UN Trust Territory of the Pacific Islands (TTPI), was granted to the U.S.¹ With the Cold War raging on, U.S. territory in Micronesia became a prime location to exert U.S. military power. It also became the site of the largest nuclear weapons testing program in the world, with over 67 weapons detonated and testing with results upwards of 1000 times more powerful than the atomic bomb dropped in Hiroshima.²

There are two separate COFA agreements, one between the U.S. and FSM and RMI, and one between the U.S. and Palau. The agreements were an opportunity for the U.S. to maintain strategic influence in the region while supporting the self-determination and economic self-sufficiency of FSM, RMI, and Palau. They effectively ended the TTPI and granted independence to the island states. The agreements span government, economic, and defense relations between the U.S. and the freely associated states. The provisions are similar across the agreements (see figure 1).

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<http://hrbrief.org/2019/03/compacts-of-free-association-in-fsm-rmi-and-palau-implications-for-the-2023-2024-renewal-negotiations/>

¹ C.D. BAY-HANSEN, *POWER GEOPOLITICS IN THE PACIFIC AGE* 179 (Inkwater Press, 2011).

² Davor Pevec, *The Marshall Islands Nuclear Claims Tribunal: The Claims of the Enewetak People*, 35 J. ON INT'L L. & POL'Y 221, 221 (2006).; *Republic of the Marshall Islands v. U.S.*, No. 15-15636 (9th Cir. 2017), at 6.

The COFAs with RMI and FSM will be up for renewal in 2024 and the COFA with Palau in 2023.³ It has been over 30 years since the initial negotiations, and the dynamics during the upcoming negotiations will be different. The rising influence of China reinforces the strategic importance of the islands, and the trade-offs for the freely associated states under the current agreements show that there are possibilities beyond the current terms. The agreements have shaped political, economic, and social realities for the freely associated states and for the role of the U.S. in the region.

FSM, RMI, and Palau all have had different experiences under the COFAs, but many have been shared, especially considering the similarities between the agreements. This article will explore the issues thematically with examples from all three states, highlighting key issues of human rights, migration, and economic assistance for the upcoming renewal negotiations.

*Figure 1. Key Provisions of the COFAs*⁴

Government Relations

- Independence for the freely associated state including rights to determine own foreign affairs
- Immigration privileges for citizens as “habitual residents” in the U.S.

Economic Relations

- Direct economic assistance through sector grants and infrastructure projects
- Access to some U.S. federal services like postal, weather, and aviation
- Trust fund for long-term financial stability

Security and Defense Relations

- U.S. authority of land, water, and airspace for security and defense matters
- Strategic military denial for the U.S.
- Citizens of freely associated states can serve in the U.S. military

HUMAN RIGHTS AND LEGAL FALLOUT

Human rights are a pressing concern in the freely associated states, especially relating to the U.S. military. After World War II, the islands became testing grounds for some of the most powerful nuclear weapons in the world. The testing occurred mainly in RMI and went on from 1946 to 1958.⁵

Although the U.S. military took some steps to move islanders out of harm’s way⁶, the impact

³ Approval of U.S.-FSM Compact of Free Association and the U.S.-RMI Compact of Free Association, 48 U.S.C. § 1921 (2006).; Extension of Compact of Free Association to Palau, 48 U.S.C. § 1932 (2012).

⁴ Approval of U.S.-FSM Compact of Free Association and the U.S.-RMI Compact of Free Association, 48 U.S.C. § 1921 (2006).; Extension of Compact of Free Association to Palau, 48 U.S.C. § 1932 (2012).

⁵ Calin Georgescu, *Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes*, UNHRC (2012), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/163/76/PDF/G1216376.pdf?OpenElement>, at 1.

⁶ During the largest and most powerful test, Castle Bravo, the atoll of Rongelap was intentionally not evacuated in order to run the Project 4.1 medical study on the effects of such radiation. MARTHA SMITH-MORRIS, DOMINATION

on communities is embedded in historical memory, and the lack of reparations has continued to affect RMI. In addition to displacement and its long-term effects, the radiation has had long-lasting health impacts on the population. A high proportion of cancer diagnoses in the Marshall Islands are related to radiation.⁷ Food and water sources were also contaminated, forcing many Marshallese to become dependent on food imports from the U.S. As opposed to traditional food sources and agriculture, food imports are linked to higher rates of obesity, which is a risk factor for further negative health outcomes.⁸

