A COMPARISON AND CROSS-ANALYSIS OF THE CONSTITUTION OF THE FEDERATED STATES OF MICRONESIA AS APPROVED BY THE MICRONESIAN CONSTITUTIONAL CONVENTION, AND THE DRAFT COMPACT OF FREE ASSOCIATION, OCTOBER 31, 1974, DRAFT.

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Edited for release to Ambassador F. Haydn Williams
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This paper has two sections. The first will analyze the provisions of the Constitution against the Compact, and the second will do the reverse. The paper does not attempt to raise other issues which bear upon the need to renegotiate certain provisions of the Compact.

At the outset, it must be noted that the Joint Committee has always supported the proposition that the Constitution should be the supreme law of Micronesia, and that if there appeared any conflict between the Constitution and the Draft Compact, the latter would be renegotiated. To the extent that such conflicts are apparent, therefore, this Report makes recommendations for renegotiation.

ANALYSIS OF CONSTITUTION AS AGAINST COMPACT

(Citations at beginning of each paragraph refer to Constitution)

PREAMBLE. The Preamble to the Constitution is not, of course, law, and cannot therefore be in conflict with the Compact. Worth mentioning is, however, the fact that the Preamble states that the establishment of the Constitution is an exercise of the "inherent sovereignty" of the Micronesian people. The Preamble to the Compact likewise recognizes the "sovereign right of self-determination" inherent in the people.

The establishment of the Constitution itself is entirely consistent with the provisions of Section 101 of the Compact, which provides that "The people of Micronesia have the right to adopt their own constitution and form of government."

ARTICLE I. Section 1 provides for the geographical boundaries of Micronesia. The limits of territorial waters are established, and will be in force "unless limited by international treaty obligations assumed by the Federated States of Micronesia". The question of treaties is discussed below.

The Joint Committee has informed Ambassador Williams, both by letter and personally at the October, 1974 meeting at Pearl Harbor, that in the absence of an international treaty on the law of the sea which would be binding upon Micronesia, the Government of Micronesia would consider the extent of its territorial jurisdiction as an internal matter, and therefore solely within the province of the Government of Micronesia as provided in Section 102 of the Draft Compact. This position poses a potential conflict with the provisions of Article II, which provides that the United States will have "full responsibility for any authority over the foreign affairs of Micronesia", and of Article III, which grants the United States similar authority and responsibility with regard to defense matters, should the United States attempt to define territorial jurisdiction as a matter of foreign affairs or defense. The position expressed by the Joint Committee represents a declaration that the Government of Micronesia would not accept such an interpretation.

Section 2 provides for internal boundaries, and is fully consistent with the provisions of Section 102 of the Draft Compact.

Section 3 deals with the acquisition of foreign territory. While this process has foreign affairs implications, and could possibly result in the invocation, at some stage, of the powers of the United States under Article II of the Draft Compact, the Section deals primarily with internal procedure for the admission of new territory. It is inconceivable that any conflict could occur except if, for some reason, the United States had a foreign policy or defense interest in not permitting the new territory to be added.

Section 4 deals with the formation and admission of new States, and in a sense is complementary to Section 3 where the new state to be admitted is formed of new territory. Except as noted above, this provision is entirely consistent with the provisions of Section 102.

ARTICLE II. Section 1 provides that the Constitution "is the supreme law of the Federated States of Micronesia", and that no act of Government may be inconsistent with it. Section 101 of the Draft Compact provides that "the constitution and laws of Micronesia shall not be inconsistent with the provisions of this Compact". Thus arises the question of potential conflict. If such conflict were to occur, the provisions of the Constitution would govern, but if there is no conflict between Micronesia's Constitution and laws, no problems would arise. Hopefully, one of the results of this analysis will be the elimination of areas of conflict. The Federated States, however, must endeavor to assure that no such conflict arises in the future, at the risk of breaching the Compact.

ARTICLE III. Section 1 provides that TTPI citizens domiciled in a district which ratifies the Constitution become citizens and nationals of Micronesia. Section 701 of the Draft Compact provides that TTPI citizens, persons who are Micronesian citizens by birth, who do not take steps to acquire citizenship or nationality other than that of Micronesia or the United States, will become United States nationals. This permits dual nationality. Further legal research is necessary as to whether this implies any conflict.

