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MARIANAS V - AGENDA ITEM I - U.S. COMMENTS ON TEXT OF DRAFT AGREEMENT - DECEMBER 5, 1975

(1) - Name of agreement -

- Repeat point made in discussions at Marianas III, that U. S. has difficulty with calling this simple "Agreement" or Commonwealth Agreement, and has gone along with calling it an "Agreement" in present draft only to keep things moving.
- Lets review basis for this U.S. position
- Not a treaty or executive agreement.
- Not an organic act, since freely negotiated, even though it is expected to be given effect of law as part of U. S. Congressional approval process.
- U. S. therefore suggested it be called "Covenant".
- A serious, recognized name with added advantage of biblical connotation.
- Woodrow Wilson also used it in his remarks quoted by FHW this A.M.
- "Covenant" technically defined in broadest legal sense as a "contract" and more specifically as "an agreement reduced to writing and duly executed whereby one or more of the parties named therein engages that a named act (or series of acts) is to be performed ... sometime in the future". Therefore technically most apt.
- Politically need something to distinguish new arrangement locally from the term "Compact" already used to describe proposed new instrument recording free association arrangement with other Districts of TTPI.
- Need a popular "handle" to be used in forthcoming political education program.

- Have never really understood why MPSC disliked "Covenant" and would appreciate hearing in detail its reasons against it.
- As alternative have suggested to MPSC counsel use of "Articles of Agreement" which would be referred to as "The Articles" or "Articles of Commonwealth" or "Commonwealth Articles."
  - Meets same tests as "Covenant"
  - Parallels Samoan "Instrument of Agreement"
  - Historic connotation for Americans in our history of "Articles of Confederation" that preceded U. S. Constitution.

(2) - Section 104 - Foreign Affairs and Defense

- U.S. still considers section unnecessary since subsumed in sovereignty.

(3) - Section 105 - Limitations on the exercise of plenary powers of federal government.

- Issue goes back to Marianas II when subject was carefully considered on both sides and finally settled in principle in language of joint communique which said " ....."
- U. S. interpreted this to mean then -- and still so interprets it -- that those areas to which mutual covenant provision applied must be of truly fundamental importance to the future relationship.
- The example used then -- and now -- was the commonwealth relationship itself, which could not be changed unilaterally by either U. S. or Marianas -- example being that U. S. could not force N. Marianas into union with Guam without N. Marianas' consent.
- Also important from practical standpoint not to make this a limitation on U.S. sovereignty but only a self imposed restraint on the exercise of its normal plenary powers by the U.S. Congress. It should be offered as permissive action on its part, wherein by approving agreement it would voluntarily agree not to exercise its authority in certain specific respects.

- Any limitations in U. S. view therefore must be greatly circumscribed; and this is the fundamental, carefully considered view of both executive branch and U. S. Congressional leadership.
- Question one of principle as well as practical politics; i.e. U. S. must have basic powers even though in fact it may never exercise them.
- In fact Congress has not in recent years acted with regard to territories in any important fashion different from manner in which it has acted for states and has sought to promote local self-government in the territories to the greatest extent possible.

- U. S. has therefore limited "mutual consent" provisions to four:
  - Article I - basic political relationship.
  - Article II - Marianas' right to internal self-government with own constitution.
  - Article III - Right to citizenship or nationality, which should be inalienable once achieved, and
  - Section 501 - delineating those provisions of U. S. Constitution which would be applicable to Northern Marianas.
- U. S. considers other provisions to be of relatively secondary importance so far as basic relationship goes, even though we recognize they remain of great concern to Marianas and are important to us as well.
- Chances of their being changed without Marianas' consent as practical matter are in fact very slight once U. S. Congress approved the agreement. Good Marianas Washington representation should insure no inadvertent change in them.

- Fact is that U. S. Congress like British Parliament operates on basis of whole series of unwritten rules and one of these clearly is its unwillingness now to act directly on matters relating to territories without taking views of people in territories into fullest possible consideration.

There must be large element of good faith in any relationship such as this.