Section 177 of the COFA created the Nuclear Claims Tribunal (NCT), which intended to remedy all past, present, and future effects of the U.S. nuclear testing program.⁹ Nearly \$2.4 billion¹⁰ has been awarded in claims through the Tribunal, but only a small fraction of that has been paid out to claimants.¹¹ In fact, the Nuclear Claims Tribunal ran out of funds in 2010. Many individuals whose claims were awarded have died without receiving compensation, and many of the NCT's records have been jeopardized since it became defunct.¹² Since then, archivists from Switzerland and Spain have been working to preserve the records, which will likely be released before 2020.¹³

“Compared to the nearly \$1.2 trillion that will be spent on modernizing the U.S. nuclear forces, the payout for remaining awarded claims from the Nuclear Claims Tribunal would be miniscule.”¹⁴

In 2014, the Marshall Islands sought justice at the International Court of Justice by arguing that the signatories to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) were not

AND RESISTANCE: THE UNITED STATES AND THE MARSHALL ISLANDS DURING THE COLD WAR 75-102 (University of Hawaii Press, 2016).

⁷ National Institutes of Health, *Estimation of the Baseline Number of Cancers Among Marshallese and the Number of Cancers Attributable to Exposure to Fallout from Nuclear Weapons Testing Conducted in the Marshall Islands*, NUCLEAR CLAIMS TRIBUNAL (2004),

https://web.archive.org/web/20131016002503fw/http://www.nuclearclaimstribunal.com/NCI_Report_92804.pdf; Misa Imaizumi, et al., *Radiation Dose-Response Relationships for Thyroid Nodules and Autoimmune Thyroid Diseases in Hiroshima and Nagasaki Atomic Bomb Survivors 55-58 Years After Radiation Exposure*, 295 J. OF AM. MED. ASSOCIATION 1011, 1011 (2006).; Steven L. Simon, et al. *Radiation Doses and Cancer Risks in the Marshall Islands Associated with Exposure to Radioactive Fallout from Bikini and Enewetak Nuclear Weapons Tests: Summary*, 99 HEALTH PHYSICS 105, 105 (2010).

⁸ Tracy Ku Lin et al., *The Effect of Sugar and Processed Food Imports on the Prevalence of Overweight and Obesity in 172 Countries*, GLOBALIZATION & HEALTH, 11 (2018).

⁹ Approval of U.S.-FSM Compact of Free Association and the U.S.-RMI Compact of Free Association, 48 U.S.C. § 1921(177) (2006).

¹⁰ In the Matter of the Alabs of Rongelap, et al. (2007) NCT No. 23-02440, 23-05443-B, 23-05445-B, 23-00501, at 34.; The People of Bikini, et al. (2001) NCT No. 23-04134, at 45.; In the Matter of the People of Enewetak, et al., (2000) NCT No. 23-0902, at 45.; In the Matter of the People of Utirik, et al. (2006) NCT No. 23-06103, at 34.; Sophie van Dijken, et al. *Monetary Payments for Civilian Harm in International and National Practice*, AMSTERDAM INT'L L. CLINIC (2013), https://civiliansinconflict.org/wp-content/uploads/2017/11/Valuation_Final_Oct_2013pdf.pdf, at 44-46.

¹¹ Georgescu, *supra* note 5, at 11.

¹² Trudy Huskamp Peterson, *Searching for Support: Preserving the Records of the Nuclear Claims Tribunal*, GRONIEK 99, 102 (2015).

¹³ *Id.*, at 106.; Interview with Trudy Huskamp Peterson, Certified Archivist (Jan. 14, 2019).

¹⁴ CBO, *Approaches for Managing the Costs of U.S. Nuclear Forces, 2017 to 2046* (2017), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53211-nuclearforces.pdf>

making efforts to disarm.¹⁵ The case was dismissed on grounds similar to that of other cases relating to nuclear weapons, and the U.S. was not even a respondent because the government does not recognize the ICJ.¹⁶ In 2017, the 9th Circuit Court of Appeals heard another case from the Marshall Islands against U.S. nuclear proliferation, but it was ruled outside of the jurisdiction of the domestic courts.¹⁷ The ICJ case showed that there is a space to be heard on these issues at an international level, but a path to remedy to non-proliferation particularly from the U.S. appears unlikely.

Little has been done by the U.S. to resolve the lasting environmental degradation, negative health outcomes, and distrust caused by the nuclear testing program. Even beyond nuclear testing, there is still WWII wreckage across the Pacific that only the U.S. and Japan have access to. The U.S. has taken minimal action in preventing dangerous leakages from the hundreds of wrecks in the Pacific.¹⁸

Further, the impact of climate change cannot be understated. Carbon emissions from wealthy states like the U.S. have caused disproportionate harm to the land, air, and sea in Micronesia. This injustice extends far beyond the end of nuclear testing and continues to threaten livelihoods and human rights.

