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January 17, 1974

MEMORANDUM FOR HOWARD WILLENS

Subject: Maritime Laws and the Marianas: A Preliminary Report

You asked me to investigate the federal maritime laws to identify potential problems in the application of those laws to the Marianas after termination of the Trusteeship. This memorandum summarizes my research and thought to date. Because of my lack of familiarity with the maritime area, and because it is not easy to determine from the face of a statute and regulations whether a particular provision may cause difficulties if applied in the rather unusual circumstances which will exist in the Marianas, I have tried to identify, even if not research fully, every provision which seemed like it might create a problem. Assistance from the economic consultant and discussions with representatives of existing territories, as well as interviews at federal agencies, will help define the problems more accurately.

Except as other statutes are specifically referred to, no serious research has been done outside of Title 46, United States Code. Except for matters which relate to admiralty and maritime jurisdiction and suits against the United States (Chapters 19A, 20 and 22) -- which were left as federal courts problems -- Title 46 was reviewed in depth, though additional

work is needed, as you will see from Part VI (Other Potential Problems). An exhaustive research job on the maritime laws would, and presumably will before this is over, include much of Title 33 and parts of Titles 16 and 19.

This memorandum is organized as follows. First, restrictions on the transportation by water of passengers and freight between the Marianas and other United States ports is discussed; then the regulation of rates of carriers by water to and from the Marianas is analyzed; third, potential problems which arise from maritime laws which limit certain rights or benefits to citizens are noted; fourth, route selection issues are touched upon insofar as they may provide a way of assuring adequate service to the Marianas; fifth, certain problems relating to the fisheries are discussed; and finally, a series of other, perhaps less important but largely unexplored issues are reviewed.

I. Restrictions on Vessels in the Coastwise Trade

Federal law prohibits the transportation of merchandise between ports of the United States of most of its Territories on any vessels which are not American-built, registered and owned. The restriction is found in 46 U.S.C.A. § 883 (Supp. 1973), which in relevant part reads as follows:*/

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*/ This section is often referred to as the Jones Act. Unfortunately, the statute which extends a right of action to injured seamen like that enjoyed by railway employees is also known as the Jones Act. Both were part of the Merchant Marine Act, 1920, 41 Stat. c. 250 (June 5, 1920), whose principal author was Senator Jones of Washington. To avoid confusion, the term "Jones Act" is not used in this memorandum.

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> "No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States . . . Provided, That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry, shall hereafter acquire the right to engage in the coastwise trade: Provided further, That no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt, shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull of superstructure of the vessel, is effected within the United States, its Territories (not including trust territories), or its possessions . . . ."

Federal law also prohibits the transportation of passengers between American ports on foreign vessels.*/

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*/ Jim Leonard raised a question about cruises. The rulings under this section seem to be that a foreign ship can carry passengers from an American port on a cruise and back to the same port or to another American port without incurring a penalty, so long as the "object of the voyage" is not transportation between the ports, 28 Op. A. G. 204, 208 (Feb. 26, 1910) (tourists were taken on board a German steamship in New York, carried around the world with stops at numerous foreign ports, and landed in San Francisco; held, no violation of what is now section 289). On the other hand, where "the main object of the voyage is the transportation to the domestic port of destination," even though "part of the object . . . is to see [the] foreign ports," section 289 has been violated, 30 Op. A. G. 44, 45 (Feb. 1, 1913) (foreign vessels cruised from New York to

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46 U.S.C. § 289 (1970) reads as follows:

> "No foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under a penalty of $200 for each passenger so transported and landed."

(footnote continued)
ports in the Caribbean and South America; passengers sometimes boarded at San Juan for the remainder of the cruise," it being their intention to make [New York] the final termination of their voyage" (at 44); held, violation).

The regulations, 19 C.F.R. § 4.802(a)(1)-(4) (1973), provide that it will be considered a violation of section 289 by a foreign vessel which takes on a passenger at a port covered by the coastwise laws if:

> "(1) The passenger goes ashore, even temporarily, at another coastwise port on a voyage solely to one or more coastwise ports, regardless of whether the passenger ultimately severs his connection with the voyage at the port at which he embarked;
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> (2) The passenger goes ashore, even temporarily, at another coastwise port on a voyage to one or more coastwise ports but touching at a nearby foreign port or ports [defined to mean foreign ports in North and Central America, the West Indies, Bermuda, and ports in the Virgin Islands] (but at no other foreign port) if during the course of the voyage the vessel remains in the coastwise port (not including the port of embarkation) for more than 24 hours, without regard to whether the passenger ultimately severs his connection with the vessel at the port at which he embarked . . . ;
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> (3) The passenger severs his connection with the voyage at another coastwise port on a voyage which touches no foreign port other than a nearby foreign port; or
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> (4) The passenger goes ashore at any port other than the port at which he embarked if coastwise transportation is the primary object of the voyage."

Thus if, as seems likely, foreign cruise ships from the Marianas touch at least one foreign port, they will not be subject to a fine under section 289 unless the voyage is a subterfuge for coastwise transportation.

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The apparent purpose of these restrictions is to promote the American Merchant Marine, so that it will be available in the case of a national emergency both to continue providing service between domestic ports and to serve the needs of the federal government. The restrictions also help assure a demand for American-built ships, so that our shipbuilding capacity will be maintained. Since American vessels are high-cost operators as compared to foreign vessels, one effect of the restrictions is to raise the cost of transportation by water between domestic ports over what it would be if foreign vessels could compete for the business.

The restrictions found in sections 289 and 883 -- the most important of what are known as the coastwise laws of the United States -- 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: <u>And provided further</u>, 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."

The most sensible reading of the first proviso, it seems to me, is that it grants the President simply the power to extend the time allowed for the establishment of service, not the power to prevent the coastwise laws from going into effect. But the language is ambiguous, and the Reports on the Merchant Marine Act of 1920 no help in interpreting it. Later Reports by Committees of Congress indicate that the first proviso grants the President the broader power. The Committee Report on the bill granting American Samoa an exemption from the coastwise laws, for example, quotes from this statute and then states:

> "The President not having extended the period for the nonenforcement of this act with regard to American Samoa beyond February 1, 1922, the provisions of the act automatically came into effect as to it on that day."

S. Rep. No. 1141, 73d Cong., 2d Sess. at 2 (May 24, 1934). Similarly, the Committee Report on the bill which added the second proviso to this section (exempting the Virgin Islands

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until the President makes the coastwise laws applicable there) explains the first proviso as providing "that if adequate shipping service is not established by February 1, 1922, the President shall extend the period for the establishment of such service in the case of any island Territory . . . until adequate shipping facilities have been established." The Report goes on to say that "[t]he President, from year to year, by Executive order, has provided that our coastwise laws should not extend to this Virgin Islands of the United States." H. R. Rep. No. 2281, 74th Cong., 2d Sess. at 1 (March 30, 1936). The letter from the Secretary of the Interior supporting and explaining the same bill stated that the coastwise laws "became applicable to the Virgin Islands February 1, 1922, subject, however, to the power of the President to defer that application." _Id_. at 3, letter from Secretary Ickes to the Chairman of the House Committee on Merchant Marine and Fisheries dated January 9, 1935.

