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MEMORANDUM FOR UNITED STATES DELEGATION

Explanation of Agreement To Establish A Self-Governing Commonwealth of the Mariana Islands in Political Union with the United States of America

Marianas Political Status Commission

May 16, 1974

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WILMER, CUTLER & PICKERING
1666 K STREET, N.W.
WASHINGTON, D.C. 20006

MEMORANDUM FOR MARIANAS POLITICAL STATUS COMMISSION

Explanation of Agreement To Establish
A Self-Governing Commonwealth of the Mariana
Islands in Political Union with the
United States of America

It is the purpose of this memorandum to set forth an explanation of the various sections of the May 1974 draft of the Commonwealth Agreement, entitled "Agreement to Establish a Self-Governing Commonwealth of the Mariana Islands in Political Union with the United States of America." In so doing, differences between the present draft of the Commonwealth Agreement and the draft provided by the United States in December 1973, entitled "Covenant Establishing a Political Union Between the Northern Mariana Islands and the United States of America," will be explained to the extent those differences are substantive and not merely stylistic.

Preliminary Questions

Format:

The format of the present draft of the Commonwealth Agreement differs from that of the U.S. draft. The present draft sets out the provisions of the Commonwealth Agreement as an integral whole, while the U.S. draft is separated into ten Titles setting forth the general principles of the Covenant and eight Articles which implement the policies spelled out by the Titles of the Covenant.

We believe that it is more desirable to draft the provisions of an agreement as one integral whole. First, the U.S. draft provides for the signatures of the representative of the Mariana Islands District and the representative of the United States at the end of the Title section of the Covenant. As drafted, the U.S. version is open to the interpretation that the provisions of the Articles are less important than the Titles setting out the general policies. Such an interpretation would not be in accord with what we believe to be the wishes of the Commission. Further, separating an agreement into Titles and Articles necessitates double drafting of many provisions and raises the possibility that inadvertant conflicts could be drafted into the agreement, again causing problems of interpretation. Finally, we are not sure whether the U.S. intends to have Congress approve both the Titles and the Articles. We believe, however, that unlike the U.S. Covenant, the Commonwealth Agreement could be adopted by Congress in basically the same form as signed.

Although the intent of the United States in its drafting may have been to provide a short section like the Titles which could be used for purposes of political education prior to the plebiscite, that aim can be achieved

through the distribution of independent summaries of the agreement drafted separately from the agreement by the parties or by the Joint Commission on Transition.

Title of Status Agreement:

1. Use of term "agreement" as opposed to "covenant"

The present draft changes the name of the agreement from the U.S. version of "Covenant Establishing a Political Union Between the Northern Mariana Islands and the United States of America" to "Agreement to Establish a Self-Governing Commonwealth of the Mariana Islands in Political Union with the United States of America." The present draft, in shortened form, refers to the agreement as the "Commonwealth Agreement" while the U.S. draft uses the shortened form of "Covenant". The term "covenant" is similar in meaning to the term "compact" used in Public Law 600, applicable to Puerto Rico, 48 U.S.C. § 731b (1970). The use of the term in that instance has been construed as having substantive bearing on the relationship between the United States and Puerto Rico. We believe that it is better to use the simple term, "agreement", and spell out in the provisions of that Agreement the exact substantive intent of the parties.

2. Name of political entity.

While the United States referred to the Marianas as "The Northern Mariana Islands," the present draft used the reference "the Mariana Islands." It is our understanding that the reference to "the Mariana Islands" is the preference of the people of the Marianas, who historically have referred only to the northernmost islands in the Marianas archipelago as "the northern Mariana Islands." The name of the political entity to be established by this agreement should clearly be a choice of the representatives of the people of the Marianas, since a name has much symbolic significance.

3. Use of term "Self-Governing Commonwealth" in Title of Agreement.

While the title of the U.S. draft used the phrase "establish a political union" the present draft uses the phrase "establish a self-governing Commonwealth in Political Union with the United States." Since the idea of self-government is as important to the people of the Marianas as the concept of political union with the United States, we believe that both concepts should be included within the title of this document.

Discussion of Preamble

Whereas Clauses:

The sense of the background and purpose of the agreement expressed in the Whereas clauses seems much the same in both the U.S. draft and the present draft. The present draft, however, does have a stronger emphasis on the idea that the United States derives its authority over the Mariana Islands District from the Trusteeship Agreement entered into by it with the Security Council of the United Nations. The present draft starts with reference to the fact that the Mariana Islands District is administered pursuant to the United Nations Trusteeship Agreement. Although this differs from the beginning clause of the U.S. draft,*/ the language of this clause is taken largely from Article I, Section 101 of the U.S. draft. We believe that providing this as the first clause properly sets forth the derivation of U.S. authority over the Mariana Islands District.

The second whereas clause of the present draft, which expresses the same idea as the second clause of the U.S. draft, defines the rights of the Marianas people which are derived from the Trusteeship Agreement. However, while the U.S. draft provides that the people of the Mariana Islands are free to express their wishes for self-government

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*/ The U.S. draft starts with a clause recognizing and supporting the desire of the people of the Marianas to exercise their inalienable right of self-determination.

or independence, the present draft makes clear that the freedom to express the wish for self-government or independence is "guaranteed" to the people of the Marianas under the Charter of the United Nations and the Trusteeship Agreement. The purpose of this language is to indicate that the relationship between the United States and the Marianas is based on the consent given by a people with the sovereign right to determine their own political future, not merely on the beneficence of the United States.

In accord with this idea, the present draft adds to the fifth whereas clause a reference to the "sovereign right" of self-determination, as well as the "inalienable right" referred to in the U.S. draft.*/ Also, it adds in the sixth whereas clause the idea that the people of the Marianas and the United States share the value of government by consent.

In the third whereas clause, the present draft has struck the language of the U.S. draft referring to the desire of the people of the Mariana Islands District "to attain the benefits inherent" in political union with the United States. As now drafted this clause merely refers

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*/ The Joint Communique issued December 19, 1973 referred in Paragraph I.A.(1) to the fact that approval of the Status Agreement by the people of the Marianas would constitute a "sovereign act of self-determination."

to the desire of the people for political union, a union which presumably provides benefits to both the people of the Mariana Islands and the people of the United States. */

When the Provisions of the Agreement Become Effective.

The final paragraph of the Preamble of the present draft provides that the Agreement shall become effective as set forth in the Agreement after approval by the people of the Marianas and by Congress. As drafted, all provisions of the Agreement would become effective before the termination of the Trusteeship Agreement except for Title III granting U.S. citizenship or nationality and Section 203 establishing a political union under the "sovereignty" of the United States. This means, in essence, that the Commonwealth Government would be established prior to termination.

The U.S. draft, on the other hand, would not make any of Article I (providing for a self-governing commonwealth, mutual consent for change of the fundamental provisions, and citizenship) effective prior to termination. Nor would Article IV, covering the applicability of U.S. law and the judicial system, Article V, containing revenue

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*/ The fifth and sixth whereas clauses of the present draft spell out in more detail than the U.S. draft the authority by which the Marianas Political Status Commission and the United States Ambassador enter into this agreement. It is not expected that the further detail will cause problems.

and taxation provisions, and significant portions of Article VI dealing with financial aid from the United States be made effective prior to termination. The U.S. draft specifically leaves open the question of what provisions of Article VII, covering the question of property made available to the United States, should become effective prior to termination. Thus, only those provisions covering the constitutional convention and the Constitution itself, and some of the provisions providing for financial assistance would become effective under the U.S. draft before termination. Therefore, under the terms of the U.S. draft, the Commonwealth Government would not come into being until termination.*/

As explained further in the "Memorandum Concerning Self-Government and a Binding Agreement Prior to Termination of the Trusteeship Agreement," we believe that a self-governing Commonwealth under the provisions of the Commonwealth Agreement as drafted could come into effect prior to termination of the U.N. Trusteeship Agreement without in any way violating the obligations of the United States under that Agreement. Article 6, paragraph (1) of the Trusteeship Agreement provides that it is the obligation of the United

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*/ Article VIII, Section 801 of the U.S. draft provides that the President of the United States will have the power to make effective at an earlier date so much of the remainder of the Covenant and so much of the Constitution of the Commonwealth "as he deems consistent with the continuation of the Trusteeship." Thus, the U.S. itself has suggested that it is possible to make more of the provisions allowing for self-government applicable before termination. We see no good reason for leaving this question to the discretion of the President.

States to "foster the development of such political institutions as are suited to the trust territory" and to "promote the development of the inhabitants of the trust territory toward self-government or independence." Commonwealth status prior to termination would be a proper means of carrying out this obligation. Article 5 of the Trusteeship Agreement imposes on the United States the obligation of ensuring that the trust territory plays its part in maintaining international peace and security. Since under the Commonwealth Agreement the United States retains complete control over the international relations and defense of the Commonwealth, this obligation can continue to be met. To vest full sovereignty over the Marianas in the United States prior to termination, however, would go against the well-established principle that an administering authority is not sovereign in a trust territory. Moreover, since until termination there remains the possibility that the Marianas and the United States would mutually agree to a different status in order to satisfy U.N. requirements, we also do not believe it would be appropriate for the Title on citizenship to apply prior to termination.

Binding Nature of the Agreement Prior to Termination of the United Nations Trusteeship Agreement.

The final paragraph of the Preamble in the present draft, which sets forth when the agreement shall become

binding, differs significantly from the U.S. draft. It provides that the Commonwealth Agreement will become mutually binding according to its terms after it is approved by a resolution of the Mariana Islands District Legislature, accepted by the people of the Mariana Islands District in a plebiscite, and enacted into law by the Congress of the United States.

The U.S. draft, in contrast, provides that the agreement entered into between the Marianas and the U.S. would be binding only after termination of the Trusteeship Agreement. The U.S. language states that after termination of the Trusteeship Agreement, "[m]odification of the fundamental provisions of the Covenant listed in Article I may be made only by mutual consent of the Commonwealth and the United States."

Support for the conclusion that this agreement can be made mutually binding prior to the termination of the Trusteeship Agreement without violating the Trusteeship Agreement is also found in the "Memorandum Concerning Self-Government and a Binding Agreement Prior to Termination of the Trusteeship Agreement." In essence, that memorandum concludes that prior to termination a mutually binding agreement is a matter of internal administration between the Marianas and the United States and is not prohibited by

the Trusteeship Agreement. To the extent that the Commonwealth Agreement would be binding after termination, this procedure accords with the ordinary practice of allowing the people of a trust territory to exercise their right of self-determination prior to the dissolution of the trusteeship by the United Nations. The act of self-determination is in effect binding on the administering authority.

Approval by Congress:

While the United States draft provides that this agreement shall be approved by the United States "in accordance with its constitutional processes" the present draft provides that the agreement shall be "enacted into law in accordance with the constitutional processes of the United States." The use of the phrase "constitutional processes" without any reference to "law" does not provide sufficient assurance that this agreement would be approved by Congress, the procedure necessary to ensure a binding agreement.

As phrased, the present draft is intended to provide Congress with the option of approving the agreement by means of either a joint resolution or an act of Congress.

A joint resolution of Congress is approved in essentially the same manner as an act of Congress. Since both have the same force and effect of law, we recommend leaving open the issue of which method of approval would be used. With this approach whichever method appears more advantageous at the time the Commonwealth Agreement is before Congress can be utilized.

Discussion of Title I -- Definitions

Title I sets out a preliminary list of relevant definitions for the Commonwealth Agreement and is basically self-explanatory. Included in the list of definitions are "Trusteeship Agreement," "Mariana Islands District," "Mariana Political Status Commission," "Commonwealth Agreement," and "Commonwealth."

Discussion of Title II -- Political Relationships

Section 201:

Subsection 201(a), providing that the Commonwealth Agreement will govern the relations between the people of the present Mariana Islands District and the United States, is essentially in accord with Article I, Section 102 of the United States draft, and also embodies the idea expressed in the conclusion of the U.S. preamble -- that the agreement "defines the future relationship" between the United States and the Marianas.

While the U.S. draft is silent, Section 201(b) of the present draft provides that insofar as the Commonwealth Agreement shall affect the relations between the people of the Mariana Islands District and the United States prior to termination of the Trusteeship Agreement, such provisions are not intended to affect the duties and obligations owed by the United States to the United Nations and to the people of the Mariana Islands District under the Trusteeship Agreement, but to be consistent with those duties and obligations. This provision has been added to ensure that the United Nations understands that while the Commonwealth Agreement is intended to provide the Marianas with self-government, it is not intended to alter the relationship between the United States and the United Nations under the Trusteeship Agreement, nor unilaterally to terminate that Agreement.

Section 202:

Section 202 provides that the Mariana Islands District shall become a self-governing commonwealth, to be known as "The Commonwealth of the Mariana Islands." This expresses the identical idea of the U.S. draft found in Title I and Article I, Section 101. The U.S. draft, however, would not provide for this Commonwealth status prior to termination of the U.N. Trusteeship Agreement. As explained above, we do not believe that the Trusteeship Agreement is a bar to the establishment of self-government in the Marianas.

Section 203:

Section 203 provides that after termination of the Trusteeship Agreement, the Commonwealth of the Mariana Islands shall achieve political union with the United States and the United States shall have sovereignty in the Commonwealth in accordance with the terms of the Commonwealth Agreement. This Section basically corresponds with the preamble of the U.S. draft and Article I, Section 101 of that draft. The preamble of the U.S. draft, rather than using the phrase "in political union" uses the language "within the American political system." Nonetheless, the title of the U.S. draft is "Covenant Establishing a Political Union . . ." so the term "political union" should

not be objectionable. While either phrase would probably be acceptable, "political union" has favorable overtones of a joining together by mutual consent.

Both the U.S. draft and the present draft reserve the application of the provision on sovereignty and political union until after the termination of the Trusteeship Agreement. As explained above, the application of U.S. sovereignty, prior to termination, would go contrary to precedent indicating that sovereignty over a trust territory does not rest in the administering authority.

Section 204:

Section 204 brings together, in one section, all provisions which describe the character of the Constitution which will govern the Commonwealth of the Mariana Islands. Subsection (a) provides that the Constitution will be popularly approved. This expresses basically the same idea as Title II of the U.S. draft. Subsection (a) further provides that the people of the Commonwealth shall retain the right to initiate and approve constitutional amendments according to procedures provided for in the Constitution. This provision corresponds with Article II, Section 205 of the U.S. draft.

Subsection (b) sets out the minimum requirements for the Commonwealth Constitution. Those provisions include

a republican form of government with separate executive, legislative, and judicial branches, a bill of rights, a popularly elected chief executive and legislature. As drafted, Section 204(b) incorporates all of the requirements found in Title II and Article III, Section 301 of the U.S. draft. The requirements for the Commonwealth Constitution are more extensive than those laid down by Congress for the Puerto Rican Constitution. In that case, Congress provided only that the Constitution should provide for a republican form of government and include a bill of rights. 48 U.S.C. § 731c (1970). Nonetheless, the addition of the separation of powers and popular election of the chief executive and of the legislature do not seem to impose unwanted burdens on the future Commonwealth government. */

Subsection (b) further provides that all provisions of the Constitution must be consistent with the Commonwealth Agreement and with those provisions of the United States Constitution and federal laws applicable in the Commonwealth. While the language in Subsection (b) parallels the language used in Title II of the U.S. draft, it is used in a somewhat different context. Title II of the U.S. draft provides that the Commonwealth will govern itself pursuant to the Constitution, the Commonwealth Agreement, and applicable provisions

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*/ To the extent that a popularly elected legislature encompasses the constitutional doctrine of one-man, one-vote, Subsection 208(b)(2), allowing the legislature to be selected without regard to population, should remedy that potential problem.

of the United States Constitution and federal law. The present draft, in contrast, makes clear that the Commonwealth Government will derive its authority from the Constitution, but that the authority shall be exercised in conformity with the Agreement and applicable provisions of the Constitution and federal laws.*/ This approach conforms with the Congressional scheme for Puerto Rico. Public Law 600 for Puerto Rico states that "the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption" (48 U.S.C. § 731b (1970)), and that Congress should approve that constitution if it is in conformity with the Public Law 600, the Federal Relations Act, and the Constitution of the United States. 48 U.S.C. § 731d (1970).

