

f - DRAFT:ADG:7/18/74:mjw

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5,4,2

MEMCON

Participants:	Herman Marcuse	Howard Willens
	Andre Surena	Michael Helfer
	Adrian de Graffenried	Erica Ward
		Steve Laurence

Date: July 17, 1974

Applicable Laws.

MH: §401-2 of U.S. Covenant is a good starting point for application of U.S. Constitution to the Commonwealth.

HM: Might say that Mink Amendment which currently extends to U.S. territories is limited to protecting individual rights of U.S. citizenship. U.S. Commonwealth Agreement is broader; it involves the political relationship between COM-U.S., so U.S. added some additional U.S. constitutional provisions. To this extent, for example, U.S. Constitution Article 1, §10 applies to explain the limits and authority of state and federal governments.

MH: I have 2 questions: (1) Article 1 §10 clause 2; Compact will deal with this issue elsewhere in the provisions, so why apply it specifically?

HM: Agree

(2) Article 1 §10 clauses 1 and 3. This appears as an attempt to change position on joint communique's regarding commonwealth's right to join international and regional organizations.

ADG: This is no change in prior agreement. Note that communique in Rounds 2 and 3 says U.S. agrees to this right only to the extent these organizations permit representation from constituent parts of a political family. No problem.

HW: This is correct. However, may want to put a specific provision recognizing this right into the agreement.

HM: Need to check with Jim Wilson.

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HW: 1st draft (US) seemed to implement this agreement, 2nd draft does not. Will agree on applying Article 1, §10 clauses 1 and 3 subject to understanding that MPSC not impeded from joining regional organization. No need to apply Cl 2, as this subject will be dealt with elsewhere in Commonwealth agreement under trade/commerce. Like to note that we agree that Marianas ought to be subject to same prohibitions against interference in federal authorities as are all states.

ADG: Would there be some adverse inference if we specifically leave out Article I, §10, clause 2? And if we also grant specific trade powers to Marianas wouldn't we modify these constitutional powers by giving Marianas broader powers that U.S. Constitution now allows?

HM: No. USC will be approving the compact which will contain the sections propoing to address the subject matter substituted for clause 2 - so don't need to repeat here specifically.

HW: Article 9, Clause 1 Not need.

HM: Agree

HW: Article 9, Clause 2,3 Yes, we need to apply. Article 9, Clause 4 Not need.

HM: Agree

HW: Article 9, Clause 5 Yes, but MPSC needs to check out further. Article 9, Clause 6 Need.

HM: Agree

EW: Do we really need? Has U.S. checked the La. Rote case?

HM: La. cases said no need to make a port entry in each state simply because another state disadvantaged.

EW: Clause seems to protect states and seems to require every state to have a port of entry.

MH: Article 9, clause 6 would, under that approach, inhibit USC from establishing a port entry more favorable in Guam than Marianas. MPSC agrees to make clause 6 applicable - but reserves for further examination along these lines.

HM: Article 9, clause 7 - not necessary (MPSC agrees).

MH: Article 9, clause 8 - don't need - applies anyway under Downes case.

HW: No problem with applying Article 9, clause 8 as it will not affect the operation of COM government only acts to limit the operation of the federal government in the Marianas.

AS: Going back to Article 10, clause 3 - if we put into Covenant a specific provision that Marianas can join regional organizations we might make a specific exception to 10 clause 3. Issue: "Agreements made by Marianas would be with other member states or would they be with the organization?"

MH: USC would preconsent to Marianas making agreements in multination organization by ratifying the status agreement so no problem with having Article 10, clause 3 apply.

HM: Article IV, §1; Title 28 USC covers this but does not include territories but does include PR.

MH: Don't need this article because of the statute, but should include as matter of course.

ADG: Might note that Mink Amendment includes IV §1 so applicable to the territories.

HM: Is Article IV §1 - OK them?

MH: Should be included as in MPSC draft, then we will put in a special exception to this Article in another section as relates to power of Marianas to control land alienation; not specifically alter its application as in U.S. draft.