Accordingly, it seems clear that at the time the coastwise laws were extended to the territories generally, flexibility was provided in case adequate service was not available. This is a strong precedent for providing the same flexibility with respect to the application of those laws to the Marianas.

The treatment of the territories with respect to the coastwise laws, and exceptions which have been granted outside the territories, can be summarized as follows.

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Guam: Guam is subject to the provisions of sections 289 and 883. See 46 U.S.C. § 877 (1970); 48 U.S.C. § 1421c(a) (1970). The 1951 Report of the Commission on the Application of Federal Laws to Guam (hereinafter cited as the Guam Commission) (at 11) recommended that the coastwise shipping laws of the United States, including sections 289 and 883, be made inapplicable to Guam. No congressional action has been taken on that recommendation.

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).

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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. See also 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 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."

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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. The same source reports that legislation has been introduced to repeal the Virgin Islands' exemption.

Puerto Rico: The coastwise laws are applicable in Puerto Rico. See 48 U.C.C. § 744 (1970). One of the items on the agenda of the Ad Hoc Advisory Group on Puerto Rico is the applicability of these laws. The Puerto Rican delegation recommended exploring three alternatives: permitting foreign carriers free entry into all sectors of the Puerto Rican trade; instituting a subsidy program to reduce the cost of shipping operations; developing local, Puerto Rican, maritime programs. The delegation stated that today coastwise shipping is largely "limited to service between the United States ports and Puerto Rico, Alaska and Hawaii. If the maintenance of a Merchant Marine is in the interest of the United States as a whole its cost in freight rates should not be borne almost exclusively by these three regions."

Puerto Rico was, for one year, exempt from the full rigors of Section 883. Under PL87-877 (Oct. 24, 1962), 46 U.S.C.A. § 883 note (Supp. 1973), the Secretary of Commerce

was permitted to suspend the provisions of that section "with respect to the transportation of lumber" to Puerto Rico from the United States if he found "there is no domestic vessel reasonably available" for the service. The suspension terminated no later than one year after PL87-877 was passed.

Hawaii: The coastwise laws are applicable now in Hawaii by their terms, and they were applicable in Hawaii when it was a territory, see 48 U.S.C.A. § 509 (1952). The only exception Hawaii ever enjoyed seems to be the one contained in the Merchant Marine Act of 1920, which permitted the Shipping Board to issue permits for foreign ships to carry passengers between the Territory of Hawaii and the Pacific Coast "if it deems it necessary to do so" between June 5, 1920, and February 1, 1922. See 46 U.S.C. § 289 note, 41 Stat. 997 (the effect of this was to treat Hawaii somewhat like the territories to which the coastwise laws were extended, effective February 1, 1922, by what is now 46 U.S.C. § 877 (1970)).

According to the 1972 Report of the Federal Maritime Commission (at 24), Hawaii was devastated by the 100-day, longshoremen's strike on the West coast that year, and

> "as a direct result of the work stoppage and the almost total dependence of Hawaii on oceanborne commerce, the State of Hawaii has been reported as considering favoring exemption from domestic maritime law requiring American-flag service. The proposed exemption would permit temporary suspension of the Merchant Marine Act of 1920, if American-flag vessels are immobilized, to permit the chartering of foreign-flag vessels to move vital cargoes."

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Alaska: Alaska enjoys some limited exemptions from the coastwise laws. Section 883 itself, fourth proviso, exempts transportation on the Yukon River until the Secretary of Commerce determines that "proper facilities" will be furnished by American citizens. And 46 U.S.C.A. § 289b (Supp. 1973) provides:

> " . . . passengers may be transported on Canadian vessels between ports in southeastern Alaska, and passengers and merchandise may be transported on Canadian vessels between Hyder, Alaska, and other points in southeastern Alaska, and between Hyder, Alaska, and other points in the United States outside Alaska . . . until the Secretary of Commerce determines that United States-flag service is available to provide such transportation."

The purpose of this statute was to allow these ports to avoid "isolation," for "U. S.-flag vessels have found such service to be uneconomic to the point where there is now no regular U. S. - flag service provided, and none in prospect." H. R. Rep. No. 538, 87th Cong., 1st Sess. (June 14, 1961), reprinted in 1961 U. S. Code & Cong. News 2048.

Other: There are, or have been, waivers of the coastwise laws for specific ports served by, or specific items carried by, Canadian vessels. For example, Canadian passenger vessels are permitted to obtain annual permits to transport passengers between Rochester, New York, and Alexandria Bay, New York, "[u]ntil such time as passenger service be established by vessels of the United States." 46 U.S.C.A. § 289a (Supp. 1973)

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At one time Canadian vessels were permitted to carry coal to Ogdensburg, New York, from other points in the United States, 70 Stat. 1090 (Aug. 7, 1956) (expired June 30, 1957), and iron ore between ports on the Great Lakes, e.g., 66 Stat. 156 (June 24, 1952) (last of a series of such provisions, expired Dec. 31, 1952), and grain on the Great Lakes "when and to the extent certified by the Defense Transport Administration as to the need therefor," 65 Stat. 371 (Oct. 10, 1951) (expired Dec. 31, 1951).*/

For the most part, these exemptions -- even the one for American Samoa, at least in part -- seem to be based on a lack of American bottom service. Even the Virgin Islands exemption seems based on the lack of interest by American vessels in meeting the commercial needs of those Islands. None

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*/ Section 883 also contains some general exceptions to its prohibition. These are: third proviso, making the section inapplicable to merchandise transported over Canadian rail lines and connecting water facilities where through routes have been recognized and tariffs filed with the ICC; fifth proviso, exempting certain railroad car ferry traffic on the Great Lakes; sixth proviso, permitting vessels of the United States not qualified for the coastwise trade, and foreign vessels whose countries grant reciprocal privileges to transport certain equipment owned or leased by the vessel's owner for use in handling cargo in foreign trade, and stevedoring equipment under certain circumstances; seventh proviso, allowing certain self-propelled barge traffic (discussed in text below).

of the exemptions appear to be based on the fact that U. S.-flag service was too expensive or unsatisfactory in other respects. Thus if precedent is to be the guide, the Marianas will have to show that American bottom service will not be available -- not just that it would be cheaper for the islands to use foreign vessels -- to obtain any sort of an exception from the coastwise laws.

With these precedents in mind, there seem to be three possible positions which the Commission might take in the negotiations:

-- Statutory (Status Agreement) Exemption: The Commission could request that the Marianas simply be exempted from the coastwise laws, as is American Samoa. The argument would be that the Commonwealth is small and generates relatively little commerce; economic self-sufficiency might sooner be reached if cheaper foreign shipping were available. It might be cheaper for the United States to exempt the Marianas from the coastwise laws and subsidize American shipping even more, than to make the laws applicable there. If the economic consultants provide the necessary data, the Commission could also argue that American vessels will not be available, in which case an exemption would be amply precedented.

One wonders whether the political realities would permit the United States to agree to this request. While the commerce generated by the Marianas now is small, that will not necessarily be true in the future. Moreover, the United States may feel that any concession it grants the Marianas

will have to be granted to Guam. And Pacific Far East Lines apparently vigorously opposes an exemption for Guam, on the ground that there is adequate service to Guam by American bottom ships -- indeed, that "[t]here is more space than cargo to fill ships in the Pacific routes." Pacific Daily News, Sept. 9, 1973 at A-3.