Subsection (c) provides that the United States shall have no authority to review or disapprove the original Constitution except as provided in Section 1202(c) of the Commonwealth Agreement. This conforms with Article II, Section 203 of the U.S. draft.

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*/ Note that Puerto Rico was not expressly required to adopt a constitution which conformed to applicable federal laws. The fact that the present draft of the Commonwealth Agreement includes such language does not represent a substantive difference from the Puerto Rico situation, however, since there the Federal Relations Act provided that "the statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States . . ." 48 U.S.C. § 734 (1970).

Subsection (c) provides further that the United States shall have no authority to review and disapprove any amendments to the Constitution. It also provides that federal courts shall be competent to determine whether amendments to the Constitution of the Commonwealth are consistent with the Commonwealth Agreement and with applicable provisions of the United States Constitution or of applicable federal law. This provision basically corresponds with Title X and Article II, Section 205 of the U.S. draft. Although Title X of that draft merely states that amendments would have to be consistent with "the United States Constitution and other federal law" without limiting the Constitution or laws to those made applicable by the Commonwealth Agreement, Section 205 of the U.S. draft states that they must be consistent with "relevant" provisions thereof. Thus, the limitation in the present draft to "applicable provisions" is most likely consistent with U.S. intent.

Section 205:

Subsection 205(a) provides that the authority of the Commonwealth of the Mariana Islands shall extend to all matters of local concern and shall be exercised in a manner which is not inconsistent with the Commonwealth Agreement or with provisions of the United States Constitution or federal laws applicable in the Commonwealth. This section essentially encompasses Sections 302, 304, and 305 of Article III of the U.S. draft which define the executive, legislative, and judicial powers of the Commonwealth. In defining the legislative power in Section 304 of the U.S. draft, the language used is "all subjects of local application" rather than "all matters of local concerns." Since the phrase "all subjects of local application" is used in the Guam Code, 48 U.S.C. § 1423a (1970), it was our concern that the judicial interpretations for the Guam Act would be automatically applied in the Commonwealth. We prefer to use a different phrase which, while similar, has a better opportunity to be interpreted independently of the Guam provision.

Subsection 205(b) provides that the Commonwealth Agreement, together with the provisions of the United States Constitution, treaties of the United States, and federal laws applicable in the Commonwealth of the Mariana Islands, shall be the supreme law of the Commonwealth and the courts

of the Commonwealth shall be bound thereby, anything in the Constitution or laws of the Commonwealth to the contrary notwithstanding. This is essentially the equivalent of the supremacy clause found in Article VI, cl. 2 of the United States Constitution, which the U.S. draft made applicable in the Commonwealth by Article IV, Section 401.

Section 206:

Section 206, like Title V of the U.S. draft, provides that the United States shall have full responsibility for and authority in conducting foreign affairs affecting the Commonwealth and providing for the defense of the islands and territorial waters constituting the Commonwealth.

Section 207:

Subsection (a) of Section 207 of the present draft defines the legislative authority of the United States in the Commonwealth. Essentially, Subsection 207(a) provides that the United States will have the same legislative authority in the Commonwealth that it has in a State, except that legislation which the United States could not make applicable in a State may be made applicable within the Commonwealth if it is justified by compelling national interest.

The Commission has taken the position that the limitation on United States legislative power with respect to the Marianas which is obtained by making certain provisions of the Commonwealth Agreement immune from alternation without the mutual consent of the parties, is alone an insufficient protection of the right of local self-government. The provisions which will be subject to mutual consent probably will limit U.S. legislative power only with respect to certain areas of federal law (e.g., citizenship or immigration) or will guarantee local control over a specific legislative area (e.g., local internal revenue laws), or will provide only the most general protections for the Marianas (e.g., the provision that the Marianas will become a self-governing Commonwealth). The application of 4-3-2 except as so limited would leave the Marianas without adequate guarantees of local self-government, for Congress would be able to enact strictly local legislation for the Marianas--and even to annul otherwise legitimate acts of the future Marianas Government--unless a specific provision subject to mutual consent were involved.

Moreover, it seems clear that no significant interest of the United States in the Marianas would be invaded if the Commonwealth Agreement provides that the power of Congress under 4-3-2 is limited as the Commission has suggested [illegible] United States authority in the Marianas to t[illegible]

authority which the federal government exercises with respect to the 50 States fully protects the federal or national interests of the United States. It is certainly wholly consistent with the principle that the United States has sovereignty in the Marianas. And it is consistent with the agreement the Commission has already made that 4-3-2 will apply under the new political status. Congress could exercise authority under 4-3-2, but this authority would not be plenary; rather, it would be restricted to legitimate areas of federal or national interest, as it is in the several States.

At the last round of negotiations, however, the United States Delegation responded that the use of the "statehood model," as the Commission had suggested, was unacceptable "not due to any legal shortcomings in the proposal," but rather to difficulties which were "political in nature." This political problem was summarized by the United States as follows: "Implementation of the statehood-model proposal would amount to creating a status for the Marianas which is materially different than that enjoyed by any other United States territory or commonwealth. The United States cannot agree to restrict the power of Congress vis-a-vis the Marianas to any appreciably greater extent than it is willing to limit that authority vis-a-vis all other United States dependencies." The United States

stressed its accord with the desire of the Commission for assurances that Congress would not interfere in local affairs. The United States' position was that the history of congressional forebearance with respect to other territories, together with the agreement with respect to mutual consent, provided practical and political assurances which should be satisfactory to the Commission. */

The United States proposed in its draft Covenant that it be granted the power to "enact legislation effective within the Commonwealth with the exception that the fundamental provisions of this Covenant . . . may be modified only with the consent of the Government of the Northern Mariana Islands . . . ." Article I, Section 102; see also Title VI. The only assurances that local self-government would be protected are found in the provisions that the U.S. will exercise its legislative powers "with strict regard for the preservation of internal self-government in the" Commonwealth, Title VI, and that "[i]n the exercise of its powers the United States will be guided by its traditional respect for local self-government." Article I, Section 102.

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*/ Summary of United States' Informal Remarks on Marianas Political Status Commission Paper on Limitations on Federal Authority (Dec. 11, 1973).

Section 207 permits the United States to exercise in the Commonwealth of the Mariana Islands the same legislative authority which the United States can exercise within the several States, and permits the United States to exercise additional authority under 4-3-2 only if the legislation specifically provides that it will be effective within the Marianas, and if there is a compelling national interest in the application of the legislation within the Commonwealth. The "except as otherwise provided" clause is a reference to those provisions of the Commonwealth Agreement which fix the manner in which certain federal laws apply to the Marianas subject to the mutual consent of the parties, and to provisions of the Agreement making applicable portions of the U.S. Constitution. The Section, then, withdraws somewhat from the position the Commission previously took, for it contemplates that the United States could exercise in the Marianas powers which it cannot exercise in a State. But it does so in a way which assures that these additional powers can be exercised only with congressional forethought and in highly unusual situations.

The term "compelling interest" is one which is well-known to the constitutional law of the United States. The courts apply this test to State or federal laws, challenged on due process or equal protection grounds, which distinguish between persons on the basis of certain suspect classifications (e.g., race) or which infringe on a fundamental right of an individual (e.g., certain rights to engage in the political process). The test is a rigorous one. The word "national" in the compelling interest test indicates that the federal government's interest must grow out of its role as the central government of the United States, and not simply out of its relationship to the territories under 4-3-2. For example, it is intended that this test would prevent the Congress from passing a law nullifying an appropriation of local funds by the Commonwealth Government to a particular educational institution, for a certain local educational purpose. The United States has no such power with respect to a State, though it has this power with respect to Guam and the Virgin Islands. In sum, where the interest is "national" and where it is "compelling", the federal government under Section 207(a) could exercise in the Marianas a power it could not exercise in a State; but not otherwise.

Subsection (b) of Section 207 lists those provisions of the Commonwealth Agreement which are mutually binding and which cannot be altered or impaired without the consent of both the United States and the Commonwealth. The U.S. draft in Article I, Section 102 also provides for such a list, although the U.S. draft does not identify the provisions to be subject to mutual consent. Section 207(b) makes the following provisions subject to mutual consent: Title II (political relationship); Title III (citizenship); Title VI (taxation and customs); Title VIII (other laws; immigration and maritime); Section 803 (phase II financial assistance); Title IX (land); Sections 1101 (non-voting delegate), 1203 (establishment of the Commonwealth), and 1205 (effectiveness). This list appears to be the minimum necessary to protect the interests of the people of the Marianas in securing a new political status.

Subsection 207(c) provides the procedures whereby the United States and the Commonwealth can give their mutual consent for modification of the Commonwealth Agreement. No similar procedures are found in the U.S. draft. The United States must give such consent by the enactment of law providing for approval or providing for the delegation of approval to an official of the United States. Consent by the Commonwealth shall be given by the Legislature or if the Legislature so provides, by the people of the Commonwealth in a referendum where a majority of the votes cast favor consent.

Section 208:

Section 208 deals with the applicability of the United States Constitution within the Commonwealth. It provides that certain provisions of the U.S. Constitution will be applicable within the Marianas so as to impose the same sorts of limitations on the exercise of governmental power by the federal government or by the Commonwealth Government in the Marianas as are imposed by the U.S. Constitution on the exercise of governmental power by the federal government or by a State government, respectively, within a State of the Union.

This approach is similar to the treatment of Guam and the Virgin Islands. By legislation passed in 1968, Congress extended to those territories "to the extent that they have not been previously extended" certain provisions of the U.S. Constitution, and provided that these provisions "shall have the same force and effect there as in the United States or in any State of the United States."*/ 48 U.S.C.A. §1421b(u) (Guam), §1561 (V.I.) (Supp. 1974).

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*/ The provisions which were extended are basically those which the U.S. draft Covenant proposes to extend to the Marianas: Article I, Section 9, clauses 2 and 3; Article IV, Section 1, and Section 2, clause 1; the first nine Amendments; the 13th Amendment; the second sentence of Section 1 of the 14th Amendment; and the 15th and 19th Amendments. By special provision in the Virgin Islands legislation, an information, rather than an indictment, is permitted for offenses which were prosecuted by information before the legislation was adopted, unless local law requires an indictment. 48 U.S.C.A. §1561 (Supp. 1974).

This approach is also similar to the one taken by the United States in the draft Covenant. Section 401 of that Covenant provides that "[t]he following provisions of and amendments to the Constitution of the United States shall apply within the Northern Mariana Islands as though they were a State of the Union . . . ." Section 402 of that Covenant makes special provision for the application of the State privileges and immunities clause (Article IV, Section 2, Clause 1).

The main difference between Section 208 and the U.S. draft is that Section 208 is designed to make very clear that the Commonwealth Government is to be considered as a State government, and not as an arm of the federal government, for purposes of the applicable provisions of the U.S. Constitution. Though at least one case has held that the legislation extending to Guam certain provisions of the U.S. Constitution does have the effect of treating the territorial government as a State government (and therefore not requiring the Guamanian Government to proceed by indictment where the federal government would be required so to proceed), Guam v. Inglett, 417 F.2d 123, 124-25 (9th Cir. 1969), we believe that Section 208 as drafted will avoid all potential confusion on this point. Another difference is that Section 208 contains a separate subsection for specific modifications of the applicable portions of the U.S. Constitution. The U.S. draft Covenant ties its modification to a specific provision of the Constitution.

For example, Section 402 of the Covenant provides that nothing in the privileges and immunities clause shall prohibit land alienation restraints based on Marianan ancestry. Since other applicable provisions of the Constitution might prohibit such restraints, for example the equal protection clause, it seems safer to make a general exception, as is done in Section 208(b) of the draft Commonwealth Agreement.

Section 208(a) makes applicable in the Commonwealth the following provisions of the U.S. Constitution: Article I, Section 9, Clauses 2 (prohibiting suspension of habeas corpus) and 3 (prohibiting bills of attainder and ex post facto laws); Article IV, Section 1 (full faith and credit) and Section 2, Clause 1 (State privileges and immunities); Amendments I through IX (Bill of Rights); Amendment XIII (prohibiting slavery); Amendment XIV, Section 1, Sentence 2 (due process and equal protection with respect to the States); Amendments XV, XIX and XXVI (prohibiting the U.S. or a State from denying anyone the right to vote based on race, sex or age over 18). Each of these provisions, except the 26th Amendment, is applicable in Guam and the Virgin Islands and is proposed in the U.S. Draft.

Section 208(a) omits a number of provisions found in the U.S. Draft. The bulk of these were omitted because they are not applicable in Guam or the Virgin Islands and because we believe further study of the effect of these provisions, as well as a statement of the reasons the U.S. proposes to make them applicable, are needed. These omitted provisions are Article I, Section 9, Clauses 6 (preference in ports) and 8 (titles of nobility and gifts from foreign states); Article 1, Section 10, Clauses 1 (prohibiting a State from entering treaties and certain other activities); 2 (prohibiting a State from laying imposts or duties on imports or exports) and 3 (prohibiting, inter alia, agreements between a State and a foreign power); and Article IV, Section 2, Clause

2 (extradition). It may well be that after study and explanation the Commission will agree to the application of these provisions.

In addition, Section 208(a) omits for policy reasons two provisions included in the U.S. Draft: Article VI, Clause 2 (the supremacy clause) -- omitted because the Draft Commonwealth Agreement has its own supremacy clause, Section 205(b), and because the supremacy clause refers to portions of the U.S. Constitution not made applicable in the Commonwealth -- and Amendment XIV, Clause 5 (granting Congress power to enforce the 14th Amendment)-- omitted as unnecessary because under Section 207(a) Congress will have in the Commonwealth at least the same power as it has in a State, which includes this power.

Section 208(b) contains the exceptions to the applicability of portions of the U.S. Constitution. It should first be noted that no exceptions are made for grand jury indictment and jury trial in civil cases as provided in Section 401 of the U.S. Draft. This is because under the approach taken in Section 208(a), the requirements of an indictment and the guarantee of a civil jury trial are applicable only against the federal government in the Marianas, not against the Commonwealth government. This, in turn, is true because the U.S. Constitution does not require a State to provide an indictment, Hurtado v. California, 110 U.S. 516 (1884),

or a jury trial in all civil cases involving more than $20, Edward v. Elliot, 21 Wall. 532 (1874), and the U.S. Contitution will apply in the Commonwealth as it does in a State. There seems no reason that these two provisions should not apply against the federal government in the Marianas as they do in a State; but the U.S. could be asked to justify its position.

Section 208(b) does provide specific exemptions which will permit land alienation controls and a legislature which has equal representation of all three major islands in, for example, one house. The land alienation controls provision reflects the agreement of the Commission and the U.S. in the June 1973 Joint Communique. The exception to permit flexibility in forming a legislature is required because of the so-called one-man, one-vote ruling of the U.S. Supreme Court in interpreting the equal protection clause of the 14th Amendment.

In Reynolds v. Sims, 377 U.S. 533, 568 (1964), the Supreme Court held that

> "the Equal Protection Clause requires that the seats in both houses of a bicameral State legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared to the votes of citizens living in other parts of the State."

This means, said the Court, that the districts must be constructed for both houses of a bicameral legislature so they are "as nearly of equal population as is practicable." Id. at 577. In a companion case, the Court held that even a majority vote by the State's electorate could not validate an apportionment scheme which otherwise failed the equal protection clause's test. Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964). The principles of one-man, one-vote have been applied to smaller units of government than the States, Avery v. Midland County, 390 U.S. 474 (1968) (school board).

