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PART B

MARINE RESOURCES, LOS AND RELATED ISSUES

The Problem

The one remaining issue to be negotiated between the U.S. and Micronesia in the nearly-completed Compact of Free Association concerns the question of authority and control over Micronesian waters and ocean resources. (The term "Micronesian waters" as used hereafter refers to a territorial sea and economic zone of Micronesia as may be defined by international agreement.) The new Micronesian Commission on Future Political Status and Transition (CFPST) seems to be prepared to move ahead to complete the status negotiations and has proposed to the U.S. negotiator that informal talks be held in early December toward that end, specifically naming the issue of marine resources for discussion. This issue, including the matter of patrolling Micronesian waters, was not considered at the time of the 1973 USC Study and the issuance of the current negotiating instructions. The U.S. cannot resume negotiations until instructions have been approved on the relevant issues presented in this paper.

Discussion

1. The Micronesian View

The series of informal and formal talks last spring with the Micronesian Joint Committee on Future Status and other Micronesian leaders and the strong stance taken subsequently by the Micronesians at the LOS Conference have underlined the critical importance which they

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attach to having authority to control commercial activities in their territorial seas and in an exclusive economic zone. Marine resources off the coasts of Micronesia offer one of the few potentials for meaningful economic development and this fact has prompted the Micronesians to request the United States to recognize their special need to preserve and control the development and exploitation of their ocean resources for their own benefit.

The Micronesians have taken the position that the question of Micronesian ocean resources is an internal matter recognized as such by the Trusteeship Agreement, and that therefore the future Government of Micronesia has a right to exercise jurisdiction and authority over the living and non-living seabed and subsoil resources in a territorial sea and an adjacent exclusive economic zone to the full extent that such rights are or may be recognized by international law or by international treaties or agreements. These concepts are now embodied in the Micronesian draft Constitution. Micronesians see a fundamental conflict of interest between themselves as a coastal state wishing to protect tuna resources within Micronesian waters and the U.S. as predominantly a distant fishing state which regards tuna as a migratory fish exploitable wherever found. They believe their interests cannot be adequately protected by the U.S. because of this conflict unless special provisions are made in the Compact. They believe specifically that an exception should be made to U.S. authority over foreign affairs to enable Micronesia to represent its own marine resource interests internationally. The Micronesians

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have agreed, however, that such authority should not infringe upon necessary U.S. Government powers and responsibilities in the field of defense, or of foreign affairs generally.

The minimum Micronesian requirement for completion of the Compact may be an acknowledgement by the United States of Micronesian jurisdiction over Micronesian waters to the same extent that any such authority is or may be established for coastal States by international law or treaty or agreement. Compromises may then be possible in the other technical areas of contention regarding the foreign affairs aspect of the problem.

## 2. The U.S. View

The U.S. position has been that control over Micronesian waters is an external matter. Accordingly the U.S. under current provisions of the Compact granting <sup>the</sup> U.S. full foreign affairs authority for Micronesia, would hold full authority and responsibility for Micronesian ocean resources and Law of the Sea matters for the duration of the Free Association relationship. The CFPST was, however, informed by the U.S. in a letter from the U.S. negotiator on October 17, 1976 that:

"The United States shares the desire of the people of Micronesia that Micronesia progress toward economic self-reliance; further the United States is prepared to negotiate on the basis that the benefits derived from exploitation of the living and non-living resources off the coasts of Micronesia accrue to the people of Micronesia. Enunciation of this principle in the compact would have to be in accordance with international law and subject to international agreements now or hereafter applicable and compatible with the provisions of Titles II and III of the Compact."

The letter envisaged the possibility of an agreement on LOS



principles in section 605 of the Compact with detailed arrangements to be contained in a separate annex as a means to complete the status negotiations.