Furthermore, a complete exemption from the coastwise laws may not be in the Marianas' interest. It may be desirable to prevent foreign shipping from taking up the intra-Marianas and Marianas-Guam trade, so as to spark the development of local concerns. The ideal economic position, then, may be to seek an exemption from the coastwise laws for shipping between the Marianas and other American ports, while leaving intra-Marianas and Marianas-Guam trade (which as a practical matter probably means local Marianas or Guamanian vessels) subject to these restrictions.

-- Exemption With Flexibility: The United States may be more inclined to agree to an exemption from the coastwise laws for the Marianas (to the extent an exemption is desirable), if the President (or other federal official) is granted the power to make the coastwise laws applicable upon some appropriate finding. This would be similar to the way the Virgin Islands is treated. Depending on the finding which is required, a provision like this could protect the legitimate interests

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on both sides.*/ There are at least two other ways to structure such an exemption. First, the President might be prohibited from exercising his power for a number of years to assure the Marianas time to take advantage of the exemption. Second -- and this is a fall-back position -- the burden of going forward might be reversed, so that the coastwise laws would automatically become applicable (perhaps a few years after termination), unless the President

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*/ The exact finding to be required could be a point of dispute and negotiation. The Puerto Rican lumber exemption used the vague term "reasonably available" domestic service. 46 U.S.C. § 877 (1970) does not require any finding; the President can extend the coastwise laws to the Virgin Islands at any time, by proclamation. Compare 48 U.S.C. § 1405c(d) (1970) (permits the President to extent to the Virgin Islands "such of the . . . coastwise laws . . . as he may find and declare to be necessary in the public interest"). The original version of what is now section 877 required the President "after a full investigation of the local needs and conditions . . . [to] declare that an adequate shipping service has been established to" the Virgin Islands before extending the coastwise laws to that territory. The House eliminated this provision and substituted the existing one because "the establishment of an adequate shipping service to the islands might be prevented by the continued suspension of the coastwise laws." H. R. Rep. No. 2281, 74th Cong., 2d Sess. at 2 (March 30, 1936). Plainly a requirement like the one which the House struck -- worded in a way which requires the President to make an assessment of the likelihood of future adequate domestic service -- would be desirable; it would be even better if it included a reference to the reasonableness or competitiveness of the rates. But cf. 46 U.S.C.A. § 1241(b)(1) (Supp. 1973) (requires "that at least 50 per centum of" certain government procured shipments "be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels" (emphasis supplied)).

exempted the Marianas. This treatment would be similar to the way that the Merchant Marine Act of 1920, 46 U.S.C. § 877 (1970), treated territories other than the Virgin Islands not then covered by the coastwise laws. The Act extended the coastwise laws to them as of February 1, 1922, unless the President delayed the effective date. Such a provision would at least mean that the Commonwealth would not have to go to the committees of Congress which guard the coastwise laws to obtain an exemption, but could deal exclusively with the executive branch. */

-- Most Favored Island: A further fall-back position would be to request a most favored island, or most favored Pacific Island, clause, so that if exemptions from the coastwise laws are made in the future to other territories, the Marianas would have the option of benefiting from them. The practical importance of such a clause with respect to the coastwise laws, however, is probably small.

There is one separate but related matter which should be mentioned. Under the seventh proviso of Section 883 **/

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*/ The drafting of such a provision would have to assure that the President could exempt the Marianas at any time, not just delay the effective date of the applicability of the coastwise laws.

**/ The proviso reads in relevant part (emphasis added):

> ". . . the Secretary of the Treasury may suspend the application of this section [883] to the transportation of merchandise between points in the United States (excluding transportation between the continental United States and noncontiguous states, districts, territories, and possessions embraced within the coastwise laws) which, while moving in the foreign trade of the United States, is transferred from a non-self-propelled barge certified by the owner or operator to be specifically designed for carriage aboard a vessel and regularly carried aboard a vessel in foreign trade

(footnote continued next page)

foreign barge-carrying ships (known as Lash and Seabee vessels) operating in the foreign commerce are permitted to transfer goods from one barge to another within the United States and continue to another point in the United States, if the foreign country provides a reciprocal privilege.*/ In the absence of the proviso, this would be considered coastwise trade. S. Rep. No. 92-417, 92d Cong., 1st Sess. (1971), reprinted in 1971 U. S. Code Cong. 1750, 1751-52. However, "transportation between the continental United States and noncontiguous states, districts, territories, and possessions embraced within the coastwise laws" is specifically excluded from the proviso. The Commission could ask to be treated as part of the continental United States for this purpose, but it is not clear whether such an exception would be economically

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(footnote continued)

> to another such barge owned or leased by the same owner or operator, without regard to whether any such barge is under foreign registry or qualified to engage in the coastwise trade."

*/ An example will make this clearer. A Japanese ship contains two barges, one loaded at Kobe and one at Osaka. Each barge holds 400 tons, 200 bound for San Francisco, and 200 bound for Stockton. At San Francisco the barges are off-loaded. Instead of towing two partially laden barges to Stockton, the 200 tons remaining on one should be transferred to the other, and a single barge towed to Stockton. But under federal law before the provision just described was passed, it was unlawful to consolidate the cargo into a single foreign barge and tow it to Stockton. Consolidation outbound was also unlawful. S. Rep. No. 92-417, 92d Cong. 1st Sess. (1971), reprinted in 1971 U. S. Code Cong. 1750, 1752.

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important, and, if it is, it is not clear why such an exception could be had more easily than a straightforward exemption from Section 883 itself. Probably more important is assuring that the seventh proviso is interpreted to permit Guam-Marianas transportation which would otherwise be prohibited by Section 883. The House version of the bill which added the seventh proviso to Section 883 did not contain the territorial exemption which is now in the law. The House Report, however, said that the proviso would not permit foreign specialty barges to carry merchandise between the continental United States and the noncontiguous states and territories, "nor between such offshore" states or territories," id. at 1754 (quoting House Report). The Senate added an amendment, now in the law, specifically excluding trade between the continental United States and the noncontinguous states and territories from the effect of the seventh proviso. Though the Senate Committee recognized that the "effect [of its amendment] would be to exclude transportation between the continental United States and noncontinguous states . . . and possession, from the application of the" proviso, the Senate Report also quoted the House Report language reproduced above, and stated that its amendment was consistent with the intent of the House in passing the legislation, id. Thus an argument can be constructed that foreign specialty barges cannot take advantage of the seventh proviso in the Guam (or, for example, Hawaii) to Marianas trade. On balance, I do not think the

argument will stick, but if it is an important economic matter, then perhaps it would be worth getting assurances of this. */

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*/ The following excerpt from an article in the Pacific Daily News, Sept. 9, 1973, at A-3, indicates that American-flag vessels do not now use Lash vessels in Guam, for reasons which need further exploration:

> "[A Pacific Far East Line representative said:] 'Last year PFEL attempted to bring about maximum utilization of its Pacific fleet and provide better service to meet the needs of the shipping public. We desired to use LASH vessels in the Guam trade to bring construction equipment which does not lend itself to containerization.'
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> "'LASH (lighter on board ship) is a self-sustaining ship with cranes to handle both barges and containers,' he explained.
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> "'The application to use LASH vessels in the Guam trade was violently opposed by the other two American lines in the service, . . .' [the representative said]. 'Officials of the lines said to me they could not stand the competition of LASH or the improved service. It would render their service ineffective.'
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> "PFEL would not consider applying again for LASH service to Guam unless the other two carriers withdrew their objections. 'The prospects for this under today's atmosphere are not very good,' he said.
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> "'PFEL operates six LASH vessels in the Far East and Australia,' he said. 'The system could be used in the Trust Territory if there were enough cargo to justify the cost of operating the 26,000-ton vessels at $16,000 a day. It is physically and legally possible for PFEL to provide LASH service to the Trust Territory.'"