Application of the equal protection clause to the Commonwealth in the same way as it applies to the States would prevent the Commonwealth from having a legislature or a house of a legislature in which there were an equal number of representatives from each island or island group regardless of population. It would likewise prevent a legislature or a house of a legislature in which each island had at least a single representative unless the more populous islands had a number of representatives proportional to their population. These requirements would extend to the municipal levels of government within the Commonwealth as well.

If the Commission decides to seek an exemption from the one-man, one-vote doctrine so as to give the

Commonwealth greater freedom in designing a legislative body, it has substantial arguments to draw on. The U.S. Congress itself is structured in a way which would violate the equal protection clause--if the structure were not provided for in the Constitution itself, and if the equal protection clause applied against the federal government. For the Senate contains two members from each State, regardless of population; and the House contains at least one member from each State, no matter how small the population of the State. The Supreme Court rejected this "federal analogy" in the reapportionment cases, for two basic reasons. First, the scheme established for the federal government was "one conceived out of compromise and concession indispensable to the establishment of our federal republic." Reynolds v. Sims, supra, 377 U.S. at 574. Second, the political subdivisions of a State "never were and never have been considered as sovereign entities"; instead, they are creatures of the State created "to assist in the carrying out of State governmental functions." Id. at 575. While these reasons may have justified rejecting the federal analogy for State legislatures, in many ways they argue for accepting the federal analogy for the Commonwealth legislature.

Section 209:

Subsection 209(a) will settle any question about whether the Commonwealth Government is an agency or instrumentality of the federal government. It appears that the governments of the territories would normally be considered agencies of the federal government, see 5 U.S.C. § 551(1)(C) (1970) (excluding the territorial governments from the meaning

of the word "agency" for purposes of the Administrative Procedure Act). An agency or instrumentality of the United States is, of course, subject to the control of the federal government in a way that the Commonwealth Government will not be. Though it would probably be clear in any event that the Commonwealth Government is not such an agency or instrumentality, this provision is included as a precaution. There is no such specific provision in the U.S. draft.

Subsection 209(b) assures that the citizens of the Commonwealth are entitled to the privileges and immunities of the citizens of the several States. The U.S. draft provides similar assurances in Title IV. In general, this means that no State will be able to discriminate against citizens of the Marianas and in favor of its own citizens. Citizens of the several States are assured the same privileges and immunities with respect to the Commonwealth by the extension to the Commonwealth of Article IV, Section 2, clause 1 of the U.S. Constitution (except that special provision has been made to permit the Commonwealth to restrict land alienation to persons of Marianan ancestry).

Subsection 209(c) assures that the States will give full faith and credit to the public laws, records and judicial decisions of the Commonwealth. This Section will be important, for example, when a person who has won a lawsuit in a court of the Marianas attempts to enforce the judgment in a State of the Union. The States are assured that

the Commonwealth will provide the same full faith and credit to their acts, records and judicial proceedings by the extension to the Commonwealth of Article IV, Section 1 of the U.S. Constitution.

Section 210:

This Section carries out the agreement of the parties reflected in the Joint Communique issued at the conclusion of the December 1973 round of negotiations that "[t]he Status Agreement would be drafted so as to reflect clearly the intention of the United States and the Marianas Political Status Commission that this undertaking [referring to the limitations placed on federal authority] be enforceable in the federal courts." In the absence of a provision like this one, there is a danger that a suit against the United States based on the Commonwealth Agreement might fail without regard to the merits either because of the doctrine of sovereign immunity, or because a court would decline to become involved in what might be termed a "political question."

Section 211.

Both Section 211 of the present draft and Article III, Section 306 of the U.S. draft require public officials to take an oath or affirmation to support those provisions of the Constitution and federal laws of the United States that are applicable in the Commonwealth of the Mariana

Islands and to support the Constitution and laws of the Commonwealth.*/

The U.S. draft, however, in Article III, Section 302 provides that in addition to the responsibilities conferred on the Executive by the Constitution, it shall be responsible for the execution of the laws of the United States applicable in the Marianas. This provision has not been carried over into the present draft, since we believe that it would be inappropriate to charge one government entity like the Commonwealth with executing the laws of another. This conclusion is buttressed by the analogy of Puerto Rico. Prior to enactment of Public Law 600 and the Puerto Rican Constitution, the Governor of Puerto Rico was charged with the responsibility for the execution of federal laws.**/ That, presumably, was because its government was essentially considered an extension of the Department of the Interior, which had responsibility for administering Puerto Rico. From the time the Commonwealth was established, however, no responsibility beyond "supporting" the United States Constitution and federal laws has been placed upon the executive. See 48 U.S.C. § 874 (1970).

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*/ The U.S. draft does not require an oath to support the laws of the Commonwealth, but such provisions are traditional.

**/ See Law of Aug. 5, 1947, ch. 490, § 1, 61 Stat. 770 (Repealed 1950).

Provisions of the U.S. Draft Omitted from the Present Draft:

The U.S. draft provides in Article III, Section 303 that whenever it becomes necessary in case of disaster, invasion, insurrection, or rebellion, or imminent danger thereof, or to prevent or suppress lawless violence, the Governor of the Commonwealth may request of the President of the United States the assistance of the Armed Forces of the United States. This power is more appropriately defined by the people of the Marianas in their Constitution. In the case of Puerto Rico, this power was given to the Governor by a federal statute prior to the establishment of the Commonwealth, but after the Commonwealth was established, that statute was repealed*/ and Article IV, Section III of the Puerto Rican Constitution dealt with the question of the Governor's power in case of a Puerto Rican crisis.

An alternative would be to pattern a provision upon Article IV, Section 4 of the U.S. Constitution, which provides that the federal government will protect each State against invasion, "and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

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*/ See Law of Aug. 5, 1947, ch. 490, § 1, 61 Stat. 770 (Repealed 1950).

Discussion of Title III - United States Citizenship and Nationality

Title III of the present draft essentially reflects the provisions on citizenship and nationality agreed upon by the United States delegation and the Marianas Political Status Commission in Paragraph I.B. of the December 19, 1973 Joint Communique. The reasons underlying the provisions are set forth in the "Position Paper on U.S. Citizenship and Nationality in the Commonwealth of the Mariana Islands" presented to the U.S. delegation by the Marianas Political Status Commission on December 6, 1973. Title III of the present draft is closely similar to Title IV and to Article I, Section 103 of the U.S. draft.

Section 301:

Section 301 provides that on the date of termination of the Trusteeship Agreement, three classes of persons (and their children who are less than eighteen years of age) who are not otherwise citizens or nationals of the United States and who have taken no affirmative steps to preserve or acquire foreign nationality shall be declared United States citizens. The first class is those who were born in the Mariana Islands, who are citizens of the Trust Territory, and who reside or are domiciled in some part of the United States, its territories or possessions, including the Mariana Islands and Puerto Rico. The second class of persons

consists of those who are citizens of the Trust Territory, who have been continuously domiciled in the Mariana Islands for at least five years, and who, if old enough to do so, have registered to vote in District elections in the Mariana Islands District prior to January 1, 1975. The third group consists of those persons who are not citizens of the Trust Territory on January 1, 1974, but who have been domiciled in the Mariana Islands continuously for at least five years and who owe no allegiance to any foreign state. The Commission may wish to consider whether the five-year residency and domicile requirement for the second and third group of persons should be lengthened in view of the possibility that the Trusteeship Agreement may not be terminated as soon as was expected at the December 1973 round of negotiations.

Section 302:

This Section provides an opportunity for each person collectively naturalized by Section 301 to elect to become a national rather than a citizen of the United States. In order to elect the status of a national, a person who would automatically become a U.S. citizen by virtue of Section 301 must make a declaration under oath before any federal court or court of general jurisdiction in the Commonwealth that such person intends to become a national and not a citizen. Such oath must be taken either within

six months after the date of termination of the Trusteeship Agreement or within six months after reaching the age of eighteen years, whichever date is later.*/

Section 303:

This Section provides that all persons born in the Marianas on or after the date of termination of the Trusteeship Agreement and subject to the jurisdiction of the United States shall be citizens of the United States. Thus, the right to become a national rather than a citizen of the United States is limited to persons born prior to termination of the Trusteeship Agreement.

Section 304:

This provision deals with the post-termination period and the question of what persons born outside the Marianas can become United States citizens by virtue of their relationship to United States citizens or nationals domiciled in the Commonwealth. The U.S. draft in Article I, Subsection 103(d) leaves this issue open as not yet agreed upon.

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*/ At the December 1973 negotiating round the draft position on citizenship presented to the United States by the Marianas Political Status Commission included a provision which excluded any person automatically naturalized pursuant to Section 301 from being a United States citizen or national if within the period allowed for making the declaration of nationality rather than citizenship that person took affirmative steps to preserve or acquire foreign nationality. In its counter proposal, the U.S. did not include such a provision. We have therefore omitted it from the present draft.

Subsection (a) of Section 304 provides that after the termination of the Trusteeship Agreement, immediate relatives of persons who are citizens or nationals domiciled in the Commonwealth shall have the right to become naturalized citizens of the United States to the same extent as persons residing in a State. It is our understanding that the U.S. has no objection to this position. Immediate relatives are defined as children, spouse, parents, brothers, and sisters. The Commission may wish to consider whether this list should be expanded or contracted.

Subsection (b) provides that persons born outside the United States of parents either or both of whom are citizens or nationals of the United States domiciled in the Commonwealth shall become citizens at birth under the same terms and conditions as persons born outside the United States of parents either or both of whom became citizens of the United States by virtue of being born in a State. It is our understanding that the United States has no difficulty with this position either.

It is Subsection (c) with which the United States apparently has some problems. Subsection (c) provides that for purposes of satisfying any residence or physical presence requirement of the nationality and naturalization laws of the United States, time spent in the Marianas will only be

counted for persons who fall within the categories of Subsections (a) and (b), i.e., those who are "immediate relatives" of persons who are United States citizens or nationals domiciled in the Commonwealth or for persons who themselves are nationals of the United States. This feature would discourage migration to the Commonwealth of persons merely wishing to take advantage of the availability of United States citizenship. In this respect, the situation in the Marianas would be somewhat similar to that prevailing in American Samoa.

Section 305:

This Section provides that the courts of general jurisdiction established under the Constitution of the Commonwealth and the United States District Court for the Mariana Islands shall have jurisdiction to naturalize persons as citizens of the United States in accordance with applicable law. Although Article I, Subsection 103(e) of the U.S. draft does not provide for giving naturalization jurisdiction to the federal District Court, but only to the courts established under the Commonwealth Constitution, we can see no reason for this omission since naturalization is traditionally a matter of federal concern.

Section 306:

Section 306 defines "domicile" to include the place where a person maintains a residence with the intention of continuing such residence for an unlimited or indefinite period, and to which such person has the intention of returning whenever he is absent, even for an extended period. This is a standard definition of domicile.

Discussion of Title IV -- Applicability of United States Laws

Section 401:

For an explanation of the provisions in Section 401 see the Memorandum for the Marianas Political Status Commission entitled, "Applicability of Existing Federal Laws in the Marianas under a General Formula Approach."

Section 402:

Section 402 of the present draft, like Article VIII, Section 802 of the U.S. draft, provides that the President of the United States shall appoint a Commission of seven persons to survey the federal statutory laws and make recommendations to the Congress of the United States within two years after the effective date of the section concerning which statutes of the United States should be made applicable in the Commonwealth. At least three of the members appointed to the Commission by the President must be persons who would qualify for automatic U.S. citizenship under Section 301 of the Commonwealth Agreement.*/ None of the members can be government officials. (This provision is not found in the U.S. draft.) These requirements for the members of the Commission are intended to create a body which has no preconceptions based upon the experience with the application of federal laws to

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*/ Such a commission was agreed to in Paragraph I.C.3 of the December 19, 1973 Joint Communique.

territories of the United States and which includes individuals familiar with problems unique to the Marianas.

This Commission would be similar to the Commission on the Application of Federal Laws to Guam, which was established by Congress in 1950.*/ Although the Guam Commission wrote a detailed report for Congress on what federal laws should be applicable to Guam, Congress never acted on those recommendations and the plan for a rational application of federal law to Guam was therefore never effectuated.

To avoid this problem, Subsection 402(b) of the present draft provides that unless the House or Senate of the United States Congress enacts legislation which specifically disapproves all or part of the recommendations of the Commission within one year after Congress has received those recommendations, the recommendations shall have the force and effect of law. The U.S. draft does not include any provision of this type.

We believe that this delegation of legislative power by Congress to a Commission appointed by the President is constitutionally valid and does not violate the principle of separation of powers. The delegation of legislative power by Congress to an Executive body is routinely upheld so long as Congress provides a standard which is sufficiently precise and definite to enable Congress and the courts to ascertain whether Congressional intent is being carried out. See United States

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*/ See Act of Aug. 1, 1950, Ch. 512, § 25, 64 Stat., 390 (repealed 1963).

v. Rock Royal Co-op, Inc., 307 U.S. 533 (1939); Yakus v. United States, 321 U.S. 414 (1944).

As drafted Subsection 402(a) requires that in formulating its recommendations, the commission shall take into consideration the effect of each federal law on the local conditions in the Commonwealth of the Mariana Islands, the federal policies embodied in the law, and the consistency of the law with the provisions and purposes of the Commonwealth Agreement. We believe that this standard is sufficiently precise and definite to overcome any constitutional objections. Further, in addition to providing a standard to guide the Commission, Congress itself, acting through either House, has one year in which to disapprove the recommendations of the Commission.

Precedent exists for Congressional delegation of the selective application of federal laws to persons appointed by the President. In 1964 Congress delegated to the Secretary of Agriculture the power to establish an agricultural program in Guam which would include such programs of the Agriculture Department "as are determined by the Secretary [to] promote the welfare of that island." See Act of Sept. 7, 1964, 78 Stat. 926 (now expired). That authority was expressly given without regard to the fact that Guam may have been originally excluded by Congress from such programs.

Precedent also exists for Congress allowing recommendations of the Executive to become effective as law unless it specifically disapproves. For example, the Reorganization Act, 5 U.S.C.A. § 901 et seq., (1974 Supp.) provides that the President may submit to Congress a plan which recommends a reorganization of the agencies, including the abolition of an agency or the transfer of its functions to another agency. Unless either House of Congress passes a resolution stating in substance that the House does not favor the reorganization plan, the recommendations become effective as law 60 days after being received by Congress. 5 U.S.C.A. § 906.

Also pertinent is the precedent of the Commission on Exectutive, Legislative and Judicial Salaries set up by Congress to review the salaries of most high officials in the United States Government. 2 U.S.C. § 351, et seq. (1970). The Commission submits its recommendations on salaries to the President who in turn transmits recommendations to Congress. Those recommendations become effective automatically on a specified date, unless either House of Congress expressly disapproves all or part of the recommendations or unless a law has been enacted which establishes rates of pay which differ from the recommendations. 2 U.S.C. § 359.

Section 403:

Section 403 provides essentially that the local laws effective on the date the Commonwealth comes into existence shall remain in force and effect until and unless repealed by the Commonwealth of the Mariana Islands. Specifically included in such local laws are the statutory laws, executive and district orders, and judicial decisions of the Trust Territory of the Pacific Islands; the statutory laws of the Mariana Islands District Legislature; and the laws and ordinances of local municipalities within the Mariana Islands District. The purpose of this provision is to make sure that upon the date the Commonwealth is established, the Marianas still have some body of law in effect. This section should not be construed as in any way limiting the power of the Commonwealth Government, or its political subdivisions, to change existing laws as desired.

Section 403 of the present draft basically comports with Article IV, Subsection 403(d) of the U.S. draft. Section 403, however, has added "judicial decisions" to the list of laws of the Trust Territory which shall remain in effect unless repealed by the Commonwealth Government. We can think of no reason why the U.S. delegation would oppose this addition.

U.S. Provision Omitted:

Article IV, Subsection 403(d) of the U.S. draft includes a definition of "laws of the United States." This definition lists under "laws of the United States" statutes, joint resolutions, treaties and Executive Agreements, proclamations, Executive Orders, judicial decisions, and regulations issued by the several departments, agencies, and regulatory commissions.