HM/ADG: OK

AS: Should be done in a delicate manner due to USC.

MH: Agree - but are other exceptions to consider such as civil rights legislation which might prevent commonwealth from restricting land alienation; so, lets address elsewhere to avoid this problem.

HM: What about Article IV, §2, clause 2? Interstate extradition.

HM/MH: No problem.

HM: Article VI is the supremacy clause, AS has some difficulty with MPSC approach.

AS: Not now. Difficulties arose from misreading MPSC §205(b).

MH: No difficulty in principle with U.S. supremacy clause. This is why MPSC has section 205(b) specific application of Article VI of U.S. Constitution may make all other provisions of U.S. Constitution applicable notwithstanding our specific listing -; Can adopt principle, but supremacy language could be incorporated elsewhere.

HM: If JW has no problems - can drop Article VI and adopt MPSC approach. Lets refer it to him.

HM: VII not apply.

HM: Are amendments 1-4 OK?

HW: Yes

HM: Amendment 5?

MH: Don't want to apply the 5th Amendment to Marianas.

EW: Amendment 5 requirement for indictment by grand jury applies to Guam but not to Virgin Islands by prior legislation which permits indictment in Virgin Islands by information.

HM: Recent case says Amendment 5 not apply to Guam in spite of Mink Amendment; by adoption of legislation which was effective prior to Mink Amendment.

MH: This must be Guam V. Enjlett a recent case. That case noted that it could not require Guam government to adopt 5 amendment, but did require USG to adopt in federal cases on Guam.

HM: Question is MPSC preference on 5.

HW: We want to leave in hands of Marianas Legislature to determine on whether federal government should be bound by 5th Amendment requirements for federal cases arising in Marianas.

HW: I note that savings clause for Virgin Islands was drafted due to a specific Virgin Island request - Guam did not ask; but, lets reread Guam case to determine effective ruling.

MH: OK

HM: Amendments 6 and 7?

MH: Also review as to what locals really want. Amendments 8, 9: will include. Amendment 13: will include.

HM: Amendment 14 §1 sentence 1 applicable? If so, no need to worry about naturalization procedures?

MH: Agree to include amendment 14 §1 sentence 1. 14 §1 sentence 2 apply also. So, all of 14 §1 will apply. Amendment 14 § 5? Under MPSC draft agreement there is sufficient power for USC to enforce the status agreement and we do not include specific grants of power to USC to enforce other provisions. So why try to apply §5 (which empowers USC to enforce 14th amendment) here? Holds out possibility of confusion.

HM: If omit here - would cause confusion too.

HW: Not really. If we have included no affirmative grants of authority to USC to enforce, then no confusion. §207 of MPSC grants broad authority to USC to enforce all provisions.

HM: Have to refer this to Mr. Wilson; is largely cosmetic problem, not crucial.

MH: Amendments 15 and 19 are OK.

HM: Amendment 26, included by MPSC. In light of earlier position why did you want to include §2 of that amendment: the right of USC to enforce. And what about 27th Amendment, if it is adopted later by the states.

HW: Will give some thought to 27th Amendment. Since our agreement language does not include Marianas as a State and Amendment 27 applicable only to States - wouldn't apply to Marianas unless USC made it expressly applicable by legislation.

MH: Is lead-in language in section 208(a) under MPSC draft OK to U.S.? MPSC want to make a more clear distinction to stating which of those powers apply as if Marianas a state and those as if it were a commonwealth. Can redraft to follow U.S. approach.

HM: Don't know if MPSC approach necessary.

MH: Will redraft to follow U.S. approach.

MH: U.S. draft requires MPSC to enact provisions regulating this land alienation. MPSC grants permission for local government to do this. This is MPSC draft section 208(b)(1).

HW: Lets' save for Wilson. Is some recollection that USC did want to require this U.S. provision.

ADG: USC does insist that this issue be addressed in the agreement and does insist that Marianas adopt land alienation laws to protect persons of Marianas ancestry from losing their lands.

