

INDOPACIFIC Posture Projects Legal, Real Estate, & Environmental Perspective

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October 5, 2023

Overall Classification: UNCLASSIFIED

Disclaimer



- **Nothing in this presentation constitutes legal advice or assurance regarding environmental or real estate issues at any location**
- **The views expressed by the presenters reflect their own personal opinions relating to current conditions and are often based on incomplete and evolving information**
- **Anyone contemplating doing business in these locations should consult with their own counsel, country teams, and consultants regarding current laws, issues, and conditions relating to each location**

Overview



- **General Legal Considerations**
- **General Environmental Considerations**
- **General Real Estate Considerations**
- **Lessons Learned**
- **Progress/Efforts in Progress**

General Legal Considerations Territories/Commonwealths



- **Territories and Commonwealths are part of the United States**
 - **Guam, the Commonwealth of Northern Mariana Islands (CNMI) , and Wake and Midway Islands are part of the U.S.**
 - NOT FOREIGN COUNTRIES
 - NOT HOST NATIONS
 - U.S. Laws Generally Applicable
 - U.S. Constitution Applicable with some exceptions (i.e. land ownership in the CNMI)

General Legal Considerations

COFA Countries



• Compact of Free Association (COFA) Countries

– There are three COFA Countries, Palau, The Federated States of Micronesia, and The Marshall Islands

– COFA countries are Independent Countries

- Umbrella Relationship with the United States Established by COFA's
- Each country has their own COFA
- Provisions are similar but there are many differences
- There are also varying Subsidiary Agreements under each COFA including different Status of Forces Agreements (SOFAs) and
 - Key provisions that may vary between COFA countries include:
 - » Varying Application of U.S. Environmental Law
 - » Varying provisions re United States Contractor Status
 - » Varying provisions re taxation, local hiring/contracting preferences, minimum wages
 - » Varying provisions re U.S. Defense Sites
- Implementation issues typically addressed through Diplomatic Exchange of Notes – May allow/require significant deviations from baseline requirements
- Maintaining Good Host Nation Relationships is Critical

General Legal Considerations Other Foreign Countries



–International Agreements Generally Govern in Other Foreign Countries

- Status of Forces Agreements (SOFAs): Generally set overall terms of presence in the host nation (VAT, Claims, jurisdiction)
- Other Treaties and International Agreements may also apply, i.e. Defense Cooperation Agreements, Visiting Forces Agreements

–International Agreements may:

- Establish Environmental Standards
- Override or condition leasing authority
- Establish Preferences for use of local labor/contractors
- Establish conditions for or limit or prohibit use of third country nationals
- Impose requirements for local licensing
- Require compliance with other host nation requirements such as wage and hour provisions, import/export standards, and taxation

–DoD Policies apply to the extent not inconsistent with International Agreements.

General Environmental Considerations Territories/Commonwealths



- **United States Environmental Laws Apply in Territories and Commonwealths; Key Issues:**
 - **National Environmental Policy Act (NEPA)**
 - Significant Mitigation Required to get to Finding of No Significant Impact (FONSI)
 - **Endangered Species Act (ESA)**
 - **National Historic Preservation Act (NHPA Section 106)**
 - **Essential Fish Habitat (EFH)**
 - **Clean Water Act, Least Environmentally Damaging Alternative (LEDPA)**
- **Designs must consider Environmental impacts and support FONSI effort to facilitate timely projects**
- **Construction must ensure environmental compliance**

General Environmental Considerations

COFA Countries



- **COFA Countries Environmental Requirements Generally Similar to U.S. Requirements**

- Host Nation Environmental Laws Generally based on older U.S. Standards (Circa late 1980's/early 1990s)

- Under COFA's U.S. NEPA and Substantive Environmental Laws may be applicable in varying ways

- COFA's generally allow establishment of alternative requirements through International Agreements

- Project or Program Specific Requirements may be established by diplomatic notes
 - Mitigation measures should be incorporated into projects
 - Permit compliance required even if permit not held by Contractor or the United States
 - Limited flexibility for changes, diplomatic and host nation permitting timelines may be long

General Environmental Considerations

Other Foreign Countries



- **International Agreements Set the Baseline in Other Foreign Countries:**

- **Host Nation Environmental Laws Generally Applicable**

- Framework established by international agreements and vary greatly from country to country

- **In addition:**

- U.S. Executive Order (EO) 12114: Environmental effects abroad of major federal actions
 - Overseas Environmental Baseline Guidance Document (OEBGD) or country specific Final Governing Standards generally applicable (DoD 4715.05)
 - In most cases, outside of wartime mobilization, the less stringent provisions of DoD Instruction 4715.22, Environmental Management Policy For Contingency Locations, will not be the governing standard at locations where MILCON construction is occurring.
 - Even in contingency locations, open air burn pits are generally not allowable under DoD Instruction 4715.19

General Legal Considerations

All Locations



- **Military Cargo Preference Act of 1904 (10 USC 2631) (DFARS 252.247-7023)**

- **Applies to military cargo even if Jones Act is not Applicable and requires use of U.S. flagged vessel**

- Case specific exemptions can be obtained if U.S. Flagged Vessel not available or if **“inordinately excessive or unreasonable”**
 - Pre-Award Waivers not possible under existing law/regulation
 - Waiver Requests filed at least 45 days prior to sailing
 - Based on what we have heard/seen waivers based on cost alone are very rare, we would expect costs to be at least 3x higher before a cost based waiver request would be likely to succeed.
 - We have seen recent success in obtaining waivers based on non-availability
 - Host Nation cabotage Laws may provide an exception for intra-country shipments but Host Nations can't afford to require Host Nation vessels if Host Nation capacity is limited.

