DRAFT - NAK
[redacted]

03/6

MEMORANDUM CONCERNING

POSSIBLE CONFLICTS BETWEEN THE COMMONWEALTH

AGREEMENT AND THE UNITED NATIONS

TRUSTEESHIP AGREEMENT

US-Title I - become self-governing commonwealth upon termination; § 801; constit. Convention + § + land approval; vest effective upon estab Cwealth, unless Pres makes applic. earlier such ports as not incompatible w/trusteeship.

JFL - § 1002(b) anything except that part inconsistent w/Tship effective upon ok of local constitution -

Since the U.S. Draft and the present draft of the Commonwealth Agreement differ on the question of when the agreement shall become mutually binding between the parties and when certain other provisions of the agreement would become effective, a comparison is needed between the Commonwealth Agreement and the United Nations Trusteeship Agreement to determine if the United States is barred under international law from entering into the Commonwealth Agreement as presently drafted. Even if there were conflicts between the present draft and the Trusteeship Agreement, which there are not, Congress would still have the authority under domestic law to enter the agreement. That is so because the Trusteeship Agreement is in effect a treaty */ and it is well established that treaties can be overriden by a later Act of Congress if a legislative intent contrary to the treaty is clear. **/

---

*/ See In re Ngiralois, 3 TRR 303, 312-13 (Tr. Div. 1967); and discussion in Marston, "Termination of Trusteeship," 18 Int'l and Comp. L. Q. 1 (1969) at 10-11 (hereafter cited as "Marston").

**/ See, e.g., Cook v. United States, 288 U.S. 102, 120 (1933); Rainey v. United States, 232 U.S. 310, 316 (1914); Whitney v. Robertson, 124 U.S. 190 (1888); Chae Chan Ping v.

[footnote continued on next page]

I. Whether the Mutually Binding Nature of the Agreement Conflicts with United States Obligations Under the Trusteeship Agreement.

There is no specific provision of the Trusteeship Agreement which provides that the trusteeship territory and the administering authority cannot enter into a mutually binding agreement determining the political arrangement between them prior to the termination of the trusteeship. However, when an agreement attempts to define the political relationship which would exist after termination, as well as during the trusteeship, it is subject to the argument that it has, in fact, changed the international status of the territory and is a unilateral attempt by the administering authority to terminate the trusteeship relationship. It seems quite clear, however, that an agreement which does not have U.N. approval entered into between the Marianas as a trust territory and the United States as an administering authority cannot change the international status.

The conclusion is supported by the advisory

[footnote continued from preceding page] v. United States, 130 U.S. 581 (1889); Pauling v. McElroy, 164 F. Supp. 390, 393 (D.D.C. 1958), aff'd, 278 F.2d 252 (D.C. Cir. 1960); cert. denied, 364 U.S. 835 (1960). Nevertheless, even though a treaty may not be enforceable by the courts or administrative authorities, a judicial determination that an Act of Congress is to prevail over a treaty does not relieve the Government of the United States of the obligations established by a treaty. See W. Bishop, International Law (3d Ed. 1962) at 152-153.

opinion of the International Court of Justice in the South-West Africa case.*/ In that case, the court was asked by the United Nations to determine the status of South-West Africa, a mandate of the Union of South Africa under the defunct League of Nations. The Union of South Africa, following the demise of the League, had refused to utilize the procedure followed by all other former League mandatory powers, which was to place their territories under the U.N. trusteeship system. The court unanimously concluded that as a result South-West Africa continued to be a mandate territory since the Union of South Africa was not "competent" without approval from the General Assembly to modify the international status of South-West Africa. The opinion stated:

> "The international status of the Territory results from the international rules regulating the rights, powers, and obligations relating to the administration of the Territory and the supervision of that administration, as embodied in Article 22 of the Covenant and in the Mandate. It is clear that the Union has no competence to modify unilaterally the international status of the Territory or any of these international rules." (1950) I.C.J. Rep. at 141.

---

*/ See International Status of South-West Africa, Advisory Opinion: (1950) I.C.J. Rep. 128. See also Marston at 36-39. Marston notes that for Tanganyika and Togo, prior agreements had been entered into between the Governments of the Administering Authority and the territory setting a date for independence. These prior agreements, according to Marston, did not have any significance in terms of international law.