Section 2 defines a person born of at least one Micronesian citizen parent as a Micronesian citizen and national at birth. This provision invokes the provisions of Section 701 of the Draft Compact, above, but will not result in any conflict.

Section 3 requires persons who are citizens of Micronesia and any other nation to make an election as to citizenship within the time specified in the Section. Section 702 of the Draft Compact could result in the loss of United States nationality for Micronesian citizens and nationals (who are also US nationals by Section 701) for persons who hold third-country citizenship or nationality as well. There is no apparent conflict here.

Section 4 permits people of the Marianas (assuming the Commonwealth Covenant is ratified by the United States) who do not elect to become United States citizens under Section 302 of the Covenant to apply for Micronesian citizenship and nationality. Such persons would be US nationals by Section 302 of the Covenant, as well as Section 701 of the Compact. The cited sections of the Compact, Constitution and Covenant are entirely compatible.

Section 5 would permit people from any district not ratifying the Constitution to apply for and obtain Micronesian citizenship and nationality. There is no conflict with any provision of the Compact.

Section 6 permits retroactive application of Article III, and is probably intended to overcome any possible problems arising out of the separate progress of the Marianas toward self-government. There does not appear to be any conflict between this provision and the Compact.

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ARTICLE IV guarantees certain fundamental rights to the people of Micronesia, not enumerated here. This Article is totally consistent with Section 101 of the Draft Compact, which requires that the Constitution of Micronesia "guarantee to the inhabitants of Micronesia their fundamental human rights."

ARTICLE V: Section 1 preserves the roles and functions of traditional leadership, and permits their participation in Government. This is an internal matter, and therefore consistent with Section 102.

Section 2 permits the traditions of the people of Micronesia to be protected by statute. If such statutes are in conflict with the rights enumerated in Article IV, "protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action." There does not appear to be any inherent conflict between this Section and the requirement of Section 101 of the Draft Compact of a guarantee of fundamental human rights.

Section 3 permits the establishment of a Chamber of Chiefs within the Congress of Micronesia. This should be contrasted against further provisions in Section 101 of the Draft Compact, which requires "a governmental structure consistent with the principles of democracy." A question could possibly arise as to whether the exercise of any legislative power by persons not selected by democratic means would be in conflict with the provisions of the Compact. Certainly, (1) there is no requirement that the Chamber of Chiefs be established while the Compact is in effect, thereby avoiding any possible conflict; and (2) if the legislative power of the Chamber of Chiefs is sufficiently limited, there would not be any such conflict.

The Section provides further that the several States of Micronesia may provide for "an active, functional role" for their traditional leaders. This provision raises a serious question of conflict with Section 101; while the Compact term "consistent with the principles of democracy" is intentionally vague. It would perhaps be advisable to seek clarification in that Section to permit the proposed role of traditional leadership in Micronesia.

ARTICLE VI. Section 1 deals with the right to vote in national elections. This is a purely internal matter, and within the exclusive responsibility of Micronesia as provided by Section 102 of the Draft Compact. Note the effect of this provision on Section 1201 of the Draft Compact, however, which provides for the plebiscite on the Compact and for voter eligibility. The Plebiscite would certainly be a "national election" within the meaning of Section 1 of Article VI of Constitution, if the Constitution had been ratified by the time of the plebiscite, and to that extent the Congress of Micronesia could not provide qualifications for voting different from those which are provided for membership in the Congress itself. It is not considered likely that any such conflict would occur, however.

Alternatively, if the plebiscite is called by the Administering Authority for the purpose of approving the termination of the Trusteeship (Compact, ratified in accordance with the Micronesian Constitution, to take effect on termination, therefore resulting in an implied vote of the Compact as well), the provisions of Section 1 would not apply, and there would be no conflict between the cited sections.

ARTICLE VII. Section 1 provides for three levels of government, and is consistent with the authority of the Government of Micronesia under Section 102 of the Draft Compact and with the "democratic principles" requirement of Section 101 of the Draft Compact.

Section 2 requires states to have "democratic constitutions." To the extent that this Section raises a conflict with the provisions of Section 3 of Article V concerning the role of traditional chiefs in state governments, a conflict with the "democratic principles" provision of Section 101 of the Draft Compact would also arise. The solution to any such conflict, at least as between the Constitution and the Compact, is detailed in the discussion of the cited section above.