### 3. International Considerations

In regard to foreign affairs authorities, and in particular to jurisdictional matters relating to Micronesian marine resources, there is a clear difference between the three status options considered in the Interagency Study. In the case of Commonwealth where the U.S. would be sovereign over Micronesia the U.S. would have complete control and conduct of all foreign affairs matters relating to Micronesia. By extension, the U.S. would also have full responsibility for the protection and preservation of all marine resources off the coasts of Micronesia, including the surveillance of Micronesian waters as well as the enforcement of the various resource rights applicable. In the case of Independence with a mutual security treaty, the Government of Micronesia would have complete control and conduct of all foreign affairs matters relating to Micronesia. By extension Micronesia, not the U.S., would also have full responsibility, operationally as well as financially, for the protection and preservation of Micronesian marine resources. In both cases the matter of negotiating with the Micronesians on the issue of Micronesian Law of the Sea and Marine Resources becomes moot.

However, the Free Association relationship raises the questions of which government will control and conduct which aspects of Micronesian Law of the Sea and Marine Resources jurisdictional matters. Under this



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status relationship jurisdictional questions should be resolved in a manner that meets legitimate Micronesian interests while reducing natural friction points between Micronesia and the U.S., yet preserving ultimate U.S. control over any actions which might impinge detrimentally on basic U.S. security interests or international obligations. It is in the U.S. interests that Micronesian Law of the Sea and Marine Resources matters be resolved within the initialled Compact rather than within the independence framework embodied within the draft Constitution or within the framework of the UN LOS Conference.

Micronesia now has an "official observer" status at the Law of the Sea Conference and has participated actively in the Caracas, Geneva and New York sessions. It has formally petitioned the Conference for signatory status which could be granted by a majority vote of the Conference perhaps even over the objections of the United States. The U.S. has taken the view that only States may become signatories. Whether or not Micronesia becomes a signatory, current language of Article 136 of the Revised Single Negotiating text of the draft Law of the Sea Convention would, regardless of the terms of the Compact of Free Association, vest in Micronesia certain important Law of the Sea rights beyond those which the U.S. is currently willing to grant to Micronesia under a Free Association status.

A number of additional issues continue to separate Micronesia and the United States at the Law of the Sea Conference and remain to be resolved. These include not only Micronesia's desire to sign the Law

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of the Sea Convention in its own name, but also Micronesia's support for Article 136 which among other things would vest ocean resource rights in the inhabitants of dependent territories and possessions (including U.S. territories), and Micronesia's desire to have access to the LOS dispute settlement mechanisms of the Convention. The United States has informed the Micronesians of U.S. opposition to their positions on these issues.

With the Micronesians having already been given with U.S. concurrence their own voice at the Law of the Sea Conference, and with strong indications that, under Third World sponsorship, they would be given the right to sign an eventual Convention in their own name, it would be extremely difficult to persuade them to pull back from their present stance. An attempt on our part to do so at the next Law of the Sea session without resolving Micronesian concerns in a bilateral context could prove abortive and counter productive to U.S./Micronesian relations. The United States may have an increasingly serious problem in the United Nations generally if it is not possible to achieve an early resolution of the future status questions, including control of marine resources.

4. U.S. Domestic Considerations

a. U.S. Commercial Interests

There are no known exploitable mineral or petroleum resources within the Micronesian waters. There are known quantities of marine resources, primarily tuna, which are significantly underfished. At the present time, U.S. commercial fishing interests are interested in increasing their activities in the waters off the Mariana Islands but

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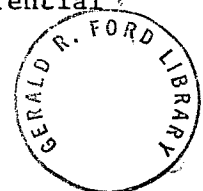


have only limited interests in Micronesia (the Caroline and Marshall Islands).

Under the present Trusteeship and the current U.S. approved foreign investment policies of the Trust Territory Government, United States commercial interests concerned with the exploration and exploitation of Micronesian ocean resources do not enjoy preferential treatment over other foreign commercial interests. U.S. commercial interests likewise would not enjoy preferential treatment under the Compact unless otherwise provided for. The Compact does, however, provide for most favored nation treatment in terms of trade between Micronesia and the United States.