So far as specifics go in MPSC proposed additions to mutual consent list:

- Section 503 - Inapplicable laws.
  - Don't disagree with MPSC view this section shouldn't be changed during Phase II Transition but consider practical likelihood of this happening to be nonexistent once Congress has approved new arrangement, and subject likely to be carefully considered at length by joint commission on federal laws provided for under Section 504.
  - Not in same category of importance as first four.
  - Possible implication as well from its inclusion under Section 105 that Congress could not act even after end of Trusteeship without mutual consent.
- Section 702 - Financial assistance.
  - U. S. knows of no instance in recent history where Congress once it has undertaken commitment such as this -- as it would in approving agreement, reneged on such commitment.
  - Parallel case is U. S. contributions to U.N. and other international organizations, which have been going on for last 30 years without any default.
  - MPSC counsel has asked alternatively for formal Justice Department opinion that this undertaking in nature of contract and justiciable in courts.

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- U. S. runs into problem on this but believes -- and willing to put this in negotiating history if necessary -- that in most unlikely event Congress failed to appropriate full amount this would constitute dispute under Article IX and thus subject to consultation and ultimate submission to court if that should ever prove necessary.

- Section 805 - Limitations on alienation.
  - Important though this is from U. S. standpoint do not believe it falls in same category as first four.
- Section 806 - Future land acquisition.
  - Subsections a & b not of such fundamental importance as to warrant inclusion in same category as first four.
  - Subsections c & d represent areas where Congress must have power to act should that ever become necessary as fundamental attribute of sovereignty, but always important to note that underlying safeguards of due process requirements under U. S. Constitution cannot be changed even by U. S. Congress.

MFSC Subsection (a) -

- Suggestion that U. S. Congress can legislate for Marianas only when it is specifically named (except when it is affected by legislation of general application to states and other territories) not likely to be well received by Congress. Puerto Rico only now asking for it and other territories

don't have it. Actually unnecessary in U. S. view in light of current Congressional practice referred to earlier.

- Same applies to proposed insistence on specific finding of national interest, since Congress presumably doesn't legislate except to promote or protect national interest and welfare.

- MPSC Subsection (c) -

  - Suggestion that during transition Marianas' consent to changes could only be given by Marianas representative rather than U. S. official asking for Marianas goes without saying, since views of people of Marianas must be represented. But don't need to say it more than it would be appropriate to say Marianas representatives must consult people before he consents.

(4) - Sections 202 and 1002 - Approval of Marianas Constitution

- U. S. executive branch would be happy to leave it to President alone to determine whether or not Marianas Constitution is consistent with Agreement and ask him to do it promptly, but Congress may well insist on looking at Constitution as well.

- See no need to make an issue of this now, and U. S. version simply leaves matter open so we can try to do it by Presidential action if possible but needn't confront Congress with yet another ticklish question of prerogative. Serious dange of Congressional disapproval of Agreement if Congress is precluded from approving constitution.

(4½) - Section 203(c) - Disproportionate representation in legislature

- Note that this is provision which has still to be tested in courts.
- Runs possible risk of being struck down, but U.S. willing to take it

if this is of such overriding importance to Marianas as indicated.

(5) - Section 504 - Joint Commission on Federal Laws

- MPSC provision that Commission report will have force and effect of law unless one house of Congress disapproves report in whole or in part simply will not be accepted by Congress - we checked this just before leaving.
- U. S. payment for Commission's work probably o.k. but see no need for U. S. to pick up salaries of Marianas members.

(6) - Section 506 - Immigration and Nationality

- Still have many problems with MPSC version.
- U. S. is still checking out its version with INS but believes this will be fully responsive to Marianas needs.
- Note that it would apply limited parts of I&M Act only at end of Trusteeship and only to "close relatives"
- Believe it should be acceptable to MPSC without going into great detail of MPSC proposal.

(7) - Section 601 (c) - Marianas power to amend IRC

- U. S. has carefully studied this proposal which would give special power to Marianas not enjoyed by Guam or any other territory except Puerto Rico. Guam does have de facto power to amend IRC as applied to internal tax in Guam through implied power to rebate taxes collected on Guam source income. But it has no power to amend or rebate taxes on U. S. source income. (Neither indeed does Puerto Rico, since Puerto Ricans must file separate returns on U. S. source income.)
- U. S. would be willing to consider provision which would give Marianas explicit right to amend IRC as it applies to Marianas source income through rebate taxes on Marianas source income, but not on non-Marianas source income.

(8) - Section 602 - Application of IRC as Federal Tax

- MPSC proposal would provide best of all worlds to Marianas (advantages of Puerto Rico system with none of its disadvantages) and this sort of exception simply not feasible in practical political sense.
- Also has grave disadvantage of creating yet another tax system within U. S. family and would cause great practical confusion for IRS and Treasury who are trying to get everyone into Guam system as revised last year.
- Suggest therefore simple adoption of Guam system of filing, which will make it possible for people of Guam and NMI to handle personal and business affairs with much greater degree of uniformity and simplicity.
- Assume MPSC aware that U.S. has short version of Section 601 and 602 which we would prefer in event agreement is reached to go to the Guam system.

