DEPARTMENT OF STATE
THE LEGAL ADVISER

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March 22, 1967

TO : UNP - Miss Brown

FROM : L/UNA - Robert Starr RS

SUBJECT: Termination of the Trusteeship Agreement for the Trust Territory of the Pacific Islands

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Formal termination of the Trusteeship Agreement would require the consent of the Security Council. In view of the veto, alternatives to formal termination should be explored. These questions are examined in the present memorandum.

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Relevant Texts

Article 79 of the Charter provides:

> "The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85." (emphasis added)

Article 85, referred to in Article 79, deals with non-strategic trusteeships, which are under the authority of the General Assembly; Article 83 is concerned with trusteeships relating to strategic areas. Article 83(1) provides:

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"All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council." (emphasis added)

Article 15 of the Trusteeship Agreement with the Security Council is identical to the draft article proposed by the United States in the Security Council proceedings in 1947. It provides:

"The terms of the present agreement shall not be altered, amended or terminated without the consent of the administering authority." (emphasis added)

Formal Termination May Be Vetoed

A well-settled principle of international law is that an international agreement such as the Trusteeship Agreement for the Trust Territory of the Pacific Islands cannot be modified without the consent of all the parties, unless a different procedure is prescribed in the agreement. Article 15 of the Trusteeship Agreement does not depart from that general principle and allow the United States to terminate unilaterally.

There is nothing in the negotiating history of article 15 to suggest that the United States would have a unilateral right of termination. During the debates in the Security Council, which took place from February 26 to April 2, 1947, no representative suggested that the Charter or draft trusteeship agreement would condone a unilateral right of

termination by the Administering Authority. In fact, the United States representative in the Security Council, Mr. Austin, expressly recognized the Security Council's role with respect to termination. In objecting to a Soviet proposal on article 15 of the draft agreement, he said:

> "In other words, obviously it is not the Security Council which originates the amendment; certainly it cannot authorize the termination; the most it can do, under the Charter, is approve or disapprove." (emphasis added)

Continuing, Mr. Austin recorded the view that the Trusteeship Agreement was in the nature of a bilateral contract between the United States and the Security Council. The Charter defines the duties, powers and responsibilities of the Security Council, while the Agreement confines itself to provisions for the powers, duties and responsibilities of the Administering Authority:

> "Thus article 15 of the draft agreement defines the action which would be required of the administering authority with respect to changes in the agreement, and does not attempt to define the responsibilities of the Security Council in this respect. The latter are already defined; they are in the Charter; and no amendment or termination can take

place without the approval of the Security Council. There is no need to repeat them here, though there would not be any harm in doing so. If you want to make a change, the United States would see no harm at all in saying that alterations in the terms of the trusteeship can only be undertaken by agreement between the United States and the Security Council...." (emphasis added)

Mr. Austin then suggested that, if any change were made in draft article 15, language such as the following should be used:

> "The terms of the present agreement shall not be altered, amended or terminated, except by agreement of the administering authority and the Security Council." (Security Council, Official Records, 2d year, No. 23, pp. 475-76.)

In an attempt to find compromise language two other texts were suggested, both of which were unacceptable to the United States, apparently because they did not specify that the consent of the Administering Authority would be necessary to terminate the agreement. Absent such a reference to the Administering Authority, the clause might be open to the interpretation that the Security Council could terminate the Agreement unilaterally. After lengthy debate Soviet and

Polish proposals to modify article 15 were rejected. The original text of article 15 as proposed by the United States was then put to the vote and adopted by a vote of 8 in favor to none against, with three absentions (Poland, Syria, U.S.S.R.).

None of the trusteeship agreements with the General Assembly expressly refers to termination. Nonetheless, the Assembly has expressly approved of the termination of the eight agreements which are no longer in force.* The Assembly has--with minor differences in text--"resolved, with the agreement of the Administering Authority" that on a given date each agreement "shall cease to be in force." That practice lends strong support to the position that termination of a trusteeship agreement is not a matter of unilateral decision.

*Togoland under British Administration, GA RES 1044 (XI); Cameroons under French Administration, GA RES 1349 (XIII); Togoland under French Administration, GA RESES 1253 (XIII) and 1416 (XIV); Somaliland, GA RES 1418 (XIV); Cameroons under British Administration, GA RES 1608 (XV); Tanganyika, GA RESES 1609 (XV) and 1642 (XVI); Western Samoa, GA RES 1626 (XVI); and Ruanda-Urundi, GA RES 1746 (XVI).