Retention by the United States of foreign affairs control over Micronesian marine resources under Free Association would enable the United States to assure protection for U.S. commercial activities vis-a-vis non-Micronesian firms, whose proposed commercial activities conflict with basic U.S. foreign policy or security interests. This would also be true if Micronesians were granted appropriate jurisdiction and control over Micronesian waters pursuant to the provisions of the Compact and applicable international law.

United States maritime economic interests might be further protected by specifically providing for most favored nation treatment for the exploration and exploitation of Micronesia's ocean resources. The United States could additionally seek to obtain preferential economic access to Micronesian ocean resources in the Compact or in a separate protocol in return for consideration by the United States of preferential





trade treatment for Micronesian goods, including tuna products.

If the United States exercises jurisdiction over an exclusive economic zone off the coast of Micronesia, the tuna question (whether regulated by the coastal state or regulated by international agreement), would be resolved to the United States' advantage although Micronesians would still have the freedom of entering into commercial agreements (including tuna) with private foreign enterprises for operation within their territorial area as long as there was no conflict with basis U.S. security interests and international obligations.

b. Enforcement (Surveillance and Regulation) in the Coastal Waters of Micronesia.

Micronesian negotiators have asked for the services of the U.S. Coast Guard to protect local resources against illegal exploitation. To date, the United States has not made any commitment with respect to surveillance or enforcement but has suggested that such services are cost-prohibitive if provided along Micronesian guidelines (strict enforcement of the territorial sea and fishing zones in each district). In the post-trusteeship period, the Government of Micronesia will have full responsibility for and authority over its "internal affairs". Presumably this could include control and enforcement of Micronesian laws in territorial waters. The Government of Micronesia would, under the Compact, be required to enact domestic legislation that is consistent with and that may be appropriate or required to enforce or implement those treaties and international agreements (including law of the sea) applicable

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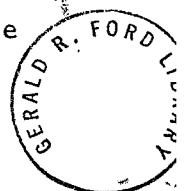


to Micronesia.

In view of the prospect that under a Free Association relationship the U.S. may well have to accept--for other concessions on the Micronesian side--certain financial obligations for the surveillance and enforcement of Micronesian waters (albeit economic zone vice territorial sea), the U.S. negotiator should be granted a certain amount of financial flexibility if required during the course of the negotiations on Micronesian marine resources.

The financial cost of surveillance and enforcement need not be exorbitant. Formulas are available for low cost programs designed to assist the districts in attaining a local capability, such as local Coast Guard Auxilliary Units, to patrol local waters. Such formulas could be initially financed through limited grants or loans, through technical assistance, and through scholarship programs. After the programs are commenced the revenues from the licensing of exploration and exploitation rights could be utilized to pay for the surveillance and enforcement program and to repay any "seed money" advanced by the U.S. The surveillance and enforcement of waters off the coasts of Micronesia would certainly serve U.S. security interests as well as Micronesian interests.

In 1974 the closeness of the Free Association relationship--and the greater protection of U.S. security interests--was determined to be worth a level of \$60 million per year to the United States. In view of the inflation since 1974 such a political relationship could well be



considered as worth \$78.6 million per year to the U.S. This figure would compare with the \$64-74 million which the U.S. will be spending in Micronesia in Fiscal Year 1980 according to current projections.

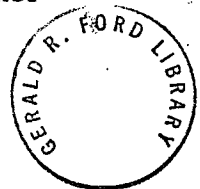
It is therefore believed that the U.S. negotiator should be authorized to commit up to a maximum of \$15 million per year for purposes of surveillance and enforcement of Micronesian marine resources if necessary to reach agreement on the overall issue of Law of the Sea and Marine Resources.