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II. Rate Regulation

There are three different situations in which the regulation of rates of vessels serving the Marianas will be important: foreign commerce, interstate or inter-territorial commerce, and intra-Marianas commerce.

Foreign Commerce: A "common carrier by water in foreign commerce" is a carrier "engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade." 46 U.S.C. § 801 (Supp. 1973). The rates of these carriers are subject primarily to the jurisdiction of the Federal Maritime Commission (FMC). At present, I am not aware of any reason that the Commission ought to seek treatment with respect to such regulation which is different from that which applies to the States and other territories. Note that 46 U.S.C.A. § 815 (Supp. 1973) gives "the Governor of any State, Commonwealth, or possession of the United States" the right to protest to the FMC that a "[conference freight] rate, rule, or regulation [in the foreign commerce of the United States] unjustly discriminates against" his jurisdiction.

Interstate or Inter-Territorial Commerce: A "common carrier by water in interstate commerce" is a carrier "engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the

United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District or possession," 46 U.S.C.A. § 801 (Supp. 1973). These carriers are subject to the Shipping Act of 1916, 46 U.S.C. § 801-42 (1970), and the Intercoastal Shipping Act of 1933, 46 U.S.C. § 843-48 (1970), which is enforced by the FMC. However, those common carriers which engage in "transportation of persons or property . . . wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States . . ." are subject to the jurisdiction of the ICC, 49 U.S.C. § 902(i)(1) (1970), and where the ICC has jurisdiction it prevails over the FMC, 46 U.S.C. § 832 (1970); 49 U.S.C. § 920(a) (1970). "State" and "United States" mean, for purposes of determining ICC jurisdiction, only States and the District of Columbia, 49 U.S.C. § 902(j), (k) (1970). Thus rates of common carriers in trade by water between the Marianas and other territories and the States will be regulated by the FMC. See Puerto Rico v. Federal Maritime Comm'n, 468 F.2d 872, 873 (D. C. Cir. 1972) (FMC's jurisdiction over rates "includes the offshore domestic commerce . . . between the continent and Puerto Rico/Virgin Islands").

The Commission could ask that the Marianas be treated like a State for these purposes, and have the ICC regulate rates, instead of like a territory, which falls within the FMC's jurisdiction. But the basic statutory framework which governs both regulatory agencies is similar, compare 46 U.S.C.A. § 845a, 817(a)

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(1958 and Supp. 1973) (FMC power to set just and reasonable maximum and minimum fares) with 49 U.S.C. § 907(a) (1970) (ICC power to prescribe lawful maximum or minimum rate). The main difference seems to be that under the ICC Act a certificate of public convenience and necessity is needed for particular routes, 46 U.S.C. § 909 (1970), while there is no such requirement in the Acts which the FMC administers. This does not seem sufficient reason for the Marianas to seek treatment different than Guam or other territories. Note that the right of the government of Guam to obtain review of rates approved by the FMC between the Island and the mainland was recognized in Guam v. Federal Maritime Comm'n, 329 F.2d 251, 253 (D. C. Cir. 1964), cert. denied, 385 U. S. 1002 (1967).

Intra-Territorial Commerce: The definition of common carrier by water in interstate commerce in 46 U.S.C.A. § 801 (Supp. 1973), quoted above, gives the FMC power over the rates of common carriers carrying "passengers or property on the high seas . . . on regular routes . . . between places in the same Territory, District or possession." This means that the FMC will regulate rates by such carriers between the islands of the Marianas (with the possible, but unlikely exception of Saipan-Tinian trade if the carriers to not travel" on the high

seas"*/). I was told by a staff person at the FMC that they do regulate the rates of carriers between St. Thomas and St. John in the Virgin Islands, for example. Intrastate commerce by water is not within the jurisdiction of either the FMC, 46 U.S.C. § 832 (1970), or the ICC, 49 U.S.C. § 903(j), (k) (1970)

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*/ Neither the Shipping Act nor the Intercoastal Shipping Act define high seas and I found no cases on the point under those Acts. 33 C.F.R. § 2.10-1 (1973) provides two definitions. Subsection (a) defines "high seas" for purposes of Coast Guard jurisdiction generally, of the Small Passenger-Carrying Vessels Act, 46 U.S.C. § 390 (1970), and "other laws relating to navigation, navigable waters, or vessel inspection," as waters outside "the territorial seas or . . . internal waters of a nation." This means, I take it, beyond the three-mile limit. Subsection (b) provides the definition of high seas for purposes of certain inspection and other laws which refer specifically to 33 U.S.C. § 151 (1970). That statute gives the Coast Guard the power to define "the lines dividing the high seas from rivers, harbors and inland waters." For these purposes "high seas" is defined by subsection (b) as "waters on which the 'Rules of the Road - Internation'" apply. Under 33 C.F.R. § 82.2, these Rules apply outside "of a line approximately parallel with the general trend of the shore, drawn through the outermost buoy or other aid to navigation of any system of aids." Interestingly, one of the laws for which this definition of high seas is applicable is the Coastwise Load Line Act, 46 U.S.C.A. § 88(a) (Supp. 1973), which defines "coastwise voyage by sea" as one "from one port or place in the United States or her possessions to another port or place in the United States or her possessions" on the high seas as determined under 33 U.S.C. § 151.

In short, the Tinian-Saipan route probably would be regulated if the subsection (b) definition applied, and might not be regulated if the subsection (a) definition applied (it would then depend how far apart the islands are). My guess is that the subsection (b) definition will apply, by analogy to the Coastwise Load Line Act, and because rate regulation is not a law" relating to navigation, navigable waters or vessel inspection."

