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INTERNATIONAL SECURITY AFFAIRS

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Mr. James M. Wilson, Jr.
Deputy Special Representative
Micronesian Status Negotiations
Room 3356
Department of Interior
Washington, D.C. 20204

Dear Jim:

In accordance with your recent request, we have reviewed Senator Lazarus Salii's letter of September 9 to Haydn Williams setting forth proposed changes to and interpretations of the Guam draft of the Micronesia Compact.

Several of the JFSC proposals appear to be unacceptable. The following comments reflect the views of the DoD legal fraternity- and are keyed to applicable paragraphs of Senator Salii's letter:

Paragraph 1. "Free association" is included in the United Nations General Assembly 1970 Declaration on Principles of International Law Concerning Friendly Relations as one of the means by which a sovereign nation may exercise its right to self-determination. In our view, deletion of the term could affect adversely the reception of the Micronesian Compact by the Security Council, and the likelihood of its acceptance there. The JCFS might be advised that both governments share the term in common, and that it could be employed with mutual benefit.

Paragraph 2. The proposed new third clause in the preamble, referring to the establishment of a relationship between the people of Micronesia and the United States "for so long as the continuation of that relationship remains consistent with the best interests of Micronesia and of the United States," while not substantive in character, instills a negative tone in the preamble and tends to derogate from the duration and termination provisions of Title XI of the Compact.

Paragraph 3. The practical effect of substituting "not be inconsistent" for the term "remain consistent" is to shift the burden of persuasion from the Government of Micronesia to the United States as to whether or not a particular provision of the Micronesian Constitution or law is consistent with the Compact. The proposed change would also broaden the construction of the Compact favoring Micronesian deviations. Chairman Salii's comments in support of this change are particularly unacceptable, in that they espouse the supremacy of the Constitution over the Compact, and intimate that the United States would have to rely on Micronesian good faith in not abrogating provisions of the Compact by subsequent constitutional amendment.

Paragraph 4. The proposed change to Section 102, expanding Micronesian responsibility and authority to include "all matters which relate to" the internal affairs of Micronesia, could impinge on the authority and responsibility of the United States under Sections 201 and 301 in situations where foreign affairs and defense have an effect on the internal affairs of Micronesia. If the JCFS insists on parallel language in Sections 102, 201 and 301, it would be preferable to delete "all matters which relate to" from Section 201, and to amend Section 301 to read "over all matters of defense in Micronesia."

Paragraph 5. The proposed change to Section 202, requiring the consent of the Government of Micronesia prior to the negotiation and conclusion of international treaties or agreements "which have a particularly pronounced effect on Micronesia," could interfere with both the responsibility and authority of the United States over the foreign affairs of Micronesia and the conduct of the foreign affairs of the United States (e.g., they might well consider a new LOS Treaty as having "a particularly pronounced effect on Micronesia").

Paragraph 6. This proposed change is acceptable. However, United States acceptance should be premised on the clear understanding that the "review" to which the parties are committed by Section 406(d) does not necessarily mean "renegotiations," as implied by Chairman Salli.

Paragraphs 7 and 8. We have no specific comments to offer on these two paragraphs.

Paragraph 9. The proposal to insert United States land requirements in the Mariana Islands into Annex B is unacceptable. Since the Marianas have consistently indicated their preference not to be part of Micronesia, it would be unnecessary and inappropriate by this device to force upon them an additional plebiscite on the Commonwealth agreement.

Paragraph 9.1. Senator Salli's interpretation of Section 302(b) is much too narrow. While the use by the United States of lands and waters as military areas and facilities is limited to those delineated in Annex B, pursuant to Section 302(b) the United States may take whatever actions are required to defend itself and Micronesia. Consequently, freedom of movement or "right to transit" is not the only right established by Section 302(b).

Paragraph 9.2. This interpretation of Title III is also unacceptable. Among other reasons, such matters are inappropriate for discussion with the private landholders and low level public land entitles with which we must negotiate for our options. Protection of the environment is already adequately provided for in Section 506 of the Compact.

Senator Salii should be dissuaded of any notion that the United States is prepared to accept limitations in particular leases on its military use of

lands and waters provided under Annex B, such as the prohibition of the storage or use of particular weapons. Such limitations would be contrary to Section 303(d).

Paragraph 9.3. This interpretation of Section 304(c) is acceptable.

Paragraph 9.4. This interpretation is unacceptable. Firstly, it is not an accurate statement of the applicable international law to the extent that it focuses attention on a breach of any one of the many obligations in the Compact, as opposed to a deprivation of an essential benefit of the Compact as a whole. Secondly, it appears to seek a revival of the unilateral right of termination rejected earlier, since the determination of whether a material breach has occurred is largely a unilateral decision. Thirdly, it would constitute a unilateral right of termination without the safeguards of fifteen years plus plebiscite plus opportunity for negotiations by dissenting districts as provided for in Section 1102. Finally, the prohibition of Section 1102 against unilateral termination within fifteen years, while not constituting a total agreement between the parties that the international law doctrine of material breach is not applicable during that period, does severely limit the application of that doctrine. Other than expressing the unacceptability of this interpretation, the United States should seek to avoid further discussion of the material breach concept since agreement on that subject is very unlikely. This is a subject best left unresolved, in the hope that no disagreement between the parties will be so serious as to make unilateral termination inless than fifteen years a serious risk. Consequently, the US should resist any efforts by the JCFS to establish the principle that the Compact may be terminated unilaterally other than as provided in Title XI, whether on grounds of material breach or otherwise.

Please let me know if you desire any further clarification of the foregoing points.

Cordially,

Signed

Philip E. Barringer
Director, Foreign Military
Rights Affairs

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