110.1

13/7

RStowe:7-8-74:kkc

TITLE II: FOREIGN AFFAIRS

1. The U.S. Government does not wish to modify the text agreed in July 1972.

2. The Micronesian negotiators have proposed changes in the fundamental scheme for free association agreed in July 1972. Recommended U.S. positions on proposed changes:

(a) Section 201(a)

(1) The phrase "For the duration of this compact" should be resisted on the basis that it adds nothing; all provisions are effective only during the life of the compact unless specific affirmative provisions is made otherwise. On the other hand as used here it adds to the impression that the U.S. authority over foreign affairs is only a temporary delegation from Micronesia. Although the only basis for that authority will indeed be this compact, during the life of this agreement we need to protect our ability to exercise that authority. We have therefore insisted on at least parallel formulas for the grants of internal and of foreign affairs authority. This phrase tends to detract from that effort.

(2) As long as Section 102 refers to "full" responsibility for and authority over internal affairs for the GOM, §201 must also contain at least as strong a description of foreign affairs responsibility and authority for the U.S. Government. Otherwise in instances where the two authorities overlap, and in particular where the U.S.Government and GOM positions conflict, it will appear that the parties intended the GOM's authority and responsibility to take precedence. Although it is preferable to use the word "full" in both sections, it would be tolerable to use it in neither. To omit in only in §201 is not acceptable.

(3) The phrase "which relate to" foreign affairs, which Salii would drop, is an attempt by us to describe U.S. Government authority in the broadest possible terms. Section 102 does not contain a similar phrase. If we insist on parallelism in other respects, this inbalance in our favor may be difficult to justify persuasively to the other side. It is not essential to the integrity of our authority. However, in conjunction with other similar provisions it helps build a strong case for the primacy of foreign affairs authority in cases of differences with the GOM, and hence could be very helpful in case of a dispute. We should therefore avoid dropping it if at all possible.

(4) The phrase "subject to the provisions of this compact" tends to undermine the scope and strength of U.S. Government authority over foreign affairs. The parallelism rationale applies here; this phrase makes the U.S. Government's authority appear highly conditioned while the GOM's authority would appear much broader.

In our view the grant of foreign affairs authority to the U.S. Government is not limited by or "subject to" other provisions of the compact. We would have full authority, and in the exercise of that authority we in turn agree that the GOM should appropriately have the discretion to carry out certain activities in this area; hence Annex A, et. cetera. This position is reinforced by phrases such as "While not derogating from its full responsibility..." in §201(b), "in the exercise of its full authority" in §204(a) and "The GOM may undertake..." in Annex A.

Obviously Section 201 must be read in light of the other provisions of the compact, as must each of the sections, including 102, as a standard matter of legal interpretation, but that it not synonomous with saying that the authority granted in that Section is "subject to" the other provisions. It should not be accepted.

(5) The "subject to" phrase is an attempt to reverse the bias in our favor which we tried to gain by the "notwithstanding" phrase in 201(a) which Salii would drop. The point here again is to attempt to protect the position of the United States if the Micronesians ever argue that we do not have authority to undertake or compel a certain action because it has connotations of internal affairs or because it was an aspect of foreign affairs not granted to the U.S. Government by the compact.

Although the "not withstanding" phrase could be very helpful in this regard, if other phreases such as "all matters which relate to foreign affairs", in §201(a) and provisions such as §201(b) and (c) are retained essentially in their present form, it could probably not be considered essential to protect our foreign affairs authority. That it may not be absolutely essential, however, is no reason simply to throw it away because Salii asks us to. It could be of sufficient advantage to us in a dispute that some other advantage should be gained in return for giving it up if it seems we must do so.

(6) The "delegation" language proposed by Salii is obviously at the heart of many changes he has suggested. It is simply and clearly unacceptable in an agreement for free association as we have been negotiating. Agreement to this formula would in substance constitute agreement to a relationship between two independent states, putting the U.S. Government in a ministerial capacity undertaking certain actions and duties on behalf of and at the bequest of the GOM. Although there may well be many political difficulties in the free association relationship as it is emerging, agreement to the delegation language would also seriously undermine the underlying legal basis for the role we are trying to protect for the United States. (See also Sneider memo of July 2).

(b) Section 201(b)

(1) Salii's proposal to reverse the clauses of sentence one of the agreed §201(b) and to refer to "any" matter of mutual concern relating to foreign affairs is unobjectionable.

(2) Elimination of reference to "the basic principle that the GOM has full responsibility....over the internal affairs" poses no problem.

(3) However, elimination of the phrase that the U.S. will "to the greatest extent possible" avoid interference in those internal affairs is quite unacceptable. This phrase furnishes a key for arguing in case of dispute that the foreign affairs authority takes precedence in marginal cases over internal affairs. Salii's formula proposes the reverse, namely that any action in a disputed or marginal area must be expressly agreed to by the GOM before it is taken. This is an extremely encumbered and virtually unworkable arrangement from our point of view, although obviously Salii would like it.

(c) Section 202

(1) Although we have agreed to refrain from including or applying certain treaties to Micronesia without the GOM's consent, we do not wish to undercut the grant of full foreign affairs authority to the U.S. Government. The 1972 version of 202 gives Micronesia full protection while phrasing the commitment in a way acceptable to us.

(2) The term "advice and consent" should not be used here - it carries for an American audience inappropriate connotations of Senate procedure, 2/3 vote, et. cetera. There does not appear to be any need for it from the GOM point of view either.

(3) The word "also" in sentence two gives rise to ambiguity whether other treaties and agreements made be made applicable also only with GOM consent It won't sell.

(d) Section 203

No changes proposed by either side.

(e) Section 204

No U.S. changes.

Salii's draft here is patently unacceptable in a free association context for many of the same reasons outlined above. It says in essence that none of the activities listed in Annex A, a significant assortment, were included in the grant of foreign affairs authority to the United States. Although we are in agreement that the Micronesians may undertake those activities, the fact that the United States conveys that right under the agreed section 204 contradicts a theory of Micronesian delegation of the basic foreign affairs authority and encourages a more restrictive interpretation of the scope of the rights conveyed than would Salii's draft. In addition, the procedural safeguards built into the agreed section 201(b) were very important elements of the negotiation of this section in 1971. They were agreed to by the Micronesians in order to get a larger list of activities included in Annex A, and they were insisted on by the United States in order to protect our ability to maintain some effective over-all control if (when ?) the Micronesians begin to expand the intended scope of Annex A unacceptably. Section 204(b) is an important and useful provision and its underlying position should not be discarded.

For the above reasons Salii's draft is also unacceptable from a drafting and editorial point of view. While his language states that "notwithstanding ... section 201 ...," paragraphs II, III, and IV of Annex A, are clearly intended to implement section 201. This textual inconsistency highlights the undesirability -- both from our point of view, and from a logical perspective -- of Salii's draft for section 204.