Note that the FMC can "exempt for the future . . . any specified activity of . . . persons subject to [the Shipping Act of 1916 or the] . . . Intercoastal Shipping Act, 1933, where it finds that such exemption will not substantially impair effective regulation by . . . [the FMC], be unjustly discriminatory, or be detrimental to commerce," 46 U.S.C.A. § 833a (Supp. 1973).*/

The Commission will want to consider whether the local Marianas government should have control over rates in intra-Marianas carriage. Local control might be desirable as a matter of principle, and might be more convenient as well, though no other island territory is so exempted. The Guam Commission recommended that the Shipping Act of 1916 and the Intercoastal Shipping Act of 1933 apply in Guam, thereby recommending federal control of intra-territorial rates, and the Puerto Rico Ad Hoc Committe has not raised the issue. But the Marianas is different than Guam and Puerto Rico, which are essentially single islands and probably don't require as extensive intra-territorial water carriage as will the Marianas. A quick look at Part II of the Interstate Commerce Act (Motor Carriers), 49 U.S.C. §§ 301 et seq. (1970) indicates that intra-territorial motor vehicle rates are not subject to ICC jurisdiction; and clearly this is so with respect to Puerto Rico, where the Interstate Commerce Act does not apply, 48 U.S.C. § 751 (1970). This could provide a useful analogy for the Commission.

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*/ Under 46 C.F.R. § 531.26 (1972), vessels with less than 100 tons carrying capacity need not file tariffs, nor need vessels serving certain specified routes. There is no blanket exemption, however, for any intra-territorial trade.

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It is possible that this potential problem will wash out if the Status Agreement is worded in such a way that the federal government cannot reach wholly intra-Marianas commerce of any sort, whether water-borne or road-borne or otherwise.

III. Citizenship

The maritime laws are replete with provisions which restrict benefits to citizens of the United States. 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. § 672a (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

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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. § 67.03-1 (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 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

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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").

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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 if many residents choose national status instead of citizenship upon termination of the Trusteeship. 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 culd 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). In United States v. Vessel FL4127SE,

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*/ 46 U.S.C.A. § 883-1 (Supp. 1973) provides a special definition of citizen which covers a corporation performing certain services for its parent corporation, and appears to be of no importance here.

311 F.Supp. 1353 (S. D. Fla. 1970), an American citizen transferred a 23-1/2-foot speedboat to a person not a United States citizen (a Cuban national). The Court held that even if the transferor believed in good faith that the transferee was an American citizen, the statute required a forfeiture, for the state of emergency proclaimed in December 1950 continues to exist.*/ See also 46 U.S.C. § 41 (1970) (any registered vessel transferred "to a subject or citizen of any foreign prince or state" without informing collector of customs will be forfeited); 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**/).

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*/ The Secretary of Commerce has given blanket transfer permission for vessels which meet a number of qualifications, including e.g., being undocumented, less than 65 feet long, and not of hydrofoil design. 46 C.F.R. §§ 221.4, 221.5 (1972).

**/ A vessel is documented if it is registered, enrolled and licensed, or licensed. 46 C.F.R. § 66.03-9 (1972). Registry can be had by vessels built in the United States and owned wholly by citizens of the United States, and vessels wherever built which are owned by citizens and "engage only in trade with foreign countries," 46 U.S.C.A. § 11 (Supp. 1973); enrollment can be had by vessels which meet the same qualifications as are required for registry, 46 U.S.C. § 252 (1970), but is used for vessels over 20 tons which will engage in the coasting trade or fisheries and meet those special requirements, see 46 U.S.C.A. § 251(a) (Supp. 1973); and licensing is available to qualifying vessels which are between 5 and 20 tons and will engage in the coasting trade or the fisheries, 46 U.S.C. § 263 (1970); 46 C.F.R. § 67.07-13(a) (1972). All vessels under 5 tons and certain other vessels are exempt from documentation, 46 C.F.R. § 67.01-11(a)(5) (1972), while other vessels must have appropriate documentation to engage in trade or the fisheries, 46 U.S.C. § 319 (1970); 46 C.F.R. § 67.01-13 (1972). Accordingly, the provisions of 46 U.S.C. § 808 (1970) are less likely to pose a problem for the Marianas than the provisions of 46 U.S.C. 835 (1970) for so long as the present national emergency is in effect.

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There seem to be three possible positions the Commission might take. First, it might decide to do nothing, on the ground that the vast majority of the people in the Marianas will become citizens, that those who do not will understand (or have an opportunity to understand) the disadvantages of national status, and that potential problems presented by such statutes as those described in the last paragraph can be handled by administrative action. Second, the Commission might seek to have nationals in the Marianas treated as citizens for these purposes, on the ground that their obligations to the country are similar to those of citizens. It is hard to imagine the United States agreeing to this.*/ Third, the Commission might seek special protection for those persons who are now citizens of the TTPI and who choose to become nationals at

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*/ The United States has a Treaty of Friendship, Commerce and Navigation with Japan, 4 U.S.T. 2064 (April 2, 1953), and perhaps with other countries, by which each extended to nationals of the other what is called "national treatment," that is, "treatment accorded within the territories [meaning "all areas of land and water under the sovereignty or authority" of either country, except the Canal Zone and except the TTPI unless the President extends the provisions of the treaty to the TTPI, Art. XXIII] of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals . . . of such Party," Art. XXII(1). Among many other provisions, the treaty grants to "[v]essels of either Party . . . national treatment . . . with respect to the right to carry all products that may be carried by vessel to or from the territories of such other Party . . . .", Art. XIX(4), though "[e]ach Party reserve[d] the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry on . . . water transport . . . .", Art. VII(2). Depending on the interpretation of this and similar treaties, the United States may be obligated to extend to certain foreign nationals such privileges as it extends to nationals in the Marianas.

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termination. These people, it can be argued, have a legitimate cultural or symbolic reason not to become citizens and neither they nor those who do become citizens should have to suffer adverse consequences from that decision. Those who become nationals after termination do not have the same excuse. (I do not find this argument particularly compelling either.)

IV. Routes

A potential problem in the maritime area -- hinted at in my discussion with an Interior Department official about the Guam Political Status Commission talks -- concerns ways in which the Marianas can be assured of sufficient service by shipping lines. The Secretary of Commerce presently has responsibility for assuring adequate service, in both domestic and foreign commerce, as is explained below. Yet there is no provision for a State or territory to influence his actions, other than through congressional pressure -- an option which probably will not be available to the Marianas. This is an area in which additional discussions will be needed to see how the statutes operate in the real world.

Domestic Commerce: The responsibility of the Secretary of Commerce to assure adequate service is spelled out in 46 U.S.C. § 866 (1970), which provides in relevant part:

> "The Secretary of Commerce is authorized and directed to investigate and determine as promptly as possible after June 5, 1920, and from time to time thereafter what steamship lines should be established and put in operation from ports in the United States or any Territory, District, or possession thereof to such world and domestic markets as in his

> judgment are desirable for the promotion, development, expansion, and maintenance of the foreign and coastwise trade of the United States and an adequate postal service, and to determine the type, size, speed, and other requirements of the vessels to be employed upon such lines and the frequency and regularity of their sailings, with a view to furnishing adequate, regular, certain, and permanent service.
>
> The Secretary is authorized to sell, and if a satisfactory sale cannot be made, to charter . . . vessels [acquired in certain ways] . . . or otherwise acquired by the Secretary, as will meet these requirements to responsible persons who are citizens of the United States who agree to establish and maintain such lines upon such terms of payment and other conditions as the Secretary may deem just and necessary to secure and maintain the service desired; and if any such steamship line is deemed desirable and necessary, and if no such citizen can be secured to supply such service by the purchase or charter of vessels on terms satisfactory to the Secretary, the Secretary shall operate vessels on such line until the business is developed so that such vessels may be sold on satisfactory terms and the service maintained, or unless it shall appear within a reasonable time that such line cannot be made self-sustaining.
>
> Preference in the sale or assignment of vessels for operation on such steamship lines shall be given to persons who are citizens of the United States who have the support, financial and otherwise, of the domestic communities primarily interested in such lines if the Secretary is satisfied of the ability of such persons to maintain the service desired and proposed to be maintained . . . ."