(9) - Section 605 (a) - Social Security

- U. S. still has minor problems with language

(10) - Section 701 - Economic Standards of Living

- As indicated many times in the past U.S. unwilling to undertake expressed or implied commitment such as that proposed by MPSC to provide economic and financial assistance until Marianas achieve level of economic development comparable to states of the union.
- Too vague, i.e., Dogpatch / Sutton Place
- No such undertaking for anyone else in the entire U.S., whether state or territory.

(11)- Sections 702, 704 (b) & (d) - Appropriation of Funds

- Most recent check with Congress staff indicates complete non-saleability of this MRSC proposal.
- Earlier remarks under mutual consent heading applicable so far as U. S. commitment is concerned.
- Problem is that Congress simply unwilling to make exception to regular procedures in this case, limiting appropriations to single years, but perfectly willing to see commitment recorded as "authorization".

(12)- Section 703 (a) - Revenue Sharing

- U. S. has agreed to this with proviso this may not stand up under challenge in Congress.
- May need additional language such as "Where this not prohibited by terms of laws in question."

(13)- Sections 802 & 803 - Method or terms of acquisition of land

- Suggest these matters be deferred for discussion under Agenda Item II.
- U. S. does feel it is better not to overly complicate basic agreement with numerous details which would more appropriately be addressed in a separate instrument of land conveyance or technical level agreements on joint use and social structure.

(14)- Section 804 - Land for Civilian Use and Isely Field

- Civilian land needs should probably be looked at again by Land Committee, especially Coast Guard requirement, before we try to examine this section.

- So far as Isely is concerned we have no problem with technical revision of joint use agreement to make changes resulting from substitution of Government of Northern Mariana Islands for Trust Territory after new status begins, but FAA cannot go along with any substantive changes in view of fact that only basis on which it provided funds for Isely rehabilitation in first place was this joint use agreement entered into with full foreknowledge of pending negotiations for change in Marianas status.

(15)- Section 805 - Land Alienation

- U. S. remains convinced provision should be mandatory rather than permissive and unable understand MPSC's unwillingness to agree; Congressional leaders also insistent.
- Limitation on individual land holdings from former public land holdings appears to be only a matter of common prudence in view of unfortunate experiences elsewhere.

(16)- Section 806 (c) & (d) - Eminent Domain

- U. S. perfectly willing to spell out existing safeguards on exercise of eminent domain powers and has attempted to do so in its version but cannot agree to new limitations being imposed.
- From practical standpoint unable to see what more MPSC can reasonably be afraid of with full protection of law available to safeguard interests of common man, which are no more sacred and no less sacred here than elsewhere in the U. S.
- Note desire for language modification in Section 806 (a).

(17)- Section 901 - Washington Representation

- True we agreed to support Marianas request before Congress and have done so, but non-voting delegate flatly unacceptable to Congress, which is also unwilling to commit itself so far as future goes.
- Title of "Resident Commissioner" also unacceptable to Puerto Rico, Virgin Islands and Guam because of comparative connotations-- past and present-- so we need to find new title (no magic in U. S. "resident agent"; maybe "resident counsel" or "counselor").

(18)- Section 903 (c) - Marianas International Representation

- Recognize U.S. tentatively agreed earlier on this, but matter never really discussed, and we have had to reverse position in view of intervening developments.
- Whole question still undecided with respect to other territories including Puerto Rico.
- Suggest note in negotiating history which will pledge U. S. to give Marianas whatever decided for other territories in this regard.

(19)- Section 1003 - Termination of Trusteeship

- U. S. believes this inappropriate since it fully recognizes its obligations to do so under Trusteeship Agreement and sees no reason to be specially admonished in this agreement to do its duty.

(20)- Section 100/7/ - Separate Administration

- This seems inappropriate for much the same reasons and in any event we will have agreed on how and when separate administration is to be accomplished before this agreement is signed.

- Will look forward to hearing MTSC views re all the foregoing plus any other topics.

- Thereafter suggest entire subject be referred once more to drafting committee, with exception of items earmarked for Land Committee, and that U. S. and MPSC representatives on drafting committee be provided with appropriate instructions from respective principals.

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