In dictum the opinion also stated that approval by the General Assembly is necessary to bring about any change in international status of trusteeships as well as mandates.*/

The court based its holding on Articles 79 and 85 of the U.N. Charter which it found gave the General Assembly authority to approve alterations or amendments of trusteeship agreements.**/ The opinion also concluded that because no international change of status had occurred, the Union of South Africa continued to be subject to its obligations under the Mandate, now defined by the U.N. Charter. Those obligations were construed to

---

*/ See (1950) I.C.J. Rep. at 142.

**/ Article 79 reads:
"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."

Article 85(1) reads:
"The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly."

include the duty to submit to U.N. supervision and the duty to submit reports on the territory to the U.N. */

Although the opinion did not deal with strategic trusts, Article 83(1) of the U.N. Charter applicable to strategic trusts parallels Articles 79 and 85. Article 83(1) provides that all functions of the United Nations relating to strategic areas, including alteration or amendment of the terms of trusteeship agreements, shall be exercised by the Security Council. Thus, the only difference is which particular U.N. body is performing the function. For this reason, Article 83(1) indicates that under the rationale of the South-West Africa case a change of the international status of a strategic trusteeship can only occur with approval of the Security Council. See (1950) I.C.J. Rep. at 141. As long as the administering authority itself recognizes this fact by submitting to U.N. supervision and supplying reports on the territory, it could not validly be argued that

---

*/ See (1950) I.C.J. at 136-37. The fact that the supervisory functions of the League were never expressly assumed by the U.N. did not trouble the court. It reasoned:

> "It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions." (1950) I.C.J. at 136.

any change in international status had come about even if a mutually binding agreeement had been entered into between the administering authority and the trust territory.*/

but if it is not a change in international status, is it mutually binding? how can it be enforced?

---

*/ While the Administering Authority cannot unilaterally change the international status, it does appear that the General Assembly can do so. In 1966, the General Assembly passed a resolution terminating the Union of South Africa's Mandate for South-West Africa for the reason that South Africa's apartheid policies violated the Mandate, the U.N. Charter, and the Universal Declaration of Human Rights. Res. 2145(XXI), Oct. 27, 1966. This termination changed the international status of South-West Africa for purposes of international law.

In discussing the validity of the U.N. resolution, Marston concludes that by virtue of Articles 85(1) and 83(1), the General Assembly and Security Council have the power to unilaterally terminate for material breach. Marston, "Termination of Trusteeship," 18 Int'l and Comp. L. Q. 1 (1969) at 18.

is a mutually binding agreement a material breach?

even given the provisions to the Trusteeship Agreement?

Despite the existence of this power, it is unlikely that it would be exercised by the United Nations in any but the most unusual circumstances since enforcement of the decision is virtually impossible. See Sayre, "Legal Problems Arising from the United Nations Trusteeship System," 42 Am. J. Int'l Law 263 (1948) at 277. For example, although the United Nations has established a committee to deal with South-West African problems, the Union of South Africa has disregarded the resolution and retained control of South-West Africa. W. Bishop, International Law (3d Ed. 1962).

II. Other Possible Conflicts Between the Commonwealth Agreement and the Trusteeship Agreement.

A. Self-government.

It has also been argued that the grant of self-government to the Marianas would render it a "self-governing" territory in international law. This agreement has been based on the analogy of Puerto Rico, where the U.N. recognized that Puerto Rico became a "self-governing" territory as a result of its compact with the United States and thus Article 73(e) information on Puerto Rico was no longer transmitted.*/ It has been suggested also that because the trusteeship agreement vested full administrative power and jurisdiction over the Marianas in the United States, the United States cannot "abandon" those powers to the people of the Marianas without United Nations approval.

Neither argument is convincing. First, as explained above, the international status of the Marianas cannot be changed as a result of the status agreement. Moreover, there is precedent for self-government under a trusteeship which goes contrary to the Puerto Rico example (which was not a trusteeship anyway). Before termination of the trusteeship

---

*/ The United Nations Committee of 24 "discussed placing Puerto Rico on the list of territories to which Resolution 1514 would apply, even though such action would have been of questionable validity in view of the General Assembly's 1953 Resolution on the creation of the Commonwealth. M. Whiteman, 13 Digest of Int'l Law 714-15 (1968).