The UN Special Rapporteur on human rights and toxic waste visited RMI and remarked that “the deep fissure in the relationship between the two Governments presents significant challenges; nonetheless the opportunity for reconciliation and progress, for the benefit of all Marshallese, is there to be taken.”¹⁹

THE “COMPACT IMPACT” AND MIGRATION POLICY

The COFA migration policy, which allows citizens of the freely associated states to live and work in the U.S. with some restrictions, is a key feature of the agreements. In fact, the RMI Ambassador has said that the Compact would not have been amenable without it.²⁰ There has been significant out-migration since the agreements were enacted. The trend is likely to continue with climate change as a push factor²¹, and renewal negotiations cannot undermine the importance of the migration provisions for the freely associated states.

The majority of COFA migrants have gone to other U.S. insular areas including Guam,

¹⁵ BBC News, *UN court throws out Marshall Islands’ nuclear weapons case*, BBC (2016), <https://www.bbc.com/news/world-asia-37560663>

¹⁶ Maitê de Souza Schmitz, *Decision of the International Court of Justice in the Nuclear Arms Race Case*, HARV. INT’L L. J. (2016), <http://www.harvardilj.org/2016/11/decision-of-the-international-court-of-justice-in-the-nuclear-arms-race-case/>

¹⁷ Republic of the Marshall Islands v. U.S., No. 15-15636 (9th Cir. 2017), at 7.

¹⁸ Clement Yow Mulalap, *Federated States of Micronesia*, CONTEMP. PAC. 126, 133 (2018).

¹⁹ Georgescu, *supra* note 5, at 16 para. 62.

²⁰ Emil Friberg & Leslie Holen, *Migration From Micronesian Nations Has Had Significant Impact on Guam, Hawaii, and the Commonwealth of the Northern Mariana Islands*, GAO (2001), <https://www.gao.gov/products/GAO-02-40>, at 61.

²¹ Victoria W. Keener, et al., *Climate Change and Pacific Islands: Indicators and Impacts Executive Summary*, PAC. ISLANDS REGIONAL CLIMATE ASSESSMENT (2012), http://www.cakex.org/sites/default/files/documents/Case-Studies-PIRCA-FINAL2_0.pdf.

American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI), but a number have also gone to Hawaii and the mainland.²² Figure 2 highlights overall migration patterns, with FSM having the highest proportion of overall migration.

Migration is an important option for citizens of the freely associated states for complex and interconnected reasons like family reunification, economic opportunities, healthcare access, and environmental degradation among others. The U.S. government tends to see reducing immigration from the freely associated states as the only solution with only two options: 1) make immigration more challenging for COFA migrants or 2) improve development outcomes in freely associated states to prevent out-migration.²³ The reality is that the migration provisions in the COFAs are important to the freely associated states, and threatening them could undermine the future of the agreements.

<i>Figure 2. Key Statistics on the U.S. Freely Associated States</i> ²⁴			
	Palau	RMI	FSM
Population	17,708	53,753	102,166
GDP per Capita	\$14,066	\$3,474	\$3,115
Percentage of Total COFA Migrants	9%	23%	68%

The U.S. should instead protect migration from the freely associated states, and there are plenty of opportunities to do so. For example, the 1996 Personal Responsibility and Work Opportunity Act made COFA migrants ineligible for Medicaid, which has had serious impacts on healthcare for low income COFA migrants and the jurisdictions in which they live that are bearing the financial burden.²⁵

“The cost education and health services for migrants from freely associated states is estimated at \$2.1 billion. Only \$409 million (less than 20 percent) of those costs were supported by Compact Impact funds.”²⁶

Further, climate change will be an increasing factor in driving migration, especially from the Pacific.²⁷ In the freely associated states, migration is not viewed as the sole solution to climate change, but as islands become uninhabitable, it will become an important option. In the

²² David Gootnick, *Compacts of Free Association: Issues Associated with Implementation in Palau, Micronesia, and the Marshall Islands*, GAO (2016), <https://www.gao.gov/products/GAO-16-550T>

²³ Friberg, *supra* note 19, at 24.

²⁴ Gootnick, *supra* note 21, at 3 and 22.

²⁵ Franco Ciammachilli, et al., *Medicaid Parity for Pacific Migrant Populations in the United States*, 24 *ASIAN AM. POL’Y REV.* 41, 46(2014).

²⁶ Cost estimate is from affected jurisdictions over the period of 2003 to 2014 and is used in the lack of other sufficient data collected by relevant institutions. (Gootnick, *supra* note 21, at 22.)