5. U.S. Foreign Policy Considerations

a. Foreign Affairs Authority

Although Title II of the Compact as initialled provides that the United States Government shall have "full responsibility for and authority over the foreign affairs of Micronesia". the Government of Micronesia has proposed that it be given primary jurisdiction and authority over marine resources in and beyond its territorial sea as may be defined by international agreement subject only to the protection of basic U.S. security interests as provided for in Title III of the Compact. In the exercise of such authority, the Government of Micronesia seeks to negotiate and sign treaties and international agreements in its own name, to participate as a full member in international organizations and conferences, to have access to all dispute settlement procedures with foreign nations as provided for in the Law of the Sea Convention (including access to the International Court of Justice), and to decide in its own right whether to recognize and apply the provisions of treaties and international

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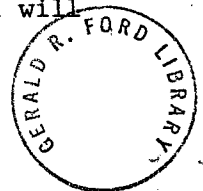
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agreements having a substantial impact on Micronesian marine resources.

These Micronesian proposals raise important foreign policy issues. Permitting the Government of Micronesia to exercise what amounts to a broad range of attributes and powers of a fully independent nation even within a limited and prescribed area of activity, would be inconsistent with the principle of full United States foreign affairs authority under the terms of the Compact. This could exacerbate rather than minimize the practical friction points in United States-Micronesian relations under a free association arrangement. Full United States authority in this area, however, could on the other hand, engender continuous friction between ourselves and the Micronesians and this in turn could have a harmful effect on the entire relationship.

Issues relating to Micronesian marine resources will continue to be, as they are now, of the greatest interest to the Micronesians; they also promise to be the focal point of any foreign affairs activity involving Micronesia. Deleting this area from the scope of U.S. authority could enhance the possibility of conflict between the United States and foreign countries over Micronesian actions which might be in conflict with U.S. policies or other international obligations, although the potential for disputes would be existent even if the United States had full authority over Micronesia's marine resources. Foreign nations may well seek to hold the United States liable (financially or otherwise) for Micronesian actions within Micronesian waters, notwithstanding the language of the Compact. However, the United States, under the terms of the Compact will

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also be liable diplomatically for Micronesian actions within the land areas of Micronesia and, by logical extension, within their territorial sea.

b. Diplomatic Responsibility

It must be presumed and accepted that the United States will be viewed as the residually responsible party in any international dispute over Law of the Sea matters between Micronesia and a third country because of the ultimate U.S. responsibility for the foreign affairs of Micronesia. This would be true whether or not Micronesia would have enforcement responsibilities. For example, Micronesian confiscation of a foreign flag fishing boat could result in third country appeals to the United States Government for redress or even outright diplomatic protest. This risk and other possible international complications, such as diplomatic problems if Micronesian waters become a major poaching area for other nations, are inherent in the free association relationship. These disadvantages must be weighed against the political and security advantages which would accrue to the United States under the Compact of Free Association.

6. The Position-by-Position Approach

The following positions are incremental and incorporate the provisions of each preceding position. The negotiator, in his discretion after strong testing of each incremental position, may move beyond the Current Position to additional positions, or any part thereof, to obtain agreement on the marine resource issue.



Current Position.

Recognize that the benefits derived from the exploitation of the living and non-living resources off the coasts of Micronesia accrue to the people of Micronesia. Reject Micronesian requests for full jurisdictional rights over a territorial and economic zone, including other requests vesting independent legal authority over such areas with the Government of Micronesia. U.S. enforcement services would be provided on a case by case basis but the U.S. would hold full enforcement responsibility and authority. This position has been presented to the Micronesian negotiators and rejected by them as inadequate.

Position I.

Agree to recognize a territorial sea and economic zone off the coasts of Micronesia as may be defined by international law but limit the exercise of jurisdiction and enforcement surveillance by the Government of Micronesia over a territorial sea to matters not in conflict with international law or with the rights and authorities of the United States under the Compact (Titles II and III). The U.S. would agree to provide limited surveillance services for enforcing laws within the territorial zone. The United States would agree to exercise authority and hold enforcement responsibility over the economic zone for the benefit of the people of Micronesia. The U.S. could agree to provide such assistance to Micronesia for the conservation, protection and exploitation of resources off the coasts of Micronesia as may be agreed to by the United States and Micronesia. Reject all Micronesian requests for full jurisdiction and authority over living and non-living resources off the coasts of

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Micronesia, including requests for the right to veto all international treaties, to negotiate government to government agreements affecting resources within the waters off the coasts of Micronesia, to be members of international conferences and organizations (unless permitted under Annex A of the Compact) and to have access to international LOS dispute settlement machinery.

