



DEPARTMENT OF STATE

Washington, D.C. 20520

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MEMORANDUM

March 15, 1974

To: OMSN - Mr. Wilson  
From: L - Thomas Johnson  
Subject: Article 11 -- Survivability of Defense Arrangements: Treaty vs: Continuation in force of Title 3

International Legal Considerations

Both a pre-negotiated defense treaty and provision in the compact for continued effectiveness of Title 3 present one common difficulty: How can the representatives of a non-sovereign entity enter into an arrangement which will be binding upon the future government of an independent sovereign? While I cannot provide a definitive answer to this question, it strikes me that, at a minimum, providing in the compact for continued effectiveness of Title 3 makes the presence of this difficulty less apparent than does providing for a pre-negotiated defense treaty. It is not seriously questioned that a free association agreement approved by the Congress of Micronesia would be valid and binding. Thus, to separate from the compact the agreement which will provide the basis for our continued military rights after independence only draws attention to the difficulty mentioned above.

Providing in the compact for the continued effectiveness of Title 3 does present a conceptual difficulty: How does part of a compact which has been terminated continue in effect? The answer to this questions is, of course, simple. Title 11 does not provide for the termination of the entire compact. Rather, the specified defense provisions of the compact may only be terminated after the expiration of the specified survivability.

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### Domestic Legal Considerations

Inasmuch as the entire United States Congress will have the opportunity to approve or disapprove the entire compact, there does not appear to be a basis for the complaint that the executive branch would exceed its authority by agreeing to the compact. The only domestic question facing us is really not legal <sup>over</sup> ~~the~~ but relates to internal Congressional housekeeping. That is, which committee in each House will consider the compact when it goes to the Congress for approval. It seems clear that if we pre-negotiate a separate defense treaty the claim of the Senate Foreign Relations Committee to jurisdiction <sup>over</sup> at least that part of our agreement with Micronesia will be greatly enhanced. Since it is not clear to me why we should care that the Senate Foreign Relations Committee considers this matter, I do not believe that this consideration cuts one way or the other.

### Conclusion

As a substantive legal matter, I do not believe it makes any difference which of the above two courses we follow. As a matter of cosmetics, I believe the course we are presently following, i.e., providing in Section 1103 of the compact for the continued effectiveness of Title 11 after termination of the compact, is marginally better.

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