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AdeG/24 Aug 73

FOR YOUR INFO. ONLY

TO : J. Wilson

FROM : A. de Graffenried

SUBJECT : Terms of Reference for B. Chapman

The Ambassador met with Brewster Chapman last week and also with Tom Johnson who attended Brewster's initial meeting between American Delegation attorneys and the Marianas attorneys. The Ambassador was very concerned about two points : (1) that Brewster was acting without consultation and direction from this office; and (2) that Brewster's Honolulu memcon on defenses to Salii's contempt citation deleted réference to the fact that the TTPI was claiming executive priviledge and that in place of that defense, Brewster appeared to be substitutihg the executive priviledge of the US executive department through the Ambassador.

As to point one, Tom Johnson noted (1) that Brewster appeared not to have consulted with any of the US delegation prior to the conference; (2) that Brewster did not have a firm grasp of the US positions taken at the Marianas negotiations; and (3) that the discussions could have been more productive and fruitful but for the direction they were taken ; by the Chairman and for the lack of familarity with the subject matter.

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Indeed, Brewster's meeting with the Ambassador showed evidences that he went beyond the Marianas positions especially as regards to permitting Willens to add to the agenda discussion on a five-year review provision and in not specifying the US position on mutual consent depended on acceptance of Art. 4,3,2, but instead noting that it depended on the kind of relationship the Marianas had with the US. The Ambassador later directed that terms of reference be drafted for Chapman and that OMSN insure they be followed. The Ambassador insisted, and Chapman agreed, that before any further meetings he will meet with you and OMSN on the agenda for the next meeting scheduled and that he will familarize himself with the US positions. Tom Johnson also noted that Brewster had not met with the US Delegation attorneys prior to this meeting and that Brewster had on occasion had luncheon dates with Willens to set up the agenda.

As to point two, the Ambassador was concerned that DOTA and the High Commissioner, together with Chapman, were shifting the emphasis away from the initial dispute between Lazarus and the JCFS and the TTPI to make it a dispute between OMSN and the JCFS. The Ambassador noted that during the initial meetings, everyone had agreed action

was necessary in the contempt citation because the JCFS was trying to dominate and subjugate the executive to the legislature's desires. He noted that Paul Warnke was particularly concerned about this challenge to the US administration, and that with the urging of all concerned he had sent the initial telegram to Lazrus. He was concerned about your and my participation in the Honolulu meeting and on reading Chapman's memorandum was not at all pleased that we may have failed to protect him adequately against the sudden shift in tactics by DOTA and the High Commissioner. I tried to reassure him that we did not undercut him, but that the defense proposed by DOTA, TTPI, and Chapman on the executive priviledge of the US executive was while valid, but one of the several defenses that were to be put forward. I also noted that my notes reflected that a defense of TTPI executive priviledge was also to be included, and that the case would no doubt be decided in our favor on procedural defenses rather than having to ever reach a defense on the merits. The Ambassador was not at all persuaded, and you should be prepared to elaborate on the Honolulu meeting and our participation as well as amending Chapman's memcon to reflect the 'TTPI executive priviledge' defense

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As to Chapman's memorandum, he does make a good argument that US executive prviledge should be claimed in lieu of the TTPI executive priviledge. Kozo, et. al, were in Washington on our request, their travel and per diem were paid by OMSN, and their work was supervised by OMSN; so that technically, there is a case for saying they were 'detailed' to OMSN for this assignment. The other side of the argument in favor of the Ambassador, is that Kozo et. al. had their salaries paid by the TTPI, that the memorandum/was addressed to DOTA as well as OMSN, which is being sought by JCFS that their refusal to testify and produce the document was on request of DOTA and TTPI, and that the record of the JCFS hearing shows that the confrontation is between the COM and the TTPI executive, not the JCFS and the OMSN which Salii specifically notes.

I told the Ambassador that the US executive priviledge defense was an excellent defense and that it should be included because we did after all invite Kozo, et al. here and ask that they prepare recommendations for our use. I still believe this, but I also feel that a defense of TTPI executive priviledge should also be included in the legal brief to be prepared by the Attorney General. I feel it is a legal defense applicable to this circumstance

because the contempt citation has been issued by JCFS against the TTPI employees' failure to produce a document which was in the possession of the TTPI executive branch and the primary issue is whether the COM can force the TTPI executive to comply with its directives to produce records which the COM desires to examine. This defense is even all the more pertinent because the memorandum prepared by Kozo, et al. was based on information obtained from their experiences and capacities as TTPI employees and on information from the TTPI, which certainly the COM has an interest in and which it must feel entitled to. The legal rationale for supporting the US 'executive priviledge' would apply equally to the TTPI 'executive priviledge', that being that the document is a working paper, is preparatory in nature, would be harmful and against thepublic interest to release prematurely, and is for internal policy making decision processes.