There is some evidence in the negotiating history of the Trusteeship Agreement to support the view that termination is not governed by the Charter. When the Polish

representative proposed, as a compromise text for article 15 of the Trusteeship Agreement, that the terms of the Agreement "shall not be...terminated except as provided by the Charter", the United Kingdom's representative asked: "What does the Charter say about termination?" The Syrian representative replied: "Nothing." The United Kingdom's representative added:

> "Then what is the point of that amendment? It does not mean anything at all.
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> . . . . . .
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> "What I mean is this: what is the use of putting forward amendments saying that a thing must only be done in accordance with the Charter, when the Charter does not say anything on the subject. It is a perfectly vague phrase which would give rise to constant controversy and we would never know where we were." (Security Council, Official Records, 2d year, No. 31, pp. 676-78.)

No representative contradicted this interpretation of the Charter advanced by the United Kingdom. However, there are abundant references elsewhere in the Security Council debates to the role of the Security Council in termination, particularly by the United States representative.

Finally, there is nothing in the negotiating history of the Trusteeship Agreement to support the view that article 15 was intended to depart from the well-settled principle of international law according to which the consent of both parties would be necessary to terminate an international agreement such as the one under consideration here.

Accordingly, the better legal view is that termination is merely a form of "alteration" of the terms of trusteeship agreements within the meaning of Articles 79 and 83(1) of the Charter.

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Under the Charter and Trusteeship Agreement the Administering Authority undertakes various obligations, one of the most important of which is to promote the progressive political development of the Trust Territory toward self-government or independence as may be appropriate to the particular circumstances of the Territory and its peoples and the freely expressed wishes of the peoples concerned. There are also related obligations which complement this one, such as the obligations to promote the economic, social and educational advancement of the inhabitants of the Territory, and to guarantee certain basic human rights and fundamental freedoms.

The United States has acted vigorously on all these fronts. It has at all times faithfully executed its obligations under the Trusteeship Agreement, and where necessary it has made special efforts in response to the views which have been expressed from time to time by various visiting missions to Micronesia on behalf of the United Nations.

In particular, the United States has sought to foster the development of political institutions in the Trust Territory and to give to the inhabitants a progressively increasing share of governmental responsibilities. With a view to enabling Micronesians to choose freely their own political future, a plebiscite has been held in the presence of representatives of the United Nations. The results of that plebiscite indicated that Micronesia decisively preferred internal self-government in free association with the United States. That preference has been carried out through new institutional arrangements of free association, agreed upon by the United States Congress and by the Congress of Micronesia.

Consequently, the peoples of Micronesia have now achieved self-government under Article 76(b) of the Charter and article 6(1) of the Trusteeship Agreement, and the United States has fulfilled its obligations as Administering Authority under the Agreement. United States obligations under the Agreement have therefore come to an end, and the Agreement has thus ceased to have effect.

A presentation along the above lines would provide full details of the steps which have been taken to achieve the new political status of the Trust Territory. We believe that such course of action should be adequate to insulate the United States from undue criticism and further U.N. scrutiny with respect to the TTPI, assuming that the terms of the plebiscite, the circumstances under which it is held, and the new institutional arrangements for free association receive the general approbation of the U.N. membership.

On the other hand, the possibility must be anticipated that there will be attempts in the General Assembly to take up the TTPI, particularly in the Committee of 24. There is no way of being certain in advance

*See, e.g., Kelsen, The Law of the United Nations, 1950, p. 658, in support of this position.

that the General Assembly or any of its subsidiary organs will not take the view that the TTPI continues to be non-self-governing; by the time a plebiscite is held, the Assembly may well press a claim to some degree of supervision of the TTPI. It can only be said that the risks of such a reaction will diminish in proportion to the care and good-faith with which the United States seeks to bring the TTPI to full internal self-government. An important element in the equation will probably be the degree to which the new institutional arrangements for free association, and the public explanations thereof, confirm the right of Micronesians to "opt out" of their new status.

Concurrence:

L:L/UNA:RStarr:mab:3-22-67

L/UNA - Mr. Reis