The Secretary of Commerce was also obligated under 46 U.S.C. § 877 (1970) "to have established [apparently by the end of 1920, but in any event by February 1, 1922] adequate steamship service at reasonable rates to accommodate the commerce and the passenger travel of" the island territories and possessions of the United States, "and to maintain

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and operate such service until it can be taken over and operated and maintained on satisfactory terms by private capital and enterprise." That obligation, however, appears to have terminated by the terms of the statute, and will not be of benefit to the Marianas.

If the Secretary's action in practice is unsatisfactory, the Commission might seek a provision which would assure the Marianas at least a hearing before the Secretary on the adequacy of service. Or the Commission might want to have provisions made which permit the prohibition against foreign flag vessels in domestic commerce to be lifted -- either at its own option or by federal administrative action -- if adequate service is not provided. Of course, no other State or territory has this special treatment. But Congress did at one time authorize the predecessor of the FMC temporarily to arrange for ocean transportation "on American vessels, to, from and within Alaska" pending determination of a long-range policy. 62 Stat. 1211

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(Act of July 1, 1948) (effective until March 1, 1949). The Commission might consider requesting that an appropriate federal agency be given similar stand-by authority if shipping service is not satisfactory.

Foreign Commerce: The Secretary of Commerce has power to designate essential trade routes in foreign commerce, and these designations are important for they trigger both his own power to provide service and his power to grant operating-differential subsidies. The statutory framework is as follows:

46 U.S.C.A. § 1121 (Supp. 1973) provides:

> "The Secretary of Commerce is authorized and directed to investigate, determine, and keep current records of --
>
> (a) The ocean services, routes, and lines from ports in the United States, or in a Territory, district, or possession thereof, to foreign markets, which are, or may be, determined by the Secretary of Commerce to be essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States, and in reaching his determination the Secretary of Commerce shall consider and give due weight to the cost of maintaining each of such steamship lines, the probability that any such line cannot be maintained except at a heavy loss disproportionate to the benefit accruing to foreign trade, [and other factors] . . . ."

46 U.S.C.A. § 1125 (Supp. 1973) provides:

> "The Secretary of Commerce is authorized to acquire by purchase or otherwise such vessels constructed in the United States as he may deem necessary to establish, maintain, improve, or effect replacements upon any service, route, or line in the foreign commerce of the United States determined to be essential under section 1121 of this title, and to pay for the same out of its construction fund . . . ."

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46 U.S.C.A. § 1204 (Supp. 1973) provides:

"If the Secretary of Commerce shall find that any trade route (determined by the Secretary of Commerce to be an essential trade route as provided in section 1121 of this title) cannot be successfully developed and maintained and the Secretary of Commerce's replacement program cannot be achieved under private operation of such trade route by a citizen of the United States with vessels registered under the laws thereof, without further Government aid in addition to [operating and construction subsidies] . . . , the Secretary of Commerce is authorized to have constructed, in private shipyards or in navy yards, the vessel or vessels of the types deemed necessary for such trade route, and to demise such new vessel or vessels on bare-boat charter to the American-flag operator established on such trade route, without advertisement or competition . . . ."

And 46 U.S.C.A. § 1171(a) (Supp. 1973) provides:*/

"The Secretary of Commerce is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States . . . . In this sub-chapter VI the term "essential service" means the operation of a vessel on a service, route, or line described in section 1121(a) of this title or in bulk cargo carrying service described in section 1121(b) of this title. No such application shall be approved by the Secretary of Commerce unless he determines that (1) the operation of such vessel or vessels in an essential service is required to meet foreign-flag competition and to promote the foreign commerce of the United States . . . ."

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*/ Operating differential subsidies cannot be granted "with respect to a vessel to be operated in an essential service served by citizens of the United States which would be in addition to the existing service, . . . unless the Secretary of Commerce shall determine . . . that the service already provided by vessels of United States registry is inadequate . . . ." 46 U.S.C.A § 1175(c) (Supp. 1973).

Thus the designation of essential trade routes may be very important to the Marianas. It may be worthwhile to explore whether the Commission should seek assurances that the Marianas will be included at least to the extent Guam is included, in such routes; or at least that the views of the local government with respect to this matter will be considered.

V. Fishing

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."

That this restriction also applies in the territories is shown by the fact that 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 foreign-flag vessels could land their catch in American Samoa, Wolf Management Services, Economic Development Program for American Samoa 234, 246 (1969). My best guess -- based on a brief conversation with an official of the Customs Bureau, who is to send me a copy of the decision -- is that the ruling was based on the Convention Relating to the Samoan Islands, which granted its signatories privileges equal to those of the United States with respect to commerce and commercial vessels. See discussion on p. 8 , supra. By most-favored nation clauses in other treaties, this agreement may have effectively exempted American Samoa so far as all-important maritime nations are concerned -- though why a special provision was then needed for the coastwise laws exemption is not at all clear. In any event, Japanese, Taiwanese and Korean vessels accounted for virtually all the tuna landed in American Samoa in 1967, Economic Development Program, supra, at 241, and apparently this is still true. The tuna packing industry is the mainstay of the American Samoan private economy. Id.

The question arises, how should the Marianas seek to be treated with respect to the restrictions against foreign-flag caught fish. On the one hand, the protection may be useful in developing a local commercial fishing industry. On the other

hand, American Samoa has greatly benefited from its exception, and apparently has been unsuccessful in its efforts to develop its own fishing fleet. The decision whether to seek an exemption, then, turns on an economic analysis. If the Marianas will not even be capable of meeting its own seafood needs, for example, then perhaps a Virgin Islands-type exemption will be needed to permit vessels from other parts of Micronesia to land their fish (this obviously assumes that the rest of Micronesia will be treated as a foreign country for these purposes).

Another "fisheries" point of potential interest concerns the protections afforded to American waters. Under the combined effect of 16 U.S.C.A. §§ 1081-85 and 1091-94 (Supp. 1973), fishing by foreign vessels is prohibited within 12 miles of the American coast (3 miles of territorial waters, and 9 miles of contiguous zone), subject to these kinds of exceptions: exceptions under international agreements; specific exemptions granted by the Secretary of the Treasury if certain conditions (including reciprocity) are met; and, with respect to the contiguous zone, "subject to the continuation of traditional fishing by foreign states . . . as may be recognized by the United States." Potential problems may arise if the Marianas is seriously interested in developing its commercial fishing industry. If it is, it presumably will want to keep for itself (and other American vessels, of course) the 12 miles the United States claims, assuming commercial fishing is viable within 12 miles of shore. Thus the Commission may want to know precisely which other nations the

United States expects will be able to fish within this 12 miles, and for which reasons -- for it seems a legitimate matter of negotiation, for example, both how the Secretary of the Treasury will exercise his discretion, and which nations will be recognized as traditionally fishing in these waters. The latter point will be particularly politically sensitive if the Micronesians expect to obtain or retain these fishing rights and the Commission believes it to be in the Marianas' interest to exclude its former compatriots.