agreement under which Great Britain administered Tanganyika, that territory had in effect been given complete self-government. By 1960, there was a legislative council made up of an African majority, almost exclusively elected, and responsible for appointing the chief minister. Members of the council represented the people at a constitutional convention in March 1961 with the United Kingdom, at which both sides agreed that Tanganyika should become independent in December 1961. After this agreement, the General Assembly on November 6, 1961 passed a resolution terminating the trusteeship. Marston has concluded that it is apparently possible for a territory to have reached the stage of self-government, as opposed to independence, and still remain under the trusteeship system. */

Second, the trusteeship agreement itself provides that the administering authority should work towards self-government. Article 6 of the trusteeship agreement seems to give specific approval to an arrangement which would allow self-government prior to termination. Article 6 provides that in discharging its obligations under Article 76(b) of the U.N. Charter, the United States shall:

---

*/ See Marston at 6.

> "foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence, as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; [and] shall develop their participation in government . . . ."

The status agreement is an indication that the United States has made the judgment that it is now appropriate to the circumstances of the trust territory to give them commonwealth status.

Article 3 of the trusteeship agreement could also be read as supporting a grant of full self-government to the Marianas. Under Article 3 the United States is given full powers of administration, legislation, and jurisdiction over the territory. There is nothing that suggests that this could not be delegated to the trust territory. The history of the debate on Article 3 in the U.N. further supports the idea that the trust territory should be allowed to assume as much responsibility as it is held capable of exercising. The United States representative to the United Nations, Senator Warren R. Austin, stated that the U.S. viewed its duty toward

the people of the trust territory as governing them "with no less consideration than it would govern any part of its sovereign territory." */ Since the United States has the authority to allow the territories over which it is sovereign to have full self-government, it should be able to grant the same rights to the Marianas.

Finally, in Article 4 the trusteeship agreement commits the United States to adhering to the goals of "self-government or independence" set out in Article 76 of the U.N. Charter. The whole movement in the United States since 1960 has been toward forcing administering authorities to grant independence to their trust territories. See, e.g., U.N. Resolution 1514. The idea that the United Nations would be critical of the United States for granting too much self-government to the Marianas goes contrary to the past fourteen years of discussions at the United Nations.

Since there would appear to be no difficulty in granting the Marianas self-government prior to termination of the trusteeship agreement, there seems no justification for the refusal of the U.S. draft to apply the provisions of the status agreement covering the applicability of U.S. laws and the U.S. Constitution, the provisions dealing with judicial authority; and provisions setting out the tax and customs rules applicable between the U.S. and the Marianas,

---

*/ See M. Whiteman, 1 Digest of Int'l Law at 778. See also Ngodrii v. Trust Territory, 2 TTR 142, 147 (Tr. Div. 1960) where the court states, "[t]he administering authority of a trust territory is expected to act to some extent like a trustee and show at least as careful consideration of the rights and properties of inhabitants of the trust territory as it would for those of its own citizens in the same situation."; and Yang v. Yang, 5 TTR 427, 428-429 (Tr. Div. 1971).

B. Sovereignty.

The MPSC draft of the status agreement provides in Section 202(b) that the Marianas Islands shall not achieve political union with the United States nor come under the sovereignty of the United States until after termination of the Trusteeship Agreement. The manner in which this provision is presently drafted comports with the South-West Africa case in that it recognizes that such a change in relationship between the United States and the Marianas could not take place without U.N. approval.

MPSC says it cd take place but wd not be effective.

Furthermore, the idea that the United States could exercise sovereignty prior to termination would go contrary to United States policy expressed since the formulation of the Trusteeship Agreement. In discussing a draft of Article 3 of the Agreement, the United States Representative to the U.N., Senator Warren R. Austin, stated "[Article 3] does not mean the extension of United States sovereignty over the territory, but in fact precisely the opposite."*/ Judicial decisions in the United States have also been unanimous in concluding that the United States lacks sovereignty over the trust territory.**/

---

*/ See U.N. Security Council Off. Rec., 116th Meeting, March 7, 1947, p. 423, quoted in M. Whiteman, 1 Digest of Int'l Law at 778.