²⁷ Briana Dema, *Sea Level Rise and the Freely Associated States: Addressing Environmental Migration Under Compacts of Free Association*, 37 *COLUM. J. ENVTL. L.* 177, 192 (2012).

absence of protections for climate migrants, these existing pathways must be protected.

ECONOMIC ASSISTANCE

A major goal of the Compacts is to advance economic growth and self-sufficiency for the freely associated states. Economic assistance from the U.S. comes in three main forms: 1) access to selected U.S. programs and services, 2) direct economic assistance, and 3) contribution to trust funds.²⁸ Since the COFAs were implemented, economic growth has not followed expected trajectories. U.S. negotiators have attributed this to a lack of accountability and oversight of funds.

The original goal of the agreements was to support FSM, RMI, and Palau with the economic assistance tapering into only trust fund access after 2024 (2023 for Palau). The problem with this arrangement is that the unreasonable goal of total self-sufficiency for any economy creates indefinite dependency on economic support. Instead, economic assistance should be tailored to support the domestic economies of the freely associated states in a way that meaningfully promotes their political autonomy.²⁹ Past actions have worked in the opposite direction to erode trust between the U.S. and freely associated states.

The 2003 amended agreement for FSM and RMI established oversight committees to address these concerns. The Joint Economic Management Committees (JEMCO) in FSM and the Joint Economic Management and Fiscal Accountability Committee (JEMFAC) in RMI were created consisting of three U.S. representatives and two from either the FSM or RMI, respectively.³⁰ Although accountability is an important goal for any funding mechanism, the committee functions more as U.S. oversight than a supportive partnership.³¹

“The goal of self-sufficiency should be suspect when other, far more richly endowed territories are not self-sufficient and do not really aspire to self-sufficiency. Self-sufficiency is not its own reward. It makes little sense to argue that the poor should learn to be self-sufficient if the rich continue to be supplied and subsidized in one way or another by the prevailing social system.”³²

Funding arrangements and a lack of U.S. accountability have impacted the trust between respective governments, particularly with Palau. In 2010, the Compact Review Agreement was signed by both the U.S. and Palau governments, which would extend economic assistance after the 2009 expiration. Despite several attempts, the funding was not actually approved by Congress until the 2018 National Defense Authorization Act (NDAA), eight years later. From

²⁸ John Fairlamb, *Compact of Free Association Negotiations: Fulfilling the Promise*, GOVT. OF F.S.M. (2002), https://www.fsimgov.org/comp_per.html.

²⁹ Francis X. S. J. Hezel, *Is That the Best You Can Do? A Tale of Two Micronesian Economies*, 1 PAC. ISLANDS POL'Y, (2006), <http://www.micsem.org/pubs/articles/economic/frames/taleoftwofr.htm>.

³⁰ ROBERT UNDERWOOD, *THE AMENDED U.S. COMPACT OF FREE ASSOCIATION WITH THE FEDERATED STATES OF MICRONESIA AND THE MARSHALL ISLANDS: LESS FREE, MORE COMPACT 3* (East-West Center, 2003).

³¹ Asian Development Bank model is more collaborative which involves ADB staff based in the islands functioning more as coaches (UNDERWOOD, *supra* note 28, at 3.) Department of Interior staff responsible for funding oversight are currently based in Honolulu and Washington, D.C.

³² George Kent, *Development Planning for Micronesia*, 34 POL. SCI. 1, 18 (1982)

2010 to 2018, funding was appropriated by Congress at a lower rate than agreed upon, and there were no contributions to the trust fund or adjustments for inflation in the meantime.³³

RESISTANCE

Ahead of the renewal negotiations, the NDAA authorized a comprehensive assessment of the strategic importance of the freely associated states to the U.S. Given the rise of China and the geopolitical significance of the islands, the U.S. government will likely confirm the importance of the islands to the strategic goals of the U.S. However, the 2023 and 2024 renewal negotiations will be much different than they were in 1986.

In 1986, the COFAs were, in effect, the only route to independence for FSM, RMI, and Palau. The trade-offs in the upcoming renewal negotiations will be an exercise of greater political autonomy and agency for the freely associated states. Their governments and civil societies have shown reservations about certain pieces of the COFAs, including the presence and actions of the U.S. military. Even during the initial COFA negotiations, civil society resistance in Palau delayed the agreement until 1994.³⁴

The freely associated states have concerns and potential to pivot from the existing agreements given there are alternatives to renewing the COFAs. As explained above, the awarded claims from the Nuclear Claims Tribunal have still not been paid to the Marshallese. The coveted immigration provisions are being restricted in new ways; for example, legal precedent and COFA terms reinforce the Attorney General's ability to deny entry to anyone likely to broadly become an expense to the public.³⁵ Even the economic assistance, in its inconsistency, has eroded the trust of the freely associated states' governments, with U.S. Congressional authorization taking up to eight years.