MH: Is it U.S. view that the extent of individual holding of public land require express exception to U.S. Constitution. U.S. seemed to direct comments at MPSC IV on this issue to Marianas regulating alienation of public, not private land.

HM: This is per Hawaii precedent.

HW: Under MPSC approach Marianas would have authority to regulate amount of public land alienated to any person anyway; so why not let Marianas address the issue in their local constitution?

HM: May be right. It does not belong in this section of our Status Agreement.

HW: This approach seems patronizing and unreasonable. It is for Marianas to decide - not for U.S. to dictate. MPSC will not agree to this provision. MPSC is planning to build these restrictions into its public land corporation. Note that U.S. language: "and will regulate the extent of individual land holdings" is what MPSC concerned about, not 1st part of §402.

MH: MPSC concerned: 1st - Japanese capital coming into Marianas - 2nd - U.S. citizens wanting ownership of local lands. MPSC is not concerned about inability of local government to protect local land owners. MPSC feels no need to deal with specifically in the status agreement, but at least we all agree this should not be dealt with here in this specific section.

MH: This comes to Section 208(b)(2) of MPSC draft which exempts Marianas from 1 man 1 vote requirement.

HM: This is a USC issue, especially on 1 man, 1 vote requirement.

HW: As U.S. knows, in the local legislature there are some jealousies, etc. MPSC wants a bicameral legislative body to permit some equal representation from each island. This would balance all interests should MPSC members say if U.S. Senate can do it - why can't Marianas have local senate on same basis. USC should be sympathetic to this problem as was demonstrated by Tinian circumstances.

MH: U.S. Senate formed to include equal representation from each of

the colonies. It was necessary to enable the new nation to come into being. MPSC needs as specific exception to permit this along lines of §208(b)(2) if 14th Amendment is applied as we now omission.

ADG: We do understand and appreciate local attitudes on this issue. However, we may be running into difficulty by making a specific exception we don't know how USC feels on this issue. American Samoa has a traditional "Fono" as part of a bicameral system, but Guam's legislature is unicameral. So U.S. needs to check further with USC, but U.S. is sympathetic to MPSC rationale for an exception to 14th amendment requirements for a representative legislature based on population. We do not want to red flag the issue, however, so why not address in the section dealing with creation of the commonwealth legislature much as we will do on land problem.

HW: Agree - don't want to red flag this - appreciate U.S. concern.

AS: This may still raise problem with 14th amendment.

MH: Depends on how we phrase the language; same problem as on land alienation.

HW: May depend on whether want to address in this status agreement or in the local constitution.

HM: Could we get more information on MPSC section 401(a) 1 (i). What are federal banking law exceptions. Does MPSC mean everything in Title XII of U.S. code?

MH: MPSC will get information to U.S.

HW: Will start on agenda item 5(b) next time.

MH: Another issue is: when does interim formula for application of laws come into being. Problem is eligibility of Marianas for federal grant programs? MPSC needs to know in order to make phase II work.

HW: Issue is becoming mystical - MPSC needs a firm U.S. commitment

on how the applicability of federal laws will be made either: (1) only under this agreement; or (2) by separate USC legislation outside the agreement.

HW: Timing is essential topic for both U.S. & MPSC. If there is no agreement on a U.S. commitment to give Marianas its benefits - there will be no status agreement.

AS: Need to discuss this matter with J. Wilson. There is a problem with U.N.

ADG: We understand MPSC concerns. However, this issue covers a number of areas which U.S. needs to discuss internally. It covers: interim government, Marianas Constitution, U.N. and avoidance of any implications of U.S. sovereignty. Will get back to MPSC on this.

HW: We want U.S. to get an answer and let us know next meeting. We also note that we are only half through the agenda. Does the U.S. want to change procedures? This may otherwise take all August to finish and get down to drafting language. We should speed it up. How about exchanging draft language as we go along on matters we have agreed on to date?

HM: Seems fine.

MH: I will start some sections and pass along to U.S.

Next meeting: Thursday - 10:00 at Wilson's office.