N.B.: This review of fishing statutes is not complete by any means.*/

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*/ There are a variety of provisions in Title 16 still to be checked. The complexity of the problem is exacerbated by the special language of the maritime world. 46 C.F.R. § 67.07-13(b) (1972), based on 46 U.S.C. § 263 (1970) (derived from Act of Feb. 13, 1793), provides (emphasis supplied

> "A vessel engaged exclusively in the cod fishery shall be licensed for that fishery. A vessel engaged in whaling shall be licensed for the whale fishery. <u>A vessel engaged in taking fish of any other description shall be licensed for the mackeral fishery</u>. . . . A vessel which engages in both the the coasting trade and fishing (other than whaling) may be licensed for the 'coasting trade and mackeral fishery.' A vessel engaged in taking out fishing parties is not a fishing vessel and shall be licensed for the coasting trade unless it intends to proceed to a foreign port, in which case a certificate of registry is required."

Thus if someone in the Marianas wants to get a license permitting his vessel to catch tuna, he must get a mackeral license!

A minor bureaucratic problem may be that vessels licensed for the fisheries cannot "touch and trade at any foreign port" without the permission of the customs collector. 46 U.S.C. §§ 310, 311 (1970). If other Micronesia ports are "foreign" for these purposes, this may become burdensome, but it could easily be handled administratively.

VI. Other Potential Problems

This section notes briefly other potential problem areas which have been uncovered but which are far from completely researched.

Restrictions Against Foreign Ships: In addition to the restrictions against foreign ships already discussed, there are several others. For example, foreign-built dredges are prohibited from operating in the United States unless documented as a vessel of the United States, 46 U.S.C. § 292 (1970).*/ There are prohibitions against "vessels not wholly owned by" citizens towing U.S.-registered vessels "from any port . . . in the United States, its Territories or possessions, embraced within the coastwise laws of the United States, to any other port within the same . . . or from point to point within the harbors of such places," 46 U.S.C. § 316(a) (1970). And foreign vessels are prohibited from engaging in salvaging operations in certain areas, *id.* § 316(d) (this may not extend to the Marianas and needs further research). Whether these are problems or not depends on whether the Marianas would want and would be likely to get otherwise unqualified vessels to perform such work at substantially lower cost.

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*/ The Attorney General opined that the foreign dredge act was a coastwise law and therefore did not apply in the Virgin Islands. This permitted the Virgin Islands government to save half-a-million dollars in dredging a deep water channel in the harbor at St. Croix. 46 Op. A. G. No. 13 at 3 n.4 (Aug. 7, 1963).

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Workers' Protections: There is a federal Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. § 901 et seq. (1970), which covers workers in the States and Territories, id. § 902 (18). However, Puerto Rico has its own Workmen's Accident Compensation Act, and the federal Act (and other federal maritime law remedies such as suits for unseaworthiness) are not applicable there. Alcoa Steamship Co. v. Rodriguez, 376 F.2d 35, 38 (1st Cir.), cert. denied, 389 U.S. 905 (1967). The Guam Commission (at 32) recommended that the federal act not apply there. The Commission may want to take a similar position. Interestingly, it has been held that Congress cannot permit a State to control maritime matters like this, Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1920), but it can permit a territory to do so under Art. IV, § 3, cl. 2, Fonseca v. Prann, 282 F.2d 153, 155 (1st Cir. 1960), cert. denied, 365 U.S. 860 (1961).

Federal law apparently provides at least two and sometimes three different theories under which an injured seaman may recover: maintenance and cure (a non-statutory remedy); 46 U.S.C. § 688 (1970), extending to seamen rights and remedies which railway employees have by statute; and 46 U.S.C. § 761-68 (1970), providing a right of action for wrongful death "occurring on the high seas beyond a marine league from the shore of any State . . . or the Territories or dependencies of the United States." Though I have not researched this area in any detail,

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I cannot see any reason that the Marianas might want to be treated differently than other territories. However, I bring it up now because, in view of its importance, I expect to go into it further later. One problem, for example, that I haven't yet worked out is the importance, if any, of 46 U.S.C. § 767 (1970), which provides that the Wrongful Death Act shall not affect "[t]he provisions of any State statute giving or regulating rights of action or remedies for death . . . ." It may be that the Marianas will want to be treated as a State within the meaning of this provision.

Nationalization: As noted, certain benefits are available only to vessels built in the United States or are denied to vessels which have at any time been documented under the laws of a foreign country. This may present a problem for vessels owned by people in the Marianas before termination.*/ It is easily solved by a provision granting to vessels owned by such persons on the date that the maritime laws generally became applicable in the Marianas the right to register as American vessels and all privileges thereof. See 48 U.S.C. § 509 (1970) (vessels carrying Hawaiian registers on August 12, 1898, owned by citizens of Hawaii or of U. S. and certain

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*/ The TTPI Government will soon take delivery on a 2,050-ton ship built in Korea "specifically to meet the requirements of transoceanic support and intra-district service for Micronesia. Pacific Daily News, Dec. 19, 1973, at 18. Depending on how the assets of the present government are divided, this ship may wind up in the hands of the Marianas Government or her citizens.

named vessels, so admitted); 48 U.S.C.A. § 744 note (1952) (similar provisions for vessels owned by "inhabitants" of Puerto Rico as of April 11, 1889).

Defensive Sea Areas: 18 U.S.C. § 2152 (1970) provides:

> "Whoever knowingly, willfully, or wantonly violates any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which the President, for purposes of national defense, may from time to time establish by executive order --
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

By Executive Order in 1941, President Roosevelt established the Guam Island Naval Defensive Sea Area, which was composed of all the territorial waters surrounding Guam out to the three-mile limit. The Order prohibited "any person, other than persons on public vessels of the United States" from entering the Area, "unless authorized by the Secretary of the Navy." Executive Order 8683 (Feb. 14, 1941). See United States v. Angcog, 190 F. Supp. 696 (D. Guam 1961) (upholding conviction for entering Area as a stowaway). The Guam Island Defensive Sea Area was discontinued and the Executive Order proclaiming it revoked on August 21, 1962, by E. O. 11045. See also, e.g., Felliciano v. United States, 297 F. Supp. 1356 (D.P.R. 1969), aff'd 422 F.2d 943 (1st Cir.) cert. denied, 400 U.S. 823 (1970) (upholding the establishment of the Culebra Island Defensive Sea Area).

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There is potential for abuse of this power in the Marianas after termination, but I am not sure what, if anything, can or should be done about it now.

Navigable Waters Generally: The federal power over navigable waters is very broad, and there is extensive federal legislation on the subject which has not yet been explored -- but it should be, and probably in connection with this maritime memorandum. As but one example, 33 U.S.C. § 401 (1970) provides in part:

> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: Provided, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced . . . ."

Assuming "State" does not include Commonwealths, the Marianas will certainly want State-like treatment, even if it has not been granted to Guam or other territories.