We do not understand why the United States felt it necessary to include this definition. Such a definition seems only to raise the potential problem that "laws" in the Commonwealth Agreement mean something different from "laws" as routinely interpreted by the courts. For example, by including "judicial decisions," the question is raised of whether this refers to all the federal judicial decisions, regardless of the judicial circuit. Another example is "regulations issued by agencies." It is possible that an agency may issue an advisory regulation. The effect of this definition would be to give the regulation the force of law in the Marianas, but nowhere else in the United States.

Discussion of Title V -- United States Judicial Authority

For a discussion of the background for the provisions in Title V setting forth the judicial authority of the United States in the Commonwealth of the Mariana Islands, see the Memorandum for the Marianas Political Status Commission entitled, "United States District Court for the District of the Mariana Islands: Status Agreement Provisions."

Discussion of Title VI -- Taxation and Customs

Sections 601 - 606 of the present draft define the application of United States income, estate and gift taxes in the Commonwealth of the Mariana Islands. These sections are based largely upon Paragraph 1.D of the Joint Communique issued December 19, 1973.

Section 601:

Subsection 601(a) of the present draft provides that those persons who reside in the Commonwealth of the Mariana Islands and not in any other part of the United States, and who have become United States citizens or nationals pursuant to Title III of the Commonwealth Agreement or who, if prior to termination of the Trusteeship Agreement, would be eligible to become United States citizens or nationals in such a manner, shall be subject to federal income tax only on United States source income, not on income earned in the Commonwealth. Such persons shall not be subject to United States gift and estate taxation except with respect to property situated in the United States outside the Commonwealth. This provision corresponds to Paragraph I.D.1 of the December 1973 Joint Communique. It is not found in the U.S. draft, but the Joint Communique indicates the U.S. agreement on this matter.

The Commission should be aware that as drafted, Section 601 does not exempt from federal income, estate or gift taxes residents of the Marianas who are already United States citizens, since the exemption of Section 601 hinges on eligibility to become a United States citizen under Title III of the Commonwealth Agreement and Title III applies only to persons not already citizens. Present U.S. citizens residing in the Marianas would, however, receive some protection from the fact that they would be covered by Section 931 of the Internal Revenue Code.

Section 931 provides that United States citizens doing business in the Marianas are not subject to federal income tax on any foreign source income (including income earned in the Marianas) if they derive 80 percent of their gross income from Marianas sources and 50 percent from the active conduct of a trade or business in the Marianas. Thus, for most Marianas residents who are United States citizens, the federal tax burdens will be small. The federal estate and gift taxes will also apply to these citizens, but since they do not affect an estate valued at less than $60,000 and since gifts up to $3,000 yearly and $30,000 over the course of a lifetime are exempt, this will have no great impact. Furthermore, as drafted, the status quo will be

preserved, since U.S. citizens in the Marianas presently are subject to such taxes. Should the Commission decide, however, that as drafted Section 601 is undesirable, it appears that an alternative provisions based on Section 934 of the Internal Revenue Code could be developed.

Subsection (b) of Section 601 provides that for the purpose of determining under Subsection (a) who is eligible to become a United States citizen or national pursuant to Title III of the Commonwealth Agreement, the requirement of Subsections 301(b) and 301(c) that persons be domiciled continuously in the Mariana Islands District or the Commonwealth of the Mariana Islands for at least five years prior to termination of the Trusteeship Agreement shall instead be read as requiring that persons be domiciled continuously in the Mariana Islands District or Commonwealth of the Mariana Islands for at least five years prior to the beginning of the period or the date of the event for which tax treatment under Subsection 601(a) is claimed. The purpose of including Subsection (b) was to make sure that citizens of the Trust Territory would be exempt from U.S. income, estate, and gift taxes from the date of the establishment of the Commonwealth. Otherwise, such exemption would not take effect until termination of the Trusteeship Agreement.

Although the U.S. has had no opportunity to consider this issue previously, we believe that if they agree to establishment of the Commonwealth prior to termination, they will also agree that the tax exemption should begin from the date the Commonwealth is established.

Section 602:

Section 602 essentially embodies the same principles of Section 931 of the Internal Revenue Code, discussed above. The purpose of this provision was to provide an incentive for United States citizens and corporations to invest in the Marianas. This provision corresponds with Paragraph I.D.2 of the Joint Communique.

Section 603:

Section 603 of the present draft provides that the Commonwealth of the Mariana Islands shall be considered a "possession" for all purposes of administering the internal revenue laws of the United States. This is essentially a technical adjustment to make sure that the provisions of the Internal Revenue Code applicable to territories also apply to the Commonwealth.

Section 603 provides further that Subsection 872(b)(4) of the Internal Revenue Code (which provides that income derived from a series E or H United States savings bond is exempt from tax if an individual acquired the bond while a

resident of the Trust Territory) shall be amended by the Commonwealth Agreement to continue its application with respect to bonds purchased in the District of the Mariana Islands prior to the date of the signing of the Commonwealth Agreement. Unless this provision is amended to apply to the Mariana Islands, income from these savings bonds would be taxable to a Marianas citizen as U.S. source income. As drafted, Section 603 is in accord with Paragraph I.D.3 of the Joint Communique. It is limited in its effect to bonds purchased prior to the signing of the Agreement since on the date of the signing the provisions of the Agreement will become public and bonds purchased after that date could otherwise provide an unjustified tax shelter.

Section 604:

Section 604 has been drafted to implement the recommendations of the economic consultant with respect to the social security laws of the United States. These recommendations and certain alternative approaches are presented to the Commission in a paper prepared by the economic consultant.

Section 605:

Section 605 provides that the Commonwealth shall have exclusive authority to enact, amend, or repeal its internal revenue laws. This provision parallels Paragraph

I.D.4 of the Joint Communique and is basically in accord with Article VI, Section 601 of the U.S. draft which provides that the Commonwealth will enact a non-discriminatory, comprehensive internal revenue law which will be progressive and will reflect local economic conditions. We have omitted the requirements that the tax be non-discriminatory and comprehensive, since we believe that the imposition of those requirements through the Commonwealth Agreement infringes on the Commonwealth's right to self-government. */

Section 605 also provides that the Commonwealth shall enact no law imposing any tax or levy upon the property of the United States or of the Government of the Trust Territory which a State would not have the power to enact. This provision is the same as Article V, Section 503 of the U.S. draft except that it expressly provides that the Commonwealth's power is the same as a State. Representatives of the U.S. Delegation have previously stated that the Commonwealth's power to tax federal activity or property should be like a State's.

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*/ The United States has informed us that they are receding from their position, agreed to in the Joint Communique, that the Marianas should have exclusive tax authority and propose that this authority extend only for a period of ten years. This is an issue which the Commission may want to discuss with the U.S., if necessary, during the negotiations.

Section 606:

Section 606 of the present draft provides that bonds issued by or on behalf of the Commonwealth shall be exempt, as to principal and interest, from taxation by the United States, or by any State, territory, possession, the Commonwealth of Puerto Rico, the District of Columbia, or any political subdivision thereof. Article V, Section 504 of the U.S. draft provides the same.

U.S. Provision on Debt Ceiling Omitted:

Article V, Subsection 503(b) of the U.S. draft provides that the Commonwealth shall authorize no public indebtedness in excess of ten percent of the aggregate tax valuation of the real property in the Commonwealth. This provision is similar to the debt limitations imposed upon Guam (48 U.S.C. § 1423a (1970)) and upon the Virgin Islands (48 U.S.C. § 1574(b)(ii)(1970)). While Puerto Rico is also subject to a ten percent debt limitation (48 U.S.C. § 745 (1970)), the United States Congress in Pub. L. 87-121, Aug. 3, 1961, 75 Stat. 245 provided that Puerto Rico may, by obtaining approval in a referendum, eliminate the debt ceiling imposed by the United States and include its own provision limiting its debt-incurring capacity in its constitution. Since Puerto Rico has, in effect, been given the power to determine its own debt-ceiling, we see no

reason why the Commonwealth, as a self-governing body, should not also be given this power.

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Sections 607 - 612 of the present draft deal with the customs and excise taxes for products exported from and imported into the Commonwealth. As drafted, these Sections essentially reflect the agreement reached on customs duties and excise taxes in Paragraph I.E of the December 1973 Joint Communique. The U.S. draft includes some, but not all, provisions of that agreement. The reasons justifying these provisions were explained to the United States in the MPSC position paper of December 6, 1973, entitled "Position Paper on Applicability of U.S. Customs and Excise Taxes to the Commonwealth of the Mariana Islands."

Section 607:

In accord with Paragraph I.E.1 of the Joint Communique, Section 607 of the present draft provides that the Commonwealth shall not be included within the customs territory of the United States. It further provides that the Commonwealth shall have exclusive authority to enact laws providing for customs duties on imports into the Commonwealth from foreign countries, provided that this

authority shall not be exercised in a manner inconsistent with the international obligations of the United States, including the General Agreement on Tariffs and Trade ("GATT"). This section expresses the same general idea as Article V, Section 502 of the U.S. draft except that the U.S. draft does not provide the Commonwealth with "exclusive" authority.

Section 608:

Section 608 provides that exports from the Commonwealth shall enter the customs territory of the United States free of any import duty, unless more than fifty percent of the value of a product is derived from foreign materials. */ This comports with Paragraph I.E.3 of the Joint Communique. Article V, Section 501 of the U.S. draft provides that imports from the Commonwealth into the customs territory of the United States shall be subject to the same treatment as those from Guam. While we believe that this provision was intended to express the same idea found in Section 608,

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*/ The question of whether some products should be treated as products from the Marianas, even though 75 percent of the value of the product is derived from foreign materials, was left open at the end of the last session of negotiations. The Commission's economic consultant states that the only serious concern in this regard is fish products. The Commission may wish to consider whether special provisions relating to fish or fish products should be sought.

we believe it is preferable to spell out exactly what treatment Guam receives. Furthermore, as drafted, the U.S. provision is subject to the risk that a change of treatment for Guam would automatically change this provision of the Commonwealth Agreement.

Section 609:

Section 609 provides that the United States shall seek to obtain from foreign countries favorable treatment for exports from the Commonwealth. It provides further that the United States shall encourage other countries to consider the Commonwealth a "developing territory" within the meaning of the June 25, 1971 GATT waiver regarding preferential treatment for goods from developing countries and territories. No similar provision is found in the U.S. draft, but Paragraph I.E.4 of the Joint Communique so provides.

Section 610:

This Section provides that the Commonwealth shall have exclusive authority to impose duties on exports from its territories. No similar provision is found in the U.S. draft but Paragraph I.E.5 of the Joint Communique gave such authority to the Commonwealth.

Section 611:

Section 611 of the present draft provides that consistent with the international obligations of the United States, the Commonwealth shall have exclusive authority to impose excise taxes upon goods imported into the Commonwealth and goods manufactured or sold in the Commonwealth. While no explicit authority to impose excise taxes is found in the U.S. draft, such power can be inferred from the power to enact internal revenue laws. Paragraph I.E.6 of the Joint Communique would support such an interpretation.

Section 612:

Section 612 provides that all revenues and federal income taxes collected by the United States and derived from the Commonwealth of the Mariana Islands (other than those taxes collected for U.S. Social Security purposes) will be covered into the Treasury of the Commonwealth for the benefit of the people. Article VI, Subsection 602(b) of the U.S. draft is similar.

Discussion of Title VII -- Other Laws

This Title is addressed to the applicability of other significant federal laws.

Section 701:

This Section is reserved for provisions relating to the applicability of the immigration laws of the United States. A separate report has been prepared for the Commission on this topic. In view of the great importance of this issue and its sensitivity in the Marianas, it seems preferable to await an agreement with the United States on a position before language is provided for the formal document.

Section 702:

This Section concerns the shipping and maritime laws of the United States.

Section 702(a) provides that the coastwise laws of the United States shall not extend to the Commonwealth of the Mariana Islands. The coastwise laws of the U.S. are those which regulate the coastwise or coasting trade. "The terms coastwise trade and coasting trade describe vessels engaged in domestic trade or plying between port and port in the United States, as distinguished from vessels engaged in foreign trade or plying between a United States port and a port of a foreign country." 42 Op. A. G. No. 13 (Aug. 7, 1963) (footnote omitted). The most significant of the coastwise laws are those which prohibit foreign

vessels from carrying goods or passengers between American ports. Under 46 U.S.C.A. § 883 (Supp. 1974), the transportation of merchandise between ports of the United States and of most of its territories on any vessels which are not American-built, registered and owned is prohibited. Under 46 U.S.C. § 289 (1970), the transportation of passengers between American ports on foreign vessels is prohibited.

The restrictions found in Sections 289 and 883 were extended to the territories by the Merchant Marine Act of 1920, 46 U.S.C. §877 (1970), which provides:

> "From and after February 1, 1922, the coastwise laws of the United States shall extend to the island Territories and possessions of the United States not covered thereby on June 5, 1920, and the Secretary of Commerce is directed prior to the expiration of such year to have established adequate steamship service at reasonable rates to accommodate the commerce and the passenger travel of said islands and to maintain and operate such service until it can be taken over and operated and maintained upon satisfactory terms by private capital and enterprise: Provided, That if adequate shipping service is not established by February 1, 1922, the President shall extend the period herein allowed for the establishment of such service in the case of any island Territory or possession for such time as may be necessary for the establishment of adequate shipping facilities therefor: And provided further, That the coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands and fix a date for the going into effect of same."

Though the language of this provision is ambiguous, later congressional action indicates that it was intended to grant the President the power to prevent the coastwise laws from going into effect in a territory,

not just the power to extend the time allowed for the establishment of service. Accordingly, it appears that at the time the coastwise laws were extended to the territories generally, flexibility was provided in case adequate service was not available.

Congress has exercised this flexibility in several instances to make exceptions to the application of the coastwise laws.

American Samoa: 48 U.S.C. §1664 (1970) provides that federal law "restricting to vessels of the United States the transportation of passengers and merchandise" between ports of the United States "shall not be applicable to commerce between the islands of American Samoa or between those islands and other ports under the jurisdiction of the United States." The exemption was passed for two reasons. First, the United States had agreed by treaty in 1899 with Great Britain and Germany that "in respect to their commerce and commercial vessels," each of the signatories would have equal rights in American Samoa. Application of the coastwise laws conflicted with the treaty, and was being used by New Zealand, which controlled Western Samoa, to justify certain discriminatory tariffs which disadvantaged American shippers. Second, the coastwise laws were of no importance with respect to American

Samoa since it had, at that time, a population of about 10,000, "and its commerce [was] insufficient to be attractive or profitable to American shipping." S. Rep. No. 1141, 73d Cong., 2d Sess. at 2 (1934).

Virgin Islands: The last proviso of 46 U.S.C. §877 (1970) states that "the coastwise laws of the United States shall not extend to the Virgin Islands . . . until the President proclaims them applicable to that territory. Similarly, 48 U.S.C. §1405c(d) (1970), grants to the President the power to make such of "the navigation, vessel inspection and coastwise laws of the United States as he may find and declare to be necessary in the public interest" applicable in that territory. The coastwise laws are presently inapplicable in the Virgin Islands. The Reports on the bill which became the last proviso to Section 877 indicate that yearly exemptions had been granted to the Virgin Islands by Executive Order since February 1, 1922, but that this had led to undesirable uncertainty. The justification for the exemption was, in the words of the Interior Department letter on which both Reports relied, that

> " . . . exports from and imports to the islands are very small, as the total population is less than 25,000; that St. Thomas is important as a port of call and transshipping and is the chief bunkering port of the Caribbean . . . and is also a port of call for vessels plying between

> our Atlantic ports and the east coast of South America. Most of the vessels which call are of foreign registry, and the coastwise shipping laws of the United States, if applied to the Virgin Islands, would prohibit such calls . . . . By the provision of the proposed bill, the needs of the Virgin Islands would be given this protection [of statutory exemption instead of yearly Executive Orders], yet the President would retain the power to extend the coastwise laws of the United States to the islands when an adequate shipping service is established there."