Despite their complex political arrangements, the freely associated states are sovereign, independent states. At the UN General Assembly in 2014, the call to action on climate change by RMI activist, Kathy Jetnil-Kijiner, inspired the first standing ovation in the hall since the late Nelson Mandela.³⁶ Leaders from both FSM and Palau have converted large parts of their exclusive economic zones (EEZs) to marine sanctuaries.³⁷ When China attempted to strong-arm Palau into ending their diplomatic ties with Taiwan through tourist restrictions, Palau President Remengesau responded that "it actually made us more determined to seek the policy of quality versus quantity."³⁸

³³ David Gootnick, *Compact of Free Association: Proposed U.S. Assistance to Palau for Fiscal Years 2016 to 2024*, GAO (2016), <https://www.gao.gov/assets/680/678243.pdf>.

³⁴ 22 Palauan women brought forth a case supporting the original Constitution of Palau which would deny U.S. military access to Palauan land, water, and airspace. Against U.S. political pressure and the consequent pressure from the U.S.-backed Palau government, they managed to hold off the Compact for seven years and were nominated in 1988 for the Nobel Peace Prize. J. ROMAN BEDOR, *PALAU: FROM THE COLONIAL OUTPOST TO INDEPENDENT NATION* 276 (2015).

³⁵ *U.S. v. Terrence*, 132 F. 3d 1291, 1292 (9th Cir. 1997).; 8 U.S.C. § 1182(a) (2006); Dema, *supra* note 25, at 188.

³⁶ Monica C. Labriola, *The Marshall Islands*, 28 *CONTEMP. PAC.* 193, 195 (2016).

³⁷ Landisang L. Kotaro, *Republic of Palau*, 29 *CONTEMP. PAC.* 118, 119 (2017); Mulalap, *supra* note 17, at 132.

³⁸ Farah Master, *Empty Hotels, Idle Boats: What Happens When a Pacific Island Upsets China*, *REUTERS* (2018), <https://www.reuters.com/article/us-pacific-china-palau-insight/empty-hotels-idle-boats-what-happens-when-a-pacific-island-upsets-china-idUSKBN1L4036>.

There are other actors involved as well, including rising donor countries like China and Japan which also seek access to the strategic significance of FSM, RMI, and Palau. For example, the Japanese government has responded to calls for clean-up of the dangerous leakages from WWII ships and airplane wrecks in FSM. The U.S. government has long resisted requests to remedy or claim responsibility for their dangerous wrecks in FSM waters.³⁹ COFA migration has also involved Hawaii, Guam, American Samoa, and CNMI, all of which will be affected by the outcomes of the renewal negotiations.

Conclusion

The 2023-2024 COFA renewal negotiations will be significantly different from the initial negotiations. The platform that the original COFAs built provided for the independence of the freely associated states. FSM, RMI and Palau all have an unprecedented amount of political autonomy coming into the 2023-2024 COFA renewal negotiations that needs to be recognized. Several pertinent human rights issues will be on the table alongside the broader questions of the future of these political relationships.

The U.S. nuclear testing program in RMI and lack of reparations, among other human rights concerns in the region, has eroded trust in the U.S. government. With the Nuclear Claims Tribunal records being preserved, the unfulfilled claims will be a key point of debate given that the COFA responds to all nuclear claims past, present, and future. Additionally, the lack of protections for COFA migrants in the U.S. is concerning, considering that the migration provisions are integral to the freely associated states and are increasingly so with the threats of climate change.

Economic assistance to the freely associated states has been questioned because it has not led to the intended economic self-sufficiency. A focus on how the governments of RMI, FSM, and Palau can take ownership of their domestic economies will reduce economic dependence. Funding oversight by the U.S. has been prioritized over partnership with the freely associated states, a method which would advance domestic ownership of economic policy. The financial management of economic assistance has illustrated distrust on both sides and a particular lack of U.S. accountability considering the substantial delays in funding authorization and payment fulfillment.

Although the U.S. military has been afforded strategic military denial in the region, geopolitical conflict in the region has sparked interest from other states including China, Japan, and Taiwan. These agreements are complex and contentious with an increasing number of interested parties. Far from guaranteed, the COFA negotiating tables will open the discussion on what the real impact of these political arrangements have been and what the future of the agreements could bear.

³⁹ Mulalap, *supra* note 17, at 133.