ARTICLE VIII deals generally with the distribution of powers between the national and state governments. This would appear to be a matter solely within the internal affairs of Micronesia, and as such is fully consistent with the provisions of Section 102 of the Draft Compact.

ARTICLE IX. Section 1 establishes the Congress of Micronesia as the national legislature, consistent with Micronesia's responsibility for the governance of its internal affairs under Section 102 of the Draft Compact.

Section 2 enumerates the powers expressly delegated to the Congress.

(a), to provide for the national defense. The national defense of Micronesia is, of course, a responsibility of the United States according to Section 301 and 302(a)(1) of the Draft Compact. The mechanism for the transfer of authority and responsibility in this area would be by the approval of the Compact as a treaty, under Section 2(b) and Section 4 of this Article of the Constitution. Problems associated with the consideration of the Compact as a treaty, however, are discussed immediately below.

(b), to ratify treaties. Under Section 201 of the Compact, treaties could be applied to Micronesia without any requirement for ratification. There is no requirement in the Constitution that all treaties applicable to Micronesia require ratification by the Congress; and further, Section 4 of this Article contemplates the delegation of treaty-ratification authority by treaty, for example, the Compact of Free Association. Thus there would not appear to be any inherent conflict, as under the provisions of Section 201, Micronesia would delegate its sovereign right to ratify certain treaties.

Conflict will, however, arise in the event that the United States applied to Micronesia under Section 201 a treaty which was somehow inconsistent with the Constitution, which by the provisions of Article II of the Constitution would make the treaty void, at least to the extent of such conflict.

(c), regulation of immigration and emigration: Expressly consistent with the provisions of Section 801(a) of the Draft Compact. This Section, however, also creates treaty obligations which, if transgressed by the Congress in its regulation of immigration and emigration, could result in a conflict with the Compact. Regulation of naturalization and citizenship are matters solely within the internal jurisdiction of Micronesia, and such regulation is entirely consistent with Section 102 of the Draft Compact.

(d), taxation, duties, and import tariffs: The authority of Micronesia in this respect is consistent with Section 601 of the Draft Compact. This Section of the Compact, however, contains limitations on Micronesia's authority to the extent that such limitations are imposed by reason of United States authority under Articles II and III of the Draft Compact. The Compact itself would, as noted above, however, constitute a delegation of this authority to the United States in such situations.

(e), taxation of incomes: The authority of Micronesia in this respect is again totally consistent with the authority of Micronesia over its

internal affairs as specified in Section 102 of the Draft Compact. The authority of Micronesia would, however, be limited by the provisions of Annex C, which prohibits each Government from certain taxation on certain officials and employees of the other. This is a limitation which is certainly susceptible of acceptance through ratification of the Treaty-Compact.

(f), issuance and regulation of currency: This is a matter within the internal affairs responsibility of Micronesia, as provided by Section 102. Note the provisions of Section 604 of the Draft Compact, however, which provide that until Micronesia does establish its own currency, United States currency will be legal tender, and further, the unspecified but nevertheless present obligation to protect the currency of the United States under Micronesian law.

(g), regulation of banking (consistent with Section 102), foreign commerce (possible conflict with US treaty powers, as noted above, although Annex A gives Micronesia broad powers in this area), interstate commerce (consistent with Section 102), insurance, issuance and use of commercial paper and securities, bankruptcy and insolvency (all consistent with Section 102), and patents and copyrights (possible inconsistency with US treaty powers, see above).

(h), regulation of navigation and shipping: Possible conflict with Section 603(a) of the Draft Compact; Micronesia could not enact laws conflicting with treaties applicable to Micronesia by Section 501(a).

(i), regulation of usury: consistent with Section 102.

(j), national postal system: Similar to provisions concerning use of US currency, Section 403 of the Draft Compact provides that the US will provide to Micronesia the services of the United States Postal Service. Presumably, the authority of the Government of Micronesia to regulate postal services would be limited or nonexistent if the Compact is approved and if the USPS is provided to Micronesia; in fact, Micronesia may be compelled to enact laws to protect the integrity of the system by virtue of Section 503(a).

(k), acquisition and governance of new territory: See discussion under Section 3 of Article I. The acquisition of new territory would have foreign affairs implications, and the authority of the Government of Micronesia to acquire new territory would seem to be limited accordingly. The governance of the newly-acquired territory would, of course, be a matter solely relating to the internal administration of Micronesia, and would therefore be consistent with Section 102 of the Draft Compact.