Letter from Secretary Ickes to the Chairman, House Committee on Merchant Marine and Fisheries, dated January 9, 1935, reprinted in S. Rep. No. 1010, 74th Cong., 1st Sess. at 1-2 (May 13, 1935), and in H. R. Rep. No. 2281, 74th Cong., 2d Sess. at 3 (March 30, 1936). According to the 1972 report of the Federal Maritime Commission (at 24), 16 of the 22 carriers which filed rates with the Commission applying to the Virgin Islands were foreign flag operated.

Other: Alaska enjoys some limited exemption from the coastwise laws. See, e.g. the fourth provision of Section 883 itself and Section 289 b of Title 46. There are, or have been, waivers of the coastwise laws for specified ports served by, or specific items carried by, Canadian vessels. See, e.g. 46 U.S.C.A. § 289(a) (Supp. 1973).

It is clear that in many situations in which there was inadequate American bottom service, the Congress has granted exemptions from the coastwise laws. Without such an exemption,

the Marianas will not have adequate shipping service. Section 702 (a) has been drafted, therefore, to provide the same kind of exemption presently possessed by American Samoa.

Section 702(b) provides that the laws prohibiting foreign flag vessels from landing fish or fish products in the United States shall not apply within the Commonwealth of the Mariana Islands.

The basic restriction against foreign-flag vessels landing their catch of fish at American ports is found in 46 U.S.C.A. §251(a) (Supp. 1973):

> "Vessels of twenty tons and upward, enrolled [under the provisions of title 46] . . . and having a license in force, or vessels of less than twenty tons, which, although not enrolled, have a license in force, as required by such sections, and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries. Except as otherwise provided by treaty or convention to which the United States is a party no foreign-flag vessel shall, whether documented as a cargo vessel or otherwise, land in a port of the United States its catch of fish taken on board such vessels on the high seas or fish products processed therefrom, or any fish or fish products taken on board such vessel on the high seas from a vessel engaged in fishing operations or in the processing of fish or fish products."

In 1961 Congress amended this statute so as to permit foreign-flag vessels of fewer than fifty feet in length to land their catch of fish in the Virgin Islands for immediate consumption. See 46 U.S.C.A. §251(b) (Supp.

1973). In recommending the amendment, the Interior Department said that "[u]nless the exception is granted . . . it will be necessary . . . to prohibit" landings of fish from small boats from the British Virgin Islands, which had been overlooked in the past. S. Rep. No. 828, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. 2640.

Notwithstanding the general restriction, the Commissioner of Customs ruled in 1953

> "that a foreign-flag vessel is not prohibited by [Section 251] . . . from landing in Guam or American Samoa its catch of fish or fish products taken on board such vessel on the high seas from a vessel engaged in fishing operations or in the processing of fish or fish products."

Bureau of Customs Marine Circular No. 124 (June 12, 1953); see also Bureau of Customs Marine Circular No. 124, Supplement 1 (November 15, 1955) (reaffirming that Section 251 does not prohibit "a foreign-flag vessel from landing [at Guam or American Samoa] fish it has taken or had transshipped on the high seas").

The basis of the Commissioner's decision with respect to American Samoa was that, as an unorganized, unincorporated territory "appurtenant to the United States" it did not contain a "'port of the United States' within the purview of" Section 251. With respect to Guam, the Commissioner found that the amendment to Section 251 which contained the specific restrictions (i.e., the second sentence of the Section, beginning with "Except as otherwise provided by treaty . . .") did not apply to Guam because the amendment made no mention of its applicability

to Guam or to possession as was required by the Organic Act of Guam at the time. */

There is good reason to exempt the Commonwealth from the restrictions placed against the landing of fish by foreign vessels. Since the restrictions contained in Section 251 have been modified for the Virgin Islands, and do not apply in full force to Guam and American Samoa, there is ample precedent for such an exemption. We believe that specific provision be made in the Commonwealth Agreement for this exemption. It is possible that because Guam is not covered by the restriction that the law would be inapplicable to the Marianas under the general formula which has been proposed (see Section 401 of the Commonwealth Agreement). But in view of the fact that the provision of

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*/ Section 25(b) of the Organic Act of Guam, 48 U.S.C.A. §1421c(b) (1952) laid down the general rule that "no law of the United States hereafter enacted shall have any force or effect within Guam unless specifically made applicable by act of the Congress either by reference to Guam by name or by reference to 'possessions'". This Section was repealed by Section 7 of the Guam Elective Governor Act, see 48 U.S.C.A. §1421c(b) (Supp. 1974). According to H. R. Rep. No. 1521, 90th Cong., 2d Sess., reprinted in 1968 U. S. Code Cong. 3564, 3568, Section 25(b) was repealed because it "is an unusual provision and is inconsistent with standard references in federal laws to the territories."

law on which the Commissioner of Customs based his decision has been repealed, in view of the ambiguity of that decision as it relates to Guam,*/ and in view of the fact that if this law is not treated separately it would be subject to change without mutual consent, we believe the safer course is to deal with it explicitly.

Section 702(c) addresses problems relating to citizenship and the maritime and shipping laws. It gives the Secretary of Commerce the authority to issue regulations so that for appropriate provisions of the U.S. maritime and shipping laws persons who are not U.S. citizens but who are domiciled in the Commonwealth (e.g., before termination TTPI citizens, and after termination U.S. nationals) can be treated as U.S. citizens.

The maritime laws are replete with provisions which restrict benefits to citizens of the United States.

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*/ The initial decision of the Commissioner states, following the language of the last portion of the statute, that foreign-flag vessels may land "fish or fish products taken on board such vessel on the high seas from a vessel engaged in fishing operations or in the processing of fish or fish products." The implication seems to be that a foreign-flag vessel could not, in the language of the earlier part of the statute, "land . . . its catch of fish taken on board such vessel on the high seas or fish products processed therefrom" (i.e., not from another vessel). But the second decision describes the first as permitting a foreign-flag vessel to land "fish it has taken or had transshipped" (emphasis supplied).

For example, the coastwise trade in merchandise is restricted to vessels which are, among other things, "owned by citizens of the United States." 46 U.S.C.A. §883 (Supp. 1973). There are also a number of provisions which require American vessels to have officers and crews composed entirely or largely of citizens. E.g., 46 U.S.C. §221 (1970) (vessels which are registered or qualified for the coasting or fishing trade "shall be deemed vessels of the United States . . . but no such vessel shall enjoy such benefits and privileges longer than it shall continue to be wholly owned by a citizen or citizens of the United States . . . and be commanded by a citizen of the United States," and all watch officers shall be citizens, except that this latter provision can be suspended by the President, 46 U.S.C. §236 (1970); 46 U.S.C. §242 (1970) (staff officers on vessels of the United States must be citizens); 46 U.S.C. §672(a) (1970) (all licensed officers and pilots, and 75 per cent of the crew of American vessels must be citizens); 46 U.S.C. §1132 (1970) (the entire crew of a cargo vessel for which a construction or operating subsidy has been granted, and 90 per cent of the crew (including all licensed officers) of a passenger

vessel for which a subsidy has been granted, must be citizens of the United States). There are other instances where citizenship is crucial as well.

There is no generally applicable definition of citizen with respect to natural persons in the maritime statutes.*/ However, the regulations which concern the documentation of vessels define "citizen" as, "in the case of an individual, . . . a native born, derivative, or naturalized citizen of the United States." 46 C.F.R. §46.03-1 (1972). This certainly indicates, if it does not show, that nationals of the United States are not considered citizens for these purposes, despite the similarity in their obligations to the country.

Legal entities must meet special requirements to be considered citizens. Under 46 U.S.C.A. §802(a) (Supp. 1973), a corporation, partnership or association is a citizen of the United States only if "the controlling interest 75 per cent interest if the vessel is to participate

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*/ Several of the statutes relating to the nationality of crews provide a definition of sorts by referring to "citizens of the United States, native-born or completely naturalized," e.g., 46 U.S.C. §§672a(a), (b), 1132(a), (b), but this is not always so, e.g., 460 U.S.C. §242 (1970) (refers just to "citizens of the United States").

in the coastwise trade] is owned by citizens of the United States, and . . . its president . . . and chairman of its board . . . are citizens of the United States and . . . a [majority] of the number necessary to constitute a quorum are [citizens] and the corporation itself is organized under the laws of the United States or of a state [or] territory . . . ."

These restrictions and many others in the maritime laws may pose a problem in the Marianas prior to termination when most persons will not be U.S. citizens, and after termination when some residents may choose national status instead of citizenship. The problem goes beyond the disadvantages which will be suffered by the nationals, for presumably those who make that decision will have a basis for it. There are situations where citizens may be hurt as well. It may be hard for a corporation to meet the definition of citizen, for example; this may work to the disadvantage of many more persons than the nationals involved. Even worse, a wrong guess about whether a person is a national or a citizen could result in criminal liability. Under 46 U.S.C. §835(b)(1) (1970), no vessel owned in whole or in part by a citizen or corporation organized under the laws of the United States or any State or territory may be transferred during a

national emergency to any person "not a citizen of the United States without the prior approval of the Secretary of Commerce." That Section provides for a criminal penalty as well as forfeiture of the offending vessel. "Vessel" means "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water," 1 U.S.C.A. § 3 (Supp. 1973). See United States v. Vessel FL4127SE, 311 F. Supp. 1353 (S.D. Fla. 1970) (23 +1/2 foot speedboat forfeited); see also 46 U.S.C.A. § 808 (Supp. 1973) (unlawful to transfer any vessel "documented under the laws of the United States" or any interest therein "to any person not a citizen of the United States" without approval of the Secretary of Commerce; fine and forfeiture provided for violation).

Discussion of Title VIII -- United States Financial Assistance

Section 801:

Section 801 of the present draft provides that the United States will supply direct financial support to the Commonwealth for local government operations and programs, for capital improvement projects and for economic development. It provides further that such support will continue until the people of the Commonwealth have achieved a standard of living comparable to that found in other parts of the United States and until the Government of the Commonwealth can meet the financial responsibilities of self-government from its own resources.

Section 801 differs in several significant respects from the comparable provision of the U.S. draft, Article VI, Section 601. First, that section of the U.S. draft is extremely vague in stating when the obligations of the United States to provide financial assistance would be satisfied. It provides merely that the United States will provide financial support in order to "facilitate the achievement of economic self-sufficiency and higher standards of living" for the people of the Commonwealth. The use of the term "facilitate" could be construed as indicating only a short-term commitment for financial aid, rather than a commitment

to provide such aid until the stated goals have been reached. The present draft, in contrast, makes clear that the U.S. Government is committing itself to provide aid until the economic goals specified in Section 801 have been reached.

Second, while the present draft specifies that one goal of providing financial assistance is to bring the Commonwealth up to a standard of living comparable to that found in other parts of the United States, the U.S. draft refers to the goal simply in terms of a "higher standard of living." Although the goal of a "higher standard of living" is in itself acceptable, it must be made clear that the reference point for determining whether the desired level has been reached is the standard of living found in other parts of the United States.

In addition, the present draft refers to the goal of placing the Commonwealth Government in a position to meet the financial responsibilities of self-government from its own resources. The goal stated in the U.S. draft of "economic self-sufficiency" may reflect this same idea, but again is vague and open to conflicting interpretations. */

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*/ These distinctions between the goals of the U.S. and the goals of the MPSC were articulated by the U.S. and MPSC at the December 1973 negotiating session. See "United States Presentation on Phase II Goals and Financial Assistance," submitted December 13, 1973 where it was stated that the United States is committed to a significant increase in per capita income and progressive development toward economic

[footnote continued on next page]

Finally, while Section 801 of the present draft defines the obligations of the U.S. alone, the U.S. draft speaks in terms of a joint effort by the Commonwealth and the United States to increase the economic level of the Marianas. We believe that the emphasis of the present draft on the United States commitment to economic development, without reference to financial contributions to be made by the Commonwealth, is appropriate. It goes without saying that the people of the Commonwealth will carry the major burden of economic development. The important question is what the U.S. will contribute to help them bear that burden.

Section 802:

Section 802 of the present draft provides for direct financial assistance from the United States, which shall consist of guaranteed levels of economic support for periods of not less than five years. Article VI, Subsection 602(a)(1) of the U.S. draft provides for direct financial assistance for the five years following the effective date of that section, but says

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[footnote continued from previous page]
self-sufficiency; and "MPSC Response to the United States Presentation on Phase II Goals and Financial Assistance," submitted December 15, 1973 where it was made clear that economic self-sufficiency is not the only legitimate goal and that complete transition to a new political status will not be accomplished until the Marianas are a self-sufficient member of the American political family with a level of economic development which will provide a standard of living comparable to that enjoyed by other Americans.

nothing about whether future aid shall also be provided in multi-year periods.*/

The present draft provides for continued multi-year commitments by the U.S. so as to permit orderly planning for government operations and economic development by the Commonwealth Government. This approach is in lieu of yearly appropriations, which in addition to making planning difficult, would be inconsistent with the concept of local control over local affairs and would create an expensive and time consuming yearly diversion of the attention of local government officials toward Washington, D.C., where they must seek funds, and away from the problems of the Marianas.

Section 803:

Subsection 803(a) of the draft provides for the authorization of and appropriation of $10 million for the budgetary support of government operations, $4.5 million for capital improvements, and $1.5 million for an economic development loan fund in each of five fiscal years. Subsection 602(a)(1) of the Covenant provides for essentially the same categories of assistance. Although not entirely clear, it appears that Subsection

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*/ The December 1973 Joint Communique also left this question open.

602(a)(1) of the U.S. draft is intended to require that the funds appropriated for economic development loan fund be made available to the people of the Commonwealth in the form of long-term, low-interest rate loans. This requirement has not been included in the present draft since the Commonwealth, as a self-governing political body, should have the opportunity to determine for itself the terms of the loans made from this fund. Nonetheless, the United States may take some comfort from the fact that long-term, low-interest-rate loans are the most practical utilization of the loan fund and therefore that its suggestion is likely to be implemented.

Subsection 803(b) of the draft provides that a pro rata share of the funds appropriated by Section 803 shall be provided for that period between the effective date of this Section and the beginning of fiscal year 1978. Though there is no comparable provision in the U.S. version, this appropriation seems entirely reasonable. It will make funds available immediately after the Commonwealth comes into effect, and will avoid the difficulties involved in waiting until the artificial date of the beginning of a fiscal year.

Subsection 803(c) provides for adjusting the guaranteed annual levels of direct grant assistance by an inflation factor. Our discussions with the economic consultant indicate that it would be possible to build such an inflation factor into the levels appropriated rather than including a separate provision in the Agreement. But a built-in inflation factor is based upon estimates of future inflation which could be incorrect. A separate provision

for inflation insures that the increase in amount will accurately reflect the actual change in cost.

Section 803(d) provides that upon the expiration of the period of guaranteed annual direct grant assistance, the amount paid in each of the categories listed in Subsection (a) shall continue until Congress passes a law appropriating a different amount. This assures that there will be no gap in direct payments because Congress has failed to act.

Section 804:

Section 804 of the present draft, providing for an annual report from the Commonwealth to the President and Congress of the United States on the administration of the funds transferred to the Government of the Commonwealth pursuant to Section 803, is essentially the same as Title VI, Section 602 of the U.S. draft.

Section 805:

Section 805 provides that not later than two years prior to the expiration of any multi-year period for which a commitment of guaranteed annual levels of financial assistance has been made, representatives of the United States government and representatives of the Commonwealth shall meet to discuss the annual levels of guaranteed assistance required for the next proceeding multi-year period. This provision is similar to Article VI, Subsection 602(a)(1) of the U.S. draft providing for a review by the United States and the Commonwealth after the first five-year period of direct appropriation has ended in order to determine the level at which the appropriations should be continued "in light of changing conditions." While the U.S. draft, however, only provides for a meeting at the end of the first appropriation period, the present draft provides for such meetings in conjunction with each multi-year appropriation. Further, while the U.S. draft sets the timing for such a meeting at the end of the appropriation period, the

present draft provides for the meeting before the appropriation has run out, so that continuity of support from the United States can be assured.