General Real Estate Considerations Territories/Commonwealths/Insular Areas



- **Territories and Commonwealths are part of the United States BUT**
 - **Land mass is extremely limited**
 - **Land Uses, Ownership, and even long-term leases usually much more sensitive than in the Continental U.S.**
 - U.S. generally has commitments in effect to seek the minimum land interest required for its activities
 - Government to Government engagements generally required for land in support of DoD projects
 - Land use engagements take time!
 - There may be limitations on private land ownership or even leases
 - **Minimizing footprint and Keeping Design and Construction within the designated footprint is critical!**

General Real Estate Considerations

COFA Countries



- **Defense Sites May be established directly under the COFA or by International Agreements in COFA Countries**
 - May provide for exclusive, joint use, or non-exclusive use
 - Important to limit use to approved uses/designated purposes
- **Defense Site establishment may not be necessary for short term land use such as lay down areas if arranged in coordination with the Host Nation**
 - In all cases critical to coordinate early with the host nation, minimize adverse impacts, and minimize footprint
- **10 USC 2675 provides foreign leasing authority for up to 10 years**
 - use may be politically sensitive and may involve risk due to complicated land ownership

General Real Estate Considerations Other Foreign Countries



- **Framework established by Statute and International Agreements in Other Foreign Countries**
 - **Host Nations may make land available directly through international agreements or implementing arrangements**
 - **Leasing Common**
 - U.S. Leasing Authority Under 10 USC 2675 Generally limited to 10 years (15 in Korea)
 - Advance payments may be possible under 10 USC 2396
 - Fair and open competition for real estate contracts is applicable
 - **Contractor Leasing Common**
 - **Logistics Contracts Common for Storage**

Progress/Lessons Learned Territories/Commonwealths



–Consultations very time consuming

- Mitigation, minimization of footprint are critical

–Maintain Good Relationships with Territorial, Commonwealth, and Municipal Governments

- Minimize adverse impacts, Maximize shared equities
- Coordinate and work together with Territorial Government and local agencies
 - Successful Tinian Divert Acquisition/Project in Process
 - Reinitiation of CJMT Project in Progress with CNMI support
 - CNMI CPA approval of Conceptual Plans for Tinian Harbor improvements

–UXO MEC Common and DoD Requirements for MEC add time and cost to projects

- Significant cost savings can sometimes be achieved through early MEC studies that allow designation of portions of a site as low likelihood for MEC based on site history or prior development

–Continuing efforts to obtain H-2B relief

- Relief through 2029 currently in Senate version of FY24 NDAA

Progress/Lessons Learned

COFA Countries



–Palau Angaur TACMOR Project Underway

- International agreements required Exclusive Application of Palau Substantive Environmental Law and UXO/MEC standards as well as Palau's UXO/MEC services provider
 - Permits being obtained by Minister of Public Infrastructure and Industries
 - U.S./Contractor responsible for developing Environmental Planning/Permitting Package for EQPB approval
- Based on Discussions with ROP Government anticipated to be the model for future projects in Palau

–Issues with taxation of U.S. Contractor Imports being addressed

- U.S. Government Counsel working with Palau Attorney General to establish process/form for U.S. Contractor Identification

–Third Country Contractor/Employee processes can be controversial

- Compliance with both letter and spirit/intent of international agreements required to maintain positive host country relations

Specific COFA Country Considerations

Lessons Learned/Progress



•Yap

- Clan ownership common
- Do not assume access to submerged lands/waters
 - May be privately owned or clan owned
- Clans/landowners exercise a lot of control, local buy-in critical to success
 - Federal/State approval does not guarantee access

•Palau

- Clan/multifamily ownership common
- Uncoordinated Contractor or Component leasing/logistics contracting may interfere with or increase costs for Defense Site Acquisition for other components/actions
- Environmental compliance/mitigation critical
- Minimization/mitigation of community impacts critical

•Marshall Islands

- Extensive Environmental Standards Adopted for U.S. Army Activities
 - US EPA, FWS, NMFS, ACHP involvement

Progress/Lessons Learned Other Countries



- Where there is a Host Nation Military we can generally rely on the Host Nation Military for:**
 - Most Environmental Planning
 - MEC/UXO Low Likelihood Determinations

- Host Nations may assume some environmental permitting responsibility, but generally responsibility is passed to the Contractor to comply with Host Nation requirements**

- Host Nation Agreements, Interpretation, and Implementation measures are subject to change**

QUESTIONS?