Position II.

(Agreement upon any provision of this position is conditioned upon the following action by the Government of Micronesia:

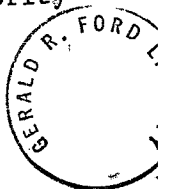
--agree to establish a joint consultative body to coordinate control over, and endeavor to resolve questions relating to, marine resources.

-- withdraw support for transition provisions of LOS Revised Single Negotiating Text.

-- agree not to seek separate signatory status to LOS Convention.

-- not discriminate against U.S. maritime interests.)

Recognize that Micronesia will hold authority over an exclusive economic zone, as well as jurisdiction over a territorial sea, as may be defined by international law--but limit the exercise of such authority



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to those matters not in conflict with international law or the rights and authorities of the United States under the Compact (Titles II and III). The U.S. would provide such conservation and protection services as may be negotiated, but the U.S. would retain ultimate enforcement authority over the economic zone by virtue of Title II of the Compact. Agree to negotiate, at the request of the Government of Micronesia but in the name of the United States, government to government agreements relating predominantly or exclusively to resources in the waters off the coasts of Micronesia provided such agreements do not conflict with the international commitments of the United States. Agree to obtain the consent of the Government of Micronesia to such agreements prior to conclusion and signing of the agreements by the United States.

Position III.

(This final position is to be taken only as a last resort to gain Micronesian agreement to an overall Compact of Free Association and would be conditional upon approval by the COM of the Compact as completed.)

Agree to represent Micronesia in any international dispute other than in disputes between the United States and Micronesia involving the resources off the coasts of Micronesia.

Permit Micronesia to undertake negotiations with other governments in their own behalf relating to the resources off the coasts of Micronesia but require U.S. concurrence to the terms of such agreements in order to assure that such terms are consistent with the rights and authorities of the United States under the Compact and with international commitments

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entered into by the United States, and require that both the United States and Micronesia will sign such agreements.

Agree that Micronesia may represent itself in regional and international conferences and organizations relating to the resources in the waters off the coasts of Micronesia.

#### Recommendations

In order to secure an overall agreement with the Micronesians on law of the sea matters, the negotiator should be permitted to move through Position II as the negotiating situation develops, testing strongly each incremental position in order to reach agreement at the highest possible level of the position spectrum. Utilization of the final position (Position III) in concluding the marine resources issue should be directly linked to final resolution by the Micronesians of how U.S. grant funds will be distributed to the districts, and to their agreement to sign the Compact and secure its approval by the Congress of Micronesia. It is arguable that the final position goes beyond the concept of Free Association which both parties have been negotiating; however, the authorities granted to Micronesia under Position III are limited, specific exceptions to U.S. foreign affairs authority under the Compact and yet permit the U.S. to retain substantial influence and control over Micronesian activities in these areas. It is also arguable that Position III would create many friction points between Micronesia and the United States; however, failure to resolve the marine resource issue by failing to accommodate to some of the Micronesians' major interests essentially means failure to reach agreement on a Free Association relationship. The consequence would be that Micronesia could become more hostile to U.S. interests and could

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seek to obtain full independence and full control over foreign affairs and marine resources, and severely limit U.S. defense activities in Micronesia. Such a consequence would mean all Micronesian activities would be free from U.S. control and any conflict in interests would be resolvable only by mutual agreement of the parties in bilateral negotiations - a far more complex and difficult matter if Micronesian/U.S. relations had become strained as a result of a failure in the status negotiations.

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