The U.S. draft makes no provision for the conduct of the meetings. The present draft in Subsection 805(b), however, provides that the parties shall negotiate in good faith to reach agreement on the level of financial assistance necessary to raise the average level of per capita income in the Commonwealth, to move the Commonwealth progressively toward economic self-sufficiency, to build toward an adequate physical, economic, and social infrastructure, to provide necessary public services and programs, and to encourage and promote the economic development of the Commonwealth.

Recognizing the legitimate interest of the United States in gradually decreasing the level of direct economic support provided to the Commonwealth, Subsection 805(c) provides that in these negotiations the parties shall take into consideration not only the needs of the people, but also their capacity to shoulder an increasing tax burden and to supplement and expand their sources of revenue otherwise than from direct financial assistance of the United States.

Subsection 805(d) provides that the parties to these negotiations shall prepare a report setting forth their recommendations and that such report will be transmitted to the Chief Executive and the Legislature of the Commonwealth and to the President and Congress of the United States. While Congress is

not bound by these recommendations, it is expected that the recommendations will play a significant part in guiding Congress in determining the amounts to appropriate.

Section 806:

Section 806 of the present draft provides authorization for the appropriation of additional funds necessary to carry out the provisions of the Commonwealth Agreement. This provision is not found in the U.S. draft. The purpose of Section 806 is to ensure that if unanticipated problems arise in implementing the Commonwealth Agreement, there is a relatively easy method of obtaining additional funds to meet those problems. It could also be interpreted as providing authorization for the multi-year direct grant assistance. Because Congress retains complete authority to determine the amount of appropriations authorized by this section, the U.S. should be willing to incorporate the provision into the agreement.

Sections of U.S. Draft on Financial Provisions Omitted:

Title VI of the U.S. draft dealing with the financial aspects of the Commonwealth Agreement includes all provisions for "direct and indirect grant assistance and other payments" from the United States. In contrast, Title VIII of the present draft concentrates on the guaranteed levels of direct economic assistance only. Thus, unlike the U.S. draft, the present draft of the Commonwealth Agreement includes the payments for land made available to the U.S. Government under

Title IX (Public Property of the Commonwealth and Property Required by the United States); the cover over provisions under Title VI (Taxation and Customs); appropriations for transitional costs under Title XII (Transition); and funds provided by Federal services and programs under Title IV (Applicability of United States Laws).

Discussion of Title IX -- Public Property of the Commonwealth and Property Required by the United States

Section 901:

Section 901 of the present draft provides that the title and all other rights to and interests in the real and personal property in the Mariana Islands District which are owned or held by the Government of the Trust Territory shall be transferred to the Commonwealth upon its establishment. Such property includes, among other things, public lands owned by the Trust Territory Government, public buildings, and the furnishings for those buildings. Section 901 provides further that until the termination of the Trusteeship Agreement, the President of the United States may retain the property needed for active use by the Government of the Trust Territory in its administration of the other five districts of the Trust Territory. */

Article VII, Section 701 of the U.S. draft also provides for the transfer of real and personal property owned by the Government of the Trust Territory to the Commonwealth Government. While the present draft in effect places the burden on the United States to justify retaining property between the establishment of the Commonwealth and the termination of the Trusteeship, the U.S. draft gives complete discretion to the President of the United States to determine whether any

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*/ We assume that it is likely that prior to the date the Commonwealth is established, the Marianas will have been administratively separated from the other districts and that in the process of separation an equitable division of property between the Marianas and the other districts will have been worked out.

property should be transferred prior to termination. Since much of the property located within the Mariana Islands District would be of use in providing facilities to the new Commonwealth Government and since the United States has already made a commitment to transferring public lands in the near future, the U.S. delegation should have no serious problem with the wording of Section 901 of the present draft.

Section 902:

Subsection (a) of Section 902 of the present draft provides that the Commonwealth Government (through the Marianas Islands Public Land Corporation or its successor) shall enter into leases with the United States Government for the Island of Farallon de Medinilla, for 250 acres of land located near the south end of Isley Air Field, for yet undetermined amounts of Tinian and for such other land as the United States may need for a post office, a Coast Guard station, or the like.*/ Such leases would become effective on the date of the establishment of the Commonwealth Government.

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*/ Section 902 and several other sections of the present draft refer to the Public Land Transfer Act. We have drafted these provisions on the assumption that this Act will eventually be passed.

In contrast, Article VII, Section 702 of the U.S. draft is vague on what kind of interests the United States would obtain in these lands and waters after the establishment of the Commonwealth. (Nor does it describe the amount of land needed.) */ Section 702 provides that the Marianas Political Status Commission, the Mariana Islands District Legislature and successor governments (presumably the Commonwealth Government) will take all measures necessary to satisfy the United States military land requirements. As the Commission knows, however, the United States would prefer to purchase the land needed by the United States, rather than to enter into long-term leases. This is a dispute which must be settled through negotiations.

Subsection (b) of Section 902 of the present draft sets out the following ten terms which must be included in the leases entered into for the land:

Form of Lease. Paragraph (1) of Subsection 902(b) provides for a fifty-year term with one option to renew for another fifty years. As drafted, this provision reflects the Commission's position found in the December 17, 1973 "Position Paper on Future United States Land Needs in the Marianas." This term goes to the heart of the dispute with the United States over how it shall obtain land for military purposes in the Marianas.

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*/ Section 702 provides that until termination of the Trusteeship (which under the U.S. draft is the date of establishment of the Commonwealth), the United States would have use rights in that property.

Reverter Clause. Paragraph (2) of Subsection 902(b) provides that if the United States fails to use the land (or any significant portion thereof) substantially and frequently during any five-year period for the purposes for which the land was made available, the land shall revert to the Mariana Islands Public Lands Corporation or its successor. Since substantial and frequent use is a term of the lease contract, a determination of whether the land is being so used can be made by a court and a court order can be obtained providing for the reversion of the land. The U.S. draft in Article VII, Section 704 suggests that agreements providing for land shall contain "provisions for reversion", so we can assume that the United States agrees in principle to this clause.

Determination of Lease Payments. Paragraph (3) of Subsection 902(b) is reserved for the price to be paid for the interest in land the U.S. obtains or for a mechanism to determine price; and for provisions relating to periodic review of the lease payments and for adjustments for inflation.

Civilian Use of Military Land. Paragraph (4) of Subsection 902(b) provides that consistent with the intended use of the leased land by the United States, the people of the Marianas shall be allowed maximum use of the land and other natural resources made available under the lease and of the facilities built upon that land. This provision is aimed at insuring that, to the extent possible, the people can continue using the resources for such activities as fishing or farming and can use the facilities which will be built for such purposes as recreation or education. No similar provision is found in the U.S. draft.

Community Development. Paragraph (5) of Subsection 902(b) provides that the United States, to the extent practicable, shall work jointly with the people of the Marianas in promoting the development of the local community in the course of building the infrastructure and facilities necessary for U.S. Government operations. The

intent behind this provision is to encourage the United States to promote the development of the local communities when building such things as roads or power plants. Such a cooperative effort would enable the people of the Marianas to save money in many instances. Since the United States is committed to providing funds for development of the Marianas it too will benefit indirectly from such savings. This provision is similar to the provision mentioned in Article VII, Section 704 of the U.S. draft for "joint undertakings of the parties to insure a balanced social and community growth."

Relocation. Paragraph (6) of Subsection 902(b), as yet incomplete, is intended to provide a commitment by the United States to relocate persons displaced by the leases with the United States which goes beyond the requirements of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act, 42 U.S.C.A. § 4601 et seq. (1974 Supp.). This paragraph can be completed when the United States and the Commission have come closer to agreeing on what land will be made available to the United States. The commitment to relocate San Jose Village, if necessary, which goes beyond the requirements of the Uniform Relocation Assistance Act has already been made by the United States and thus can be tentatively incorporated into the Commonwealth Agreement.

Article VII, Section 704 of the U.S. draft provides for the resettlement of occupants wherever necessary. While the United States seems agreed to this in principle, the exact extent of the assistance which is contemplated should be explored further when the land to be leased has been determined.

Environmental Protection. Paragraph (7) of Subsection 902(b) provides that in utilizing the land made available to it, the United States shall act in a manner which accords full respect to the environment of the Mariana Islands. Additional protection to the environment will be provided by the National Environmental Protection Act, 42 U.S.C. §§ 4331-4335 (1970). Article VII, Section 704 of the U.S. draft also provides that any agreements on land shall contain a provision against environmental damage.

Military Procurement. Paragraph (8) of Subsection 902(b) provides that the United States shall guarantee that when it enters into construction and supply contracts relating to military activities which it engages in on the land made available by the Commonwealth, the United States shall make every effort to utilize the services of the people of the Marianas. This provision is very generally drawn and it is expected that for each lease a detailed action program

will be negotiated in order to insure maximum utilization of local talent and resources in the building and operation of the military complexes.

The U.S. draft contains no similar provision, but Ambassador Williams assured the Commission on June 3, 1973 that the United States "can and will include specific language in its contracts to ensure use of local contractors wherever possible and particularly with respect to small business contracts and non-competitive bid contracts." (Land Statement of Ambassador Williams, at p. 15 (June 3, 1973)).

Grievance Procedures. Paragraph (9) of Subsection 902(b) provides that any person with a grievance relating to the presence of the United States military in the Commonwealth may submit such grievance to a Joint Committee on Civil-Military Affairs. This Joint Committee shall be composed of two representatives appointed by the United States Government (at least one of whom shall be a military officer) and three representatives appointed by the Commonwealth Government. While it is not expected that the Joint Committee shall have any judicial powers, it is hoped that such a committee can operate to settle minor difficulties in the relations between civilians of the Marianas and the United States military before such grievances escalate into serious problems. No similar provision is found in the U.S. draft.

Breach of the Commonwealth Agreement. In Paragraph 10 of Subsection 902(b) it is provided that upon an adjudication by a court of proper jurisdiction that the United States has breached any provision of the Commonwealth Agreement and upon the failure of the United States to correct the breach within a reasonable time, the Government of the Commonwealth may cause the leases to be terminated. Under the terms of this provision, the question whether the Commonwealth Agreement had been breached would not be determined by the Commonwealth Government, but by a court of proper jurisdiction. Further, even upon such an adjudication of a breach, the Commonwealth could cause the lease to be terminated only if the United States refused to correct the breach within a reasonable time. It should be noted that breach of only those provisions which are subject to mutual consent could lead to the termination of the leases. This is because any action taken which conflicted with provisions of the Commonwealth Agreement not subject to mutual consent could not breach the Agreement, since they are within the power of the United States.

Section 903:

Section 903 of the present draft provides that the Commonwealth of the Mariana Islands (through the Mariana Islands Public Land Corporation) shall enter into covenants running with the land for the benefit of the United States with respect to certain portions (yet to be decided upon) of Tanapag Harbor and Isley Air Field. The

covenants would restrict civilian use of the land in a manner consistent with possible military use by the United States at a future time and would provide for the land to be made available to the United States at such future time if needed for military purposes. This was the position which the Commission took in the December 17, 1973 "Position Paper on Future United States Land Needs in the Marianas." The purpose of Section 903 is to keep Tanapag Harbor and Isley Air Field in the control of the people of the Marianas until such time as the United States Government can show an actual need for these areas.

Section 904:

Section 904 provides that, upon the effective date of the leases provided for by Section 902 of the present draft, all rights of the United States with respect to land in the Commonwealth of the Mariana Islands shall be governed by the Commonwealth Agreement and leases entered into thereunder, any prior agreements between the United States and the Trust Territory of the Pacific Islands not withstanding. This means, in effect, that the use and occupancy agreements entered into between the Government of the Trust Territory and the United States Government shall terminate.

Section 904 of the present draft conflicts with Article VII, Section 703(c) of the U.S. draft which provides that nothing in the Commonwealth Agreement shall impair existing agreements between the Trust Territory Government and the United States relating to land use and retention and

Commonwealth Government takes all such land subject to such agreements. While it seems reasonable that prior to the establishment of the Commonwealth the land transferred by the United States to the Marianas should be subject to such "use and retention" agreements, we can see no justification for such agreements continuing after the date when the leases become effective. The purpose of negotiating the leases is specifically to limit U.S. land rights in the Marianas and so long as the use and occupancy agreements are in effect, no meaningful limitation has been established.

Section 905:

Section 905 of the present draft provides that the lease of land to the United States Government should not be construed as indicating that the Government of the Commonwealth has ceded to the United States its legislative authority or political jurisdiction over such land. No such provision is found in the U.S. draft.

An example of the type of jurisdiction retained by the Commonwealth would be jurisdiction over nonmilitary crimes committed within the leased area. The exercise of that jurisdiction, of course, must not conflict with the United States Constitution or applicable federal laws.

The reason for including Section 905 is to ensure that the Commonwealth has some jurisdiction over the leased areas. Under Article 1, § 8, cl. 17 of the United States

Constitution, the United States automatically obtains exclusive jurisdiction over land provided with the consent of a State legislature unless the State specifically reserves its power. See Paul v. United States, 371 U.S. 245 (1963). In view of the way Section 207(a) is worded, which gives the United States the powers it would have in a State, we believe that the inclusion of this provision is necessary to safeguard the Commonwealth's jurisdiction.

Section 906:

Section 906 guarantees that the Commonwealth of the Mariana Islands shall take the necessary steps to insure that the rights and interests of the United States under the lease agreements are protected and guarantees that, if necessary, the Commonwealth will exercise its power of eminent domain to obtain the land which is to be leased to the United States or to make effective the restrictive covenants described in Section 903. Section 906 also provides that the Commonwealth Government will assume the duties and responsibilities of its predecessors-in-interest under the lease agreements

and covenants. Thus, should the Commonwealth Government obtain the land from an entity such as the Mariana Islands Public Land Corporation, the United States can be guaranteed that the terms of the lease agreements and the covenant will remain in effect. The U.S. draft contains no similar provision, but since the purpose of Section 906 of the present draft is to protect the United States, the U.S. delegation is unlikely to object to the inclusion of this section in the Commonwealth Agreement.

Section 907:

Section 907 sets out the power of eminent domain which the United States will have in the Commonwealth of the Mariana Islands. It differs significantly from the U.S. position on eminent domain expressed in Article VII, Section 703 of the U.S. draft. Section 907 of the present draft embodies the principles stated in the December 19, 1973 "Position Paper on the United States Eminent Domain Power under the New Commonwealth Arrangement," which was presented to the U.S. delegation by the Commission at the last round of negotiations. This is an issue which will presumably receive attention during the present round of negotiations.

To protect the scarce land resources of the Marianas people, Subsection 907(a) of the present draft provides

that the United States shall never obtain an interest in land greater than a long-term lease which shall be subject to reversion to the Commonwealth Government in the event of the failure of the United States to substantially and frequently use the land for the purpose for which it was acquired.

Further, Subsection (b) provides, with the exception of interests in property which extend for less than a one-year period, that the United States must acquire interests in land from the Commonwealth Government or its agent, rather than from private landowners. This provision places the Commonwealth Government rather than private individuals, with little bargaining power, in the position of negotiating with the United States.*/

Subsection (c) of the present draft provides that the United States may acquire interests in land to be used for nonmilitary purposes or interests in Tanapag Harbor or Isley Air Field by seeking approval for such an interest from the Commonwealth Land Commission or from the Legislature of the Commonwealth Government. Paragraph (1) of Subsection (c) provides that if the Legislature or the Land Commission agrees to the amount of and the interest in the land sought by the United

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*/ Any individual property owner affected will be entitled to fair compensation either under the laws of the Commonwealth or under applicable provision of the United States Constitution. In addition, such individual would have the right to participate as an intervenor in any judicial proceedings that might be involved.