**/ See, e.g., Callas v. United States, 253 F.2d 838, 840 (2d Cir. 1958), cert. denied, 357 U.S. 936 (1956); Brunell v. United States, 77 F.Supp. 68 (S.D.N.Y. 1948); Calvo v. Trust Territory, 4 TTR 506, 512 (App. Div. 1969); Alig v. Trust Territory, 3 TTR 603, 609-610 (App. Div. 1967). See Trusteeship System, 42 Am.J. Int'l Law 263, at 271, 277 (1948). And see

[footnote continued on next page]

For these reasons it would be neither appropriate for the MPSC nor acceptable to the United States to draft the agreement so that U.S. sovereignty existed in the Marianas prior to termination of the Trusteeship Agreement.

C. Citizenship.

Making citizenship available to the people of the Marianas prior to termination would create difficulties similar to applying sovereignty during this period. Citizens are those who owe "permanent allegiance to the United States."*/ Afroim v. Rusk, has made clear that the United States cannot revoke this citizenship. Thus, were the United Nations to refuse to terminate the trusteeship agreement in favor of the present agreement and should a different agreement be worked out persons would owe permanent allegiance to the United States who in fact were not subject to its sovereignty. The complications arising from such a situation and the ultimate split that such condition could cause within the Marianas suggests it is unwise to grant citizenship before termination.

[footnote continued from preceding page]
dissenting opinion of Judge Lumbard in Callas v. United States where he states "The territory is controlled by the United States by virtue of a Trusteeship Agreement with the United Nations, allowing in practical effect the exercise of full sovereign power by the United States although a residual sovereignty remains in the territory, divisions thereof, or the United Nations."

*/ 8 U.S.C. § 1101(a)(22) (1970).

D. U.N. Participation in Plebiscites.

DeSmith in his book on Microstates and Micronesia suggests that unless there is a drastic change in the attitudes of the majority of the members of the United Nations, it should be expected that in the future proposals by administering powers for retention of a constitutional link between themselves and their trusteeships will be viewed with extreme suspicion as a remnant of colonialism.*/ DeSmith argues that it is this suspicion which explains why the United Nations refused to accept the associated status, approved in referendums, for the British West Indies and Gibralter with the United Kingdom.

The fact is, however, that the U.N. did accept proposed associated status between the Cook Islands and New Zealand, their former administering authority. DeSmith suggests that one important factor which distinguishes the U.N. reaction to the Cook Islands' arrangements from the U.N. reactions to the British West Indies' and Gibralter's arrangement was the degree of U.N. involvement in the process of self-determination.**/ Whereas the U.N. was not asked to participate in the plebiscites held in the British West Indies or Gibralter, New Zealand requested at an early stage that the U.N. should become involved

---

*/ See S. DeSmith, Microstates and Micronesia (1970) at 51.

**/ See Id. at 49.

in the process of self-determination.*/

In line with this precedent, the MPSC status agreement provides that the United States shall invite representatives from the United Nations to participate as observers in the plebiscite on the Commonwealth Agreement.** It should be noted, however, that precedent exists for allowing no U.N. participation in such plebiscites. It is pointed out in UNITAR, "Small States and Territories" (1971) at 165, 166, that although the U.N. has usually insisted that before the final stages of self-determination are reached, a visiting mission should go to the territory to familiarize itself with the local conditions and acquaint the people with the aims of the U.N., this visit has generally been refused by the administering authority. Furthermore, the administering authorities (with the exception

---

*/ In 1962 New Zealand took the initiative in suggesting to the Cook Islands legislative assembly that four status alternatives should be considered: independence, integration with New Zealand, membership in a Polynesian Federation, or continuing association with New Zealand accompanied by full internal self-government. Although New Zealand did not ask that the U.N. determine the alternatives to be presented to the Cook Islands, it kept the U.N. informed of the developments and in addition set forth a far broader scope of alternatives than the MPSC status agreement seems to contemplate. New Zealand invited the U.N. Secretary General to nominate delegates to the Cook Islands to act on behalf of the U.N. during and after the election campaign. A U.N. Supervisor of Elections was appointed (he apparently only observed rather than supervised) and reported back to the U.N. that the elections in which the new constitutional scheme was approved had been free and fair. Id. at 46-47.

**/ See MPSC Draft, Section 1001(b)(2).

of New Zealand and Spain) have been most reluctant to accept any U.N. presence during elections or plebiscites bearing on a change of international status.*/

---

*/ Apparently, even the U.N. has rarely specified that it should participate actively in the outline and discussion of the options presented to the people. See UNITAR, at ___.