The federal government also exercises broad powers over ports, 33 U.S.C.A. § 1221 (Supp. 1973) (including those in the TTPI), and over pilots, 46 U.S.C.A. § 211-216; (1958 and

Supp. 1973) (includes special provisions regulating pilotage in the Great Lakes and its tributaries and prohibiting State or local regulation "of any aspect of pilotage" in those waters), which need to be analyzed further to determine whether special provisions are desirable. Presumably there will be no objection to the application of such laws as the federal Boat Safety Act of 1971, 46 U.S.C.A. §§ 1451-89 (Supp. 1973) which grants the Secretary of Commerce the authority to issue regulations "establishing minimum safety standards" for non-commercial vessels. The Act applies to vessels to be used on "waters subject to the jurisdiction of the United States," but not to vessels "whose owner is a State," which is defined to include the District of Columbia and five territories (including Puerto Rico). It is possible that the standards established will work hardships in the Marianas, but this does not seem to be an issue worthy of negotiation now.

Technical Problems: There are a large number of technical or minor problems, or potential problems, which probably can await the drafting of an omnibus bill. For example, the Trust Territory is not considered part of the United States for certain shipbuilding purposes, though the territories sometimes are, 46 U.S.C.A. § 883 (Supp. 1973), and sometimes may be, *id.* § 1155 (United States not defined), and sometimes are not, 46 U.S.C.A. § 1192 (Supp. 1973) (certain ship construction permitted at yards "in the continental United States," defined to include

Alaska and Hawaii). Certainly the Marianas will demand to be and should be so treated. See also 46 U.S.C.A. §§ 1126-1126d (Supp. 1973) (Merchant Marine Academy; Guam treated as a State; TTPI permitted four students who cannot become officers; American Samoa is also treated as a State, but is specially permitted to send nationals instead of citizens, though the nationals cannot become officers). Another problem which falls in this category is 46 U.S.C.A. § 18 (Supp. 1973) which provides that "every vessel of the United States shall have a 'home port' in the United States, including Puerto Rico." Why other territories are not included, and whether this is an important matter need to be explored.*/ Another concern is 46 U.S.C.A. § 11 (Supp. 1973), under which vessels entitled to U. S. registry include "seagoing vessels . . . wherever built which are to engage only in trade with foreign countries, with the Islands of Guam, Totuila, Wake, Midway, and Kingman Reef, being wholly owned by citizens of the United States . . . Research is needed to determine if this is a benefit the Commission should demand, though under the "all laws applicable

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*/ Under the regulations, Guam can be a home port and a port of documentation, 46 C.F.R. §§ 66.03-13, 66.05-1 (1972). The significance of being permitted to be a home port may be that a vessel can get permanent documents only at its home port, 46 C.F.R. §§ 67.07-1, 67.19-1 (1972) and may be subject to property tax only at its home port, Hays v. Pacific Mail Steamship Co., 58 U.S. (17 How.) 596 (1855), though the validity of that case with respect to an apportioned tax is at least in grave doubt, e.g., Braniff Airways v. Nebraska Board of Equalization, 347 U.S. 590 (1954) and further research may wash this aspect of the matter out.

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in Guam" formula, presumably this section would automatically be extended to the Marianas.*/ Yet another technical matter is raised by 46 U.S.C.A. § 1177 (Supp. 1973), which permits a U. S. citizen to establish with the Secretary of Commerce a capital construction fund for the purpose of providing replacement or additional vessels built in the United States for operation in the foreign, Great Lakes or noncontiguous trade, or in the fisheries. Contributions to the fund reduce taxable income in the year made. Under § 1177(k)(8)(iii), "trade between the islands of Hawaii" is included in the definition of "noncontiguous trade." It may be that inter-island trade in the Marianas ought to be treated the same way.**/

Tonnage Duties, Entrance and Clearance Fees, Inspection and Safety Laws: Federal laws providing for tonnage duties, entrance and clearance fees are not applicable in the Virgin Islands, 48 U.S.C. § 1405c(c) (1970). This was intended to

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*/ The regulations are worded in a way which indicates that a foreign-built vessel wholly owned by a citizen of the United States and registered in accordance with this provision is entitled to trade with Guam, though it is not entitled to engage in the coasting trade! See 46 C.F.R. § 67.01-5(i) (1972).

**/ A minor irritant may be 46 U.S.C.A. § 601 (Supp. 1973), which prohibits the withholding by a state or territory of taxes on wages of seamen or the crew of a vessel engaged in foreign or domestic trade. It would be hard to make a case for an exemption from this provision, which was passed in response to a Territory of Alaska law providing for such withholding, see Alaska v. Petronia, 418 P.2d 755, 760 (Wash. 1966), appeal dismissed, 389 U.S. 7 (1967).

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permit the Virgin Islands to compete with foreign ports in its vicinity for foreign shipping. 42 Op. A. G. No. 13 at 8-9 (Aug. 7, 1963). The Guam Commission (at 10) recommended that Guam be exempt from these laws as well. It may be advantageous to seek similar treatment for the Marianas, though in view of reciprocal treaties giving other nations rights of entry to U. S. ports, it may not be crucial.

The Virgin Islands is also treated specially with respect to other maritime laws. 48 U.S.C. § 1405c(d) (1970) provides:

> "The Legislative Assembly of the Virgin Islands shall have power to enact navigation, boat inspection, and safety laws of local application; but the President shall have power to make applicable to the Virgin Islands 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, and, to the extent that the laws so made applicable conflict with any laws of local application enacted by the Legislative Assembly, such laws enacted by the Legislative Assembly shall have no force and effect."

(The President has made all navigation and vessel inspection laws applicable to the Virgin Islands except the coastwise laws, certain laws aimed at preventing collisions in harbors, rivers and in land water, 33 U.S.C. §§ 154-231 (1970), those portions of the vessel inspection laws requiring the inspection as a passenger vessel of cargo vessels when carrying more than twelve passengers, and, of course, laws levying tonnage duties and the like inapplicable under 48 U.S.C. § 1405c(c) (1970),

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Executive Order 9170, 7 F.R. 3842 (May 21, 1942), 48 U.S.C.A. § 1405c note (1952).) The Guam Commission recommended similar statutory treatment for that Island, though, as noted above, it recommended that the coastwise laws be declared wholly inapplicable. This treatment deserves consideration because it introduces a desirable flexibility and would mean that the Marianas would have to negotiate only with the executive branch instead of both the Executive and Congress. Further analysis and outside recommendations are needed with respect to the practical importance of the inspection and safety laws which would apply in the Marianas.

Service: Still to be explored are ways to assure satisfactory shipping service to the Marianas, other than the route selection issues noted in Part IV, supra. It may be that the FMC has sufficient power under the broad language of the statutes it enforces to regulate not only rates but service. See 46 U.S.C. § 816 (1970) ("every . . . person subject to [the Shipping Act, 1916] shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property"; FMC can prescribe a regulation or practice if one is unjust or unreasonable); 46 U.S.C.A. § 817(a) (Supp. 1973) (common carriers in interstate commerce "shall establish, observe and enforce . . . just and reasonable regulations and practices relating . . . to . . . the manner and method of presenting, marking, packing and delivering property for transportation . . . the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, stor-

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