States, but demands a higher price for that land than the United States is willing to pay, the question of "just compensation" shall be determined by means of a judicial proceeding. On the other hand, if the decision of the Land Commission or the Legislature is not in accord with the request made by the United States for the amount of and the interest in the land, or if no decision is made within a reasonable length of time, Paragraph (2) of Subsection (c) provides that the United States may seek a court order transferring the land to it upon payment of just compensation. In the judicial proceedings for a court order, the court must consider whether the United States has a legitimate need for the land and whether the amount of land is the minimum required to meet that need, as well as considering such issues as are regularly involved in an eminent domain proceeding ("taking," "public use," and "just compensation"). Paragraph 3 of Subsection (c) makes clear that at the request of any party to these judicial proceedings, a jury trial on the issue of just compensation will be provided.

Subsection (d) of Section 907 prohibits the United States from seeking to acquire an interest in any land located in the Commonwealth for <u>military</u> purposes by means of a

judicial order. This prohibition, however, is modified to allow the United States to seek land for military purposes in two other ways. First, the United States may obtain land for military purposes at any time with the agreement of the Government of the Commonwealth. Second, upon a declaration of war or upon the existence of other lawful hostile military action by the United States armed forces and upon a declaration by the President of the United States that particular land is needed for either of those purposes, the United States Government will have the authority to exercise its power of eminent domain as it does in the several States.

We believe that Section 907 of the present draft provides a means for the United States to satisfy unanticipated land needs while at the same time assuring the people of the Marianas that their scarce land resources will be respected. Except for the special limitations on military acquisitions, most of the safeguards and limitations proposed are similar to those proposed by the United States in the "U.S. Commonwealth Proposal," Section 381(d), (e), (f)(1)-(f)(6) and (g) and in the U.S. Draft Bill for Unincorporated Territories, Section 405(d)(vii). The provision with respect to military need is considered necessary to assure respect from the United States for the terms for any

agreements on military land to be set forth in the Commonwealth Agreement. Subsection 907(d) nonetheless assures that the United States will be able to take land for military purposes in emergencies.

Article VII, Section 701(a) of the U.S. draft provides that the United States may acquire land for public purposes under such terms and conditions as may be negotiated by the parties. Section 703(b) provides that in the event the United States is unable to acquire property by negotiation, it may "as a last resort" acquire property under its eminent domain power, giving compensation for the "current fair market value of the interest acquired, exclusive of any amount or amounts previously paid, gratuitously or otherwise, therefor." It further provides that in the exercise of its power of eminent domain, the United States "will take due regard for the scarcity and special importance of land" in the Marianas.

Discussion of Title X -- Consultation Between the Parties

Section 1001:

Subsection (a) of Section 1001 provides a mechanism for holding meetings to discuss the relationship between the Commonwealth and the United States in order to resolve problems which may arise with the Commonwealth Agreement. Such meetings may be called at the request of the Commonwealth or at the request of the United States and in any event will be held no less frequently than once every five years. The U.S. draft has no similar provision.

Subsection (b) provides that the agenda for the meeting will be determined by a representative of the President of the United States and by the Chief Executive of the Commonwealth. Based upon the subjects chosen for the agenda, the President of the United States will designate representatives "of appropriately high rank" from each of the agencies concerned with the agenda items. Subsection (c)

provides that the representatives designated by the President will meet with an equal number of duly authorized representatives of the Commonwealth, who will be chosen in a manner to be determined by the Commonwealth.

Subsection (d) requires that the parties must negotiate in good faith in order to resolve problems raised by the agenda items. The results of the meeting, under Subsection (e), will be included in a report which shall be transmitted to the Chief Executive and Legislature of the Commonwealth and to the President and Congress of the United States.

Section 1002:

Section 1002 of the present draft sets out a number of subject areas in which the U.S. shall consult with the Commonwealth. The first area is foreign affairs. Subsection 1002(a) provides that the United States give sympathetic consideration to the advice of the Government of the Commonwealth on international matters directly affecting the Commonwealth. This corresponds with Title V of the U.S. draft.

Subsection 1002(b) of the present draft provides that the United States will support membership by the Commonwealth in regional or other international organizations which are concerned with social, economic, educational, scientific, technical and cultural matters of concern to the Commonwealth to the extent that such organizations will

permit this membership. The U.S. draft in Title V is very similar and indicates the U.S. agreement with this principle. As drafted, Subsection 1002(b) is somewhat broader than Title V of the U.S. draft which only refers to international organizations concerned with "social, economic, and cultural matters." The United States, however, should have no objection to the additional categories found in the present draft since educational, scientific and technical matters are essentially non-political subjects with no great impact on international relations and since these matters will be of great concern to the Commonwealth as a developing economy.

While the U.S. draft is silent on this issue, Subsection 1002(b) of the present draft provides that the Commonwealth may negotiate and sign agreements with any international organization in which it is a member provided that it has the acquiescence of the United States Secretary of State and provided that the agreement pertains only to the Commonwealth and not to other parts of the United States. While not conflicting with U.S. authority over foreign affairs, this provision will assure that the Commonwealth has adequate stature as a member of such organizations. The provision is similar to Paragraph I(b) of Annex A of the draft Compact of Free Association which provided: "The Government of Micronesia may negotiate and conclude in the name of Micronesia agreements of a cultural, educational, financial, scientific or technical nature that apply only to Micronesia with

any international organization in which Micronesia is a member."*/

Like Title V of the U.S. draft, Subsection 1002(c) of the present draft provides that the United States will assist and facilitate the establishment by the Commonwealth of offices in the United States and abroad to encourage local tourism and other economic or cultural interests of the Commonwealth.

Finally, Subsection 1002(d) of the present draft provides that the United States will consult fully with the government of the Commonwealth in regard to the efforts of the United States to obtain favorable treatment by foreign countries for exports from the Commonwealth. Although this provision is not found in the U.S. draft, it does reflect the agreement of the U.S. delegation expressed in Paragraph I.E.4 of the December 19, 1973 Joint Communique.

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*/ Paragraphs II through IV of Annex A limit such agreements to those not conflicting with the international commitments, responsibilities, or policies of the United States.

Discussion of Title XI -- Delegate and Resident Commissioner

Title XI deals with the representation of the Commonwealth in the United States Congress. The U.S. draft does not cover this question at all. Section 1101 provides that at the time the population of the Commonwealth of the Mariana Islands reaches 50,000 persons (or at such earlier time as Congress shall provide) the Commonwealth will be entitled to its own nonvoting Delegate in the United States Congress, whose status would be similar to that of the nonvoting Delegates from Guam, the Virgin Islands, Puerto Rico, and the District of Columbia. Section 1102 provides that until a nonvoting delegate is selected in accordance with Section 1101, the Commonwealth shall be represented in Washington by a Resident Commissioner, who shall receive official recognition as such a Commissioner by all of the departments and agencies of the U.S. Government. The status of this Resident Commissioner would be similar to that of the Delegate-at-Large from American Samoa.

Title XI has been drafted in this manner because it appears that certain members of Congress are opposed to having a nonvoting Delegate from the Commonwealth at the present time. This opposition is apparently based on the relatively small population of the Marianas in comparison to the average size of the population represented by U.S. Representatives or even compared with the size of the population represented by the nonvoting Delegates from Guam and the Virgin Islands. While the United States delegation in the June 1973 Joint Communique committed itself to supporting a request by the Commonwealth for a nonvoting Delegate it is questionable whether such support would be effective in overcoming Congressional opposition on this question, because Congress believes the issue of a Delegate is peculiarly within its discretion.

If the Agreement were drafted to provide for a Commonwealth Delegate from the beginning of Commonwealth status and if Congress refused to approve that provision, the refusal would constitute a substantive change in the Commonwealth Agreement, and as a result, the Agreement -- with the omission or amendment of that provision -- would probably have to be resubmitted to the people of the Mariana Islands. Under these circumstances, opponents of Commonwealth status could use the refusal of Congress to allow the Commonwealth a nonvoting Delegate as a

rallying point in an attempt to defeat the Commonwealth Agreement on the second vote. This threat seems especially serious if the provision for a Delegate were the only substantive change in the Agreement -- so that the second plebiscite would focus on this issue alone.

It is hoped that the approach taken in this present draft of the Commonwealth Agreement can satisfy both the Congress of the United States and the people of the Marianas. Since the major Congressional concern expressed appears to be the small population of the Marianas, the 50,000 person population figure should alleviate that concern. The 50,000 figure was arrived at because it correlates roughly with the population of the Virgin Islands in 1970 when it received a nonvoting delegate. */

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*/ If the population approach should prove unacceptable, an alternative approach would be to provide that after a certain number of years -- regardless of population -- there will be a nonvoting Delegate from the Commonwealth.

Subsections (a)-(e) of Section 1101 set out the more detailed provisions applicable to a nonvoting Delegate from the Commonwealth. These provisions are similar to those found in the Act of Congress providing for Delegates to Congress from Guam and the Virgin Islands (48 U.S.C.A. §§ 1711-1715 (1974 Supp.)), but are also based upon consideration of the provisions governing the Resident Commissioner from Puerto Rico (48 U.S.C. §§ 891-894 (1970)) and the Delegate from the District of Columbia (Act of Sept. 22, 1970, Tit. II, §202, 84 Stat. 848).

The present draft of the Commonwealth Agreement does not specify how the elections for the Delegate shall be conducted, but merely provides in Section 1101 that the qualified electors of the Commonwealth shall choose a Delegate at a general election. This approach closely resembles that taken in 48 U.S.C. § 891 for election of the Puerto Rican Delegate where the details of the election are left to the Puerto Rican Legislature. It is unlike the provision governing the election for Delegates from Guam and the Virgin Islands, which specifies that the Delegates shall

be elected by separate ballots and includes a procedure for run-off elections. 48 U.S.C.A. § 1712. The Act relating to Guam and the Virgin Islands also specifically gives to the territorial legislatures all powers to enact laws pertaining to the elections which are not otherwise provided. 48 U.S.C.A. § 1714. As a self-governing Commonwealth, such powers to determine election procedures can be presumed to exist in the Commonwealth Legislature.

Subsection 1101(a) provides that the Delegate is entitled to receive official recognition by all the departments and agencies of the Government of the United States upon presentation through the Department of State of a certificate of election from the Chief Executive of the Commonwealth. Though this provision is not found in the Act providing Delegates from Guam and the Virgin Islands, it is found in the Act providing a Delegate from Puerto Rico. 48 U.S.C. § 891. It has been included in the present draft because the need to present such a certificate may suggest the more independent status of Puerto Rico, as opposed to the territorial status of Guam and the Virgin Islands.

Subsection 1101(b) provides that the Delegate will have the same compensation, allowances and benefits as a member of the House of Representatives and be entitled to all privileges and immunities of office as a Representative in the House of Representatives. However, the Delegate would not have a vote on the floor of the House, would receive only 60% of the allowance of a full member for hiring a staff, and would be reimbursed for only four round trips each year between the Commonwealth and Washington, D.C. This subsection is modeled closely on 48 U.S.C.A. § 1715, providing for Delegates from Guam and the Virgin Islands.

Subsection 1101 (c) provides that the Delegate must be 25 years of age on the date of his election; must be a citizen of the United States; must be a resident of the Commonwealth; and must not be a candidate for any other office on the date of election. The only substantive difference between this subsection and 48 U.S.C.A. § 1713 for the Guam and Virgin Islands Delegates is that those Delegates must have been citizens of the United States for at least seven years prior to the date of their election. Since the people of the Marianas will not generally become U.S. citizens until after the termination of the Trusteeship Agreement, a requirement of

seven years of United States citizenship would appear to restrict unduly the number of persons from the Marianas who could hold the office of Delegate.

Subsection 1101(d) provides that the initial term of office for the Delegate would expire on the third of January of the next proceeding odd numbered year following this election and that from that time on the term of office would be two years. The two-year term is presently provided for all United States Representatives and for the Delegates from Guam and the Virgin Islands. The Commission, however, might want to consider the possibility of a four-year term for the Delegate. The Puerto Rican Resident Commissioner has a four-year term (48 U.S.C. § 891) and this longer length provides the advantage of requiring less frequent campaigning. On the other hand, a four-year term provides the possible disadvantage of making a Delegate less responsive to the wishes of the people.

Should a vacancy occur in the office of the Delegate because of death, resignation, or permanent disability, subsection 1101(e) provides that a special election shall be scheduled by the Chief Executive of the Commonwealth, to fill the office. This provision is similar to 48 U.S.C.A. § 1712 of the Act providing for Delegates from Guam and the Virgin Islands.

Section 1102, providing for the Resident Commissioner, is drafted so that the United States would pay the majority of the Commissioner's costs in Washington, and would pay his salary and the cost of four round trips a year between Washington and the Commonwealth. We believe that placing the burden for the cost of a Resident Commissioner on the United States is justified because a self-governing territory such as the Commonwealth should be assured of some adequate representation in Washington, even if Congress does not believe the Commonwealth's population is great enough to warrant a nonvoting Delegate in the House.

Discussion of Title XII -- Transition

Section 1201:

Section 1201 provides procedures for approval of the Commonwealth Agreement. Subsection (a) declares that the Agreement shall become mutually binding between the parties and effective in accordance with its terms when both the United States and the people of the Marianas have given their approval. This approach differs from that of the U.S. draft, which would not make the Agreement binding or effective (with certain limited exceptions) until after the United Nations Trusteeship Agreement has been terminated. This issue is discussed above in connection with Title II of the present draft.

Subsection (b) of the present draft provides the procedures for approval of the Commonwealth Agreement by the people of the Marianas. Paragraph (1) provides that after the signing of the Agreement by the Marianas Political Status Commission, it shall be submitted to the Mariana Islands District Legislature for approval by a majority of all members authorized to vote. As drafted, the Commission must make the submission "promptly" after signing. No time frame is provided within which the District Legislature must act because we have assumed that the Legislature will vote on this important issue as soon as practically

possible. The U.S. draft in the conclusion of the Title section (p.4) provides for similar approval by the Mariana Islands District Legislature.

Subsection (b)(2) provides that within thirty days after approval by the Mariana Islands District Legislature, the High Commissioner will issue a proclamation for a plebiscite on the Agreement which must be held within 120 days after the date of the proclamation. All residents of the Mariana Islands District who would be entitled to vote in a general election in the District if such election were held on the day the plebiscite is conducted will be entitled to vote in the referendum. That provision comports with the U.S. draft. (p.4).

Although we considered the possibility of limiting the vote on the plebiscite to domiciliaries, rather than residents of the Marianas, we eventually rejected that approach.*/ The reason for considering a limitation on the right to vote in the plebiscite to domiciliaries was to prevent persons who are residents of both the Marianas and another District, but who do not plan to remain in the Marianas, from voting in the election. Such persons, it was thought,

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*/ See Section 306 of the present draft for a definition of "domicile."

would not have the same stake in the question of Commonwealth status as residents of the Marianas who intend to remain there.

While we believe there would be no problem legally with limiting the vote to domiciliaries, there are some practical factors which have influenced us to use the test of residence. First, the limited facutal investigation we could make in Washington, D.C. indicated that the number of persons falling into the category of multiple residents would not be significant. Second, limiting the vote to domiciliaries would considerably complicate the determination of who is eligible to vote in the plebiscite. Since the criteria of domicile is different from the criteria of residence used presently in the Trust Territory for registering voters (43 TTC § 253 (1970)), a whole new registration process would have to be accomplished in the relatively short time between the High Commissioner's proclamation of a plebiscite and the date of the plebiscite. It is possible that a number of otherwise eligible voters might not take the opportunity to register and thus would be unable to vote in the plebiscite.*/ Should that happen, the approval of the Commonwealth Agreement could appear to both Congress and the United Nations as having been

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*/ The likelihood of persons not registering is increased by the fact that under the present law persons need only register once unless they change their address or their name. 43 TTC 255(2)(1970). Thus, many persons might be confused about whether registration was required.

given by too small a number of people to represent a true mandate from the people on Commonwealth status.*/

Subsection 1201(b)(2) provides that the people of the Marianas participating in the plebiscite will be asked to vote "yes" or "no" on the following proposition:

> "The people of the Mariana Islands District hereby approve the Agreement to Create a Self-Governing Commonwealth of the Mariana Islands in Political Union with the United States of America."

Although the Commonwealth Agreement is drafted in English, the Commission may want to consider whether the question should be put to the people in Chamorro also.

The U.S. draft is silent on the question which will be put to the people of the Marianas in the plebiscite.**/ The formulation of the question presented to the people seems sufficiently important so that it should be agreed upon between the parties.

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*/ Furthermore, the additional registration process could be largely ineffective in separating out people domiciled in the Marianas from those who are merely residents. Since "domicile" means the place where a person maintains a residence with the intention of continuing such residence for an unlimited or indefinite period and to which he has the intention of returning whenever absent, even for an extended period, it must be determined in large part by what individuals themselves say they intend to do. Therefore, anyone interested in voting in the election would only need to state that he intended to stay in the Marianas. An effort to go behind such a statement could lead to a significant number of contested registrations which would be difficult to resolve prior to the plebiscite.

**/ As drafted, the question in Section 1201(b)(2) of the present draft is similar to the formulation of the question to be presented to the people in the constitutional referendum found in Article II, Section 2 (a) of the U.S. draft.

Subsection 1201(b)(2) provides the people of the Marianas with no opportunity to vote on any alternative besides Commonwealth status. This raises the problem that the United Nations might conclude that the United States had not given the people of the Marianas a true opportunity for self-determination and would, for that reason, refuse to terminate the Trusteeship. At this point, however, there seems no practical means of providing in the Agreement for the people to be presented with other alternatives in the plebiscite. The most obvious alternative for the Marianas is to remain with the other Districts of the Trust Territory and be included in the Free Association Agreement with the United States. However, until the question of Free Association is worked out between the other districts of the Trust Territory and the United States, the people of the Marianas could make no meaningful decision on whether such a status would be desirable. Should the Agreement on Free Association be in final form at approximately the same time as the Commonwealth Agreement, the Commission will have to face the question whether it is desirable to present both alternatives to the voters.

Neither this draft of the Commonwealth Agreement nor the U.S. draft includes any reference to having United Nations observers at the plebiscite. There is precedent

for allowing no U.N. participation in such plebiscites. It is pointed out in UNITAR, Small States and Territories (1971) at 165, 166, that administering authorities (with the exception 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.*/ Nonetheless DeSmith in his book Microstates and Micronesia suggests that U.N. participation can be helpful in favorably influencing the members of the United Nations who view proposals for a continuing link between administering authorities and their trusteeships as a remnant of colonialism.**/

Despite DeSmith's argument, it does not appear as necessarily in the interests of the Marianas to demand United Nations observers. It is possible that the United Nations would refuse to send observers because of political opposition within the United Nations to the continuing link proposed between the United States and the Marianas or because of a belief that insufficient alternatives are being offered to the people in the plebiscite. This refusal would establish on the record that the United Nations considered the plebiscite

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*/ 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, supra, at 165.

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

of questionable validity for determining eventual status and make the termination of the Trusteeship Agreement more difficult to attain. Since the United States has a strong interest in termination of the Trusteeship Agreement, it seems practical to allow its representatives in the United Nations to evaluate at a date closer to the plebiscite whether the request for a U.N. observer would be wise.

Subsection 1201(c) of the present draft provides for approval of the Commonwealth Agreement by the United States. The language used is the same as that used in the preamble of the present draft, and provides that the Agreement shall be enacted into law in accordance with the constitutional processes of the United States. As explained above in connection with the discussion of the Preamble, this language clearly contemplates that the Agreement will be acted upon by Congress and be approved by either an act or joint resolution -- thus having the full force and effect of law. Although the U.S. draft (p. 4) merely says that the United States will give approval "in accordance with its constitutional processes," discussions with the U.S. suggest that the U.S. delegation also wants the Agreement acted upon by Congress so that it will become law.

Section 1202:

Section 1202 covers the question of drafting and adoption of a Constitution for the Commonwealth. Subsection (a) provides that after approval of the Commonwealth Agreement by the people of the Marianas, the Mariana Islands District Legislature shall establish a convention to draft the Constitution. This subsection is drafted so that the Constitutional Convention can begin prior to approval of the Commonwealth Agreement by the United States if the Mariana Islands District Legislature should so desire. The U.S. draft in Article II, Section 202 does not provide this flexibility since that section (read in conjunction with Article VIII, Section 801 of the U.S. draft) does not become effective until after approval. Although beginning a Constitutional Convention prior to approval could possibly be a futile action if Congress never approved the Agreement, it appears that this problem can be minimized by a judicious evaluation of the chances for approval of the Agreement at some time after the Agreement has been submitted to Congress. Furthermore, the work of the Convention could have a favorable influence on Congress. Congress would be able to get a better idea of what the Constitution would contain, and a Convention would be an obvious manifestation of the serious interest of the people of the Marianas in having their own Constitution.

Although Article II, Section 202 of the U.S. draft provides that "[e]ach of the present electoral districts within the Mariana Islands District will be represented in the Constitutional Convention," no similar provision has been included in the present draft. While we presume that all distinct geographic areas of the Marianas will be represented at the Convention, we could not understand the rationale behind the U.S. requirement that the present electoral districts be represented. It would appear better to leave the composition of the Constitutional Convention in the hands of the Mariana Islands District Legislature.*/ Should the United States delegation give a strong and acceptable rationale for including this requirement, then the present draft can be changed.

Subsection (b) of Section 1202 of the present draft provides for a vote on the Constitution after approval of the Commonwealth Agreement. The U.S. draft, in contrast, provides in Section 203 of Article II that before approval of the Constitution by the people of the Marianas, it shall be found by the United States to be consistent with the Commonwealth Agreement. We believe that in conformity with the principle of self-government for the Marianas, it is more appropriate for the people of the Marianas to have the first opportunity to decide the acceptability of their

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*/ Moreover, the use by the United States of the term "present" electoral districts would mean that if those districts were changed between the signing of the Agreement and the Constitutional Convention, the old districts would still have to be represented.

Constitution. Original approval by the United States, even though only on the question of the Constitution's consistency with the Commonwealth Agreement, detracts from the important idea that the people of the Marianas are determining their own form of government. As drafted, the procedure conforms to the Puerto Rican experience where the constitution was approved by the people prior to approval by the United States. See 48 U.S.C. §§ 731c, 731d (1970). The risk that the United States would later refuse to approve the Constitution can be minimized by allowing for some kind of working relationship with the United States during the Constitutional Convention.

Subsection (b) of Section 1202 provides further that the Chairman of the Constitutional Convention shall inform the High Commissioner that the Constitution is completed and the High Commissioner, within thirty days of being so informed, shall issue a proclamation for a referendum on the Constitution to be held not more than 120 days after the date of the proclamation. This procedure conforms with Section 204(a) of Article II of the U.S. draft except that the U.S. draft does not provide for any role to be played by the Chairman of the Constitutional Convention. We believe that the Chairman should play an active role in the procedures set out for approval, since he directly represents the people of the Marianas, whereas the High Commissioner is more accurately viewed as a representative of the United States.

As with the plebiscite, Subsection (b) provides that all residents who would be elibigle to vote in a general election in the District will be eligible to vote on the question of the Constitution. The U.S. draft contains no discussion of who would be eligible to vote in the referendum, but the standard used in the present draft conforms with the standard used by the U.S. draft (p. 4) for determining who votes in the plebiscite on the Agreement.

The question put to the people will be whether they vote "yes" or "no" on the following proposition:

> "The people of the Mariana Islands District hereby adopt the Constitution of the Commonwealth of the Mariana Islands as proposed by the Constitutional Convention."

Here, too, the Commission may want to consider whether the question should be put to the people in Chamorro as well as English. If a majority vote yes, the Constitution will be approved. The High Commissioner, within thirty days of the referendum, shall certify the results of the referendum to the Chairman of the Constitutional Convention, who shall within seven days certify the results of the referendum to the President of the United States for a determination that the Constitution is consistent with the Commonwealth Agreement. This provision is basically the same as Section 204(b) of Article II of the U.S. draft, except that in the U.S. draft it is the High Commissioner who certifies the results to the President.

Subsection (c) of Section 1202 provides that within thirty days of receiving a certification from the Chairman of the Constitutional Convention that the Constitution has been approved, the President of the United States shall determine whether the Constitution as approved is consistent with this Commonwealth Agreement.*/ It is to be expected that by the time the Constitution reaches the President, his advisers will have already made such a determination on an informal basis. The U.S. draft in Section 203 of Article II provides that this determination shall be made by Congress, as had previously seemed desirable. The present draft provides for certification by the President, rather than Congress, because it is very difficult in practice to limit the scope of congressional review of the Constitution solely to its conformity with the Commonwealth Agreement,**/ and because a limited scope of review is more consistent with self-government in the Marianas than an indeterminate scope.

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*/ Article II, Section 203 of the U.S. draft provides that the work of the Constitutional Convention must be accomplished within one year.

**/ Article II, Section 203 of the U.S. draft provides for a determination that the Constitution is not contrary to the applicable provisions of the Constitution of the United States and applicable federal law, as well as the Commonwealth Agreement. We believe those additional determinations are implicitly encompassed within a determination that the Constitution of the Commonwealth is consistent with the Commonwealth Agreement.

Moreover, such a Presidential certification will provide the same amount of stature to the Constitution as a Congressional certification.

Under Subsection (c) of Section 1202, if the President finds that the Constitution is not consistent with the Commonwealth Agreement, he must immediately certify that determination and the reasons for that determination to the Chairman of the Constitutional Convention for further action. "For further action" means that the Constitutional Convention shall decide at that point how the President can be persuaded to change that determination and shall, if necessary, submit a revised version to the people. After the action of the Constitutional Convention, the President must again examine these provisions for consistency with the Agreement. The procedure is repeated until the President certifies to the Chairman of the Convention that the Constitution is consistent with the Agreement. The procedures provided by Section 1202(c) of the present draft are essentially consistent with those provided by Section 203 of Article II of the U.S. draft.

Section 1203:

Section 1203 of the present draft provides that within 30 days of the Presidential certification that the Commonwealth Constitution is consistent with the Commonwealth Agreement, the President of the United States shall issue a

proclamation announcing that the Commonwealth of the Mariana Islands shall be established 180 days after the date of proclamation. Under the terms of the United States draft (p.5) the President is given complete discretion to determine the date upon which the Commonwealth shall come into existence.

Section 1204:

Section 1204 of the present draft provides that during the 130 days between the proclamation of the President issued pursuant to Section 1203 and the establishment of a Commonwealth of the Mariana Islands, the Commonwealth Government shall be organized as provided in the Constitution of the Commonwealth. The purpose of this section, not found in the U.S. draft, is to make clear that on the date that the Commonwealth comes into existence there will be an organized Commonwealth government prepared to exercise the powers of local self-government in accordance with the Commonwealth Agreement and the Commonwealth Constitution.

Section 1205:

Section 1205 of the present draft provides that beginning on the date of the establishment of the Commonwealth, the relations between the United States and the people of the Commonwealth shall be governed by the Commonwealth Agreement and all provisions of the Agreement shall be effective with the exception of those dealing with United States citizenship and sovereignty, which shall become fully effective upon termination of the Trusteeship Agreement.

These provisions are found in other sections of the Trusteeship Agreement. The purpose of including them under the transition section is to make absolutely clear that from the date of the establishment of the Commonwealth most provisions of the Agreement become effective and the relations between the people of the Marianas and the United States shall be governed by the Commonwealth Agreement.

Section 1206:

Section 1206(a) provides that the United States shall make all good faith efforts to terminate the Trusteeship Agreement at the earliest possible date, in its entirety or insofar as it affects the Commonwealth of the Mariana Islands. No similar provision is found in the U.S. draft. The purpose of this subsection is to articulate the commitment of the United States on a matter which is of obvious importance to the people of the Marianas, since until termination they cannot become United States citizens. It has been the U.S. position that the Trusteeship could only be terminated in its entirety. Nonetheless, since the date of termination for the rest of the Trust Territory could be a number of years away, it seems desirable that the Marianas should push for

earlier, individual termination if that is practical in terms of United Nations policies.

Section 1206(b) provides that at such time as the President of the United States determines that the Trusteeship Agreement, in its entirety or insofar as it affects the Commonwealth, has been terminated, he shall immediately issue a proclamation to that effect and at that time all provisions of the Agreement not made effective by Section 1205(b) shall become effective. This provision, providing for a Presidential proclamation of termination, is not found in the U.S. draft. Since in the U.S. draft the proclamation announcing the date upon which the Commonwealth shall be established is issued after termination, a separate proclamation of termination would be superfluous.

Section 1206(c) provides that the determination of the President that the Trusteeship Agreement has been terminated is not subject to review by any authority of the Commonwealth or of the United States, including the courts of either. This provision is similar to Section 801(b) of Article VIII of the U.S. draft.

Section 1206(d) provides that if the President of the United States determines that a further plebiscite on future status is necessary immediately prior to termination of the Trusteeship Agreement, such a plebiscite shall be held to provide the people of the Commonwealth of the Mariana Islands with an opportunity to reaffirm their commitment to

the Commonwealth Agreement. The purpose of this provision is to make clear that if the United Nations refuses to recognize the act of self-determination performed in approving the Commonwealth Agreement and if the President determines that a further vote must be taken in order to obtain approval for termination of the Trusteeship Agreement by the United Nations such a vote may be taken consistent with the Commonwealth Agreement. The U.S. draft contains no similar provision but that is probably because the U.S. draft does not provide for Commonwealth status prior to termination. Since Section 1206(d) of the present draft gives the President the discretion to decide whether another vote is taken, we do not see why the United States should object to including this provision.

Section 1207:

Section 1207 provides that the United States may administratively separate the Mariana Islands District from the remainder of the Trust Territory to the extent and in the manner requested by the Mariana Islands District Legislature. It provides further that in no event shall such separation occur later than upon the date the Commonwealth is established. This provision contrasts with Article VIII, Section 801(a) of the U.S. draft which gives the President total discretion in deciding whether to establish a separate administration before the establishment of the Commonwealth.

Section 1207 is drafted to provide that the United States "may" establish a separate administration at the request of the District Legislature. Thus, it does not encroach on the U.S. power and therefore should be acceptable to the U.S. delegation. The hope is that this provision will allow the District Legislature an input into when and how the separate administration will come about.

Section 1208:

Section 1208 provides that for the purpose of conducting transitional studies, programs, and events relating to the establishment of the Commonwealth of the Mariana Islands, a Joint Commission on Transition shall be established composed

of eight members. This provision is not found in the U.S. draft, but is in accord with the agreement reached by the Ad Hoc Preparatory Committee on Transition in the Marianas, as modified by the Commission.

Section 1208 is essentially a reminder to the United States that it has agreed to set up and provide funds for the Joint Commission on Transition. It is basically in accord with Title IX and Section 604 of Article IV of the U.S. draft, except that the U.S. did not specify the amount to be provided. Section 1208 provides that the U.S. will furnish the Joint Committee with no less than $1,210,000. That figure is based upon the estimate of the financial needs of the Joint Committee made by the Ad Hoc Preparatory Committee on Transition. Recognizing that this estimate may be low, Section 1208 specifies that the United States will make available additional money if necessary.

Discussion of Title XIII -- Miscellaneous

Sections 1301 and 1302 are standard technical provisions. Section 1301 provides that the invalidity of any provision of the Commonwealth Agreement shall not affect the validity of the remaining portions. Section 1302 provides that the table of contents or heading of titles are not part of the Commonwealth Agreement and shall not be deemed to affect the meaning or construction of any of its provisions.