(l), governance of national capital: Consistent with Section 102.

(m), regulation of marine resources within Territorial limits and beyond 12 miles: See also discussion on Article I, Section 1. Possible conflict would arise if proposed regulation conflicts with treaties applicable to Micronesia by Section 501(a) and Title 2 of the Draft Compact.

(n), public service system: Consistent with Section 102.

(o), impeachment of high officials: Consistent with Section 102; see also discussion on Section 7 of this Article.

(p), criminal law: Consistent with Section 102. Note, however, that Section 101 requirements of "fundamental human rights" apply, but are protected by provisions of Article IV of the Constitution.

(q), override of veto: Consistent with Section 102.

Section 3 enumerates concurrent powers of the national and state governments. All are consistent with Section 102; note, however, that certain types of borrowing money on the public credit may be regulated by treaty, such as an agreement with the US whereby the US would guarantee repayment of ADB loans as required by ADB charter, and the like.

Section 4 provides for the ratification of treaties. Two observations: first, the section does not specifically say what constitutes a treaty which must be ratified. For example, if a treaty (the Compact?) gives another nation (the US) the authority to apply treaties to Micronesia, there would not seem to be any requirement that these treaties be ratified by Micronesia. This interpretation would be consistent with Section 501(a) and Section 202 of the Draft Compact. But, as noted above, what if a treaty so applied were inconsistent with Article II Supremacy clause? The Constitution does not answer this question, and there is a latent conflict here. Second, this Section by its own terms defines the Compact of Free Association as a treaty, and provides a procedure for its ratification. It is believed that the validity of the Compact, absent compliance with the provisions of this Section, would be highly questionable. Section 1201 of the Compact provides the terms of its own ratification, and these terms are inconsistent with the provisions of this Section. Section 1201 should therefore be renegotiated.

Section 5 deals with the imposition and collection of national taxes, and is consistent with the provisions of Sections 101 and 102.

Section 6 deals with the disposition of revenues from marine resources exploitation, and is consistent with Section 102.

Section 7 deals with grounds and procedure for the impeachment of high officials (See Section 2(o) of this Article). The Section appears to be consistent with the "democratic principles" and "human rights" requirements of Section 101.

Section 8 details the composition of the Congress of Micronesia, and is consistent with the provisions of Section 102 and Section 101.

Section 9 prescribes qualifications for membership in the Congress, a matter within the authority of Micronesia under Section 102.

Section 10 requires decennial reapportionment of the Congress, consistent with Section 102 and meeting the requirements of Section 101.

Section 11 permits a state to allocate one of its seats in the Congress to a traditional leader. As noted above in connection with Section 3 of Article V, this provision raises a question of possible conflict with the "principles of democracy" requirement of Section 101, and efforts should be made to clarify the language in that Section.

Section 12 deals with vacancies in the Congress, and is consistent with Section 102.

Section 13 deals with outside employment and conflicts of interest on the part of members of Congress, and is consistent with Section 102.

Section 14 provides for the salary of members of Congress, and is consistent with Section 102.

Section 15 deals with legislative immunity, and is consistent with Section 102.

Section 16 deals with meetings of the Congress, and is consistent with Section 102.

Section 17 details the powers of Congress over the qualifications of its members, its Rules of Procedure, and subpoena power, and is consistent with Section 102.

Section 18 defines a quorum, and is consistent with Section 102.

Section 19 requires a Journal, and makes other procedural provisions applicable to the Congress, all consistent with Section 102.

Section 20 deals with the manner of passage of a bill, and is generally consistent with Section 102.

Section 21 deals with the manner of enactment of laws, and is consistent with Section 102.

Section 22 deals with Presidential approval of legislation, and is consistent with Section 102.

ARTICLE X. Section 1 vests executive power in a President, and provides for his qualifications and manner of election. The section is consistent with Section 102 of the Draft Compact.

Section 2 delineates the powers of the President:

(a) execute the laws and Constitution: Fully consistent with Section 102.

(b) receive ambassadors and conduct foreign affairs and defense: To the extent that foreign affairs and defense powers are delegated to the United States by the Compact, there would be a possible conflict if the President exercised such powers. Caution also over Section 203(b), which provides for joint U.S.-Micronesian approval of the establishment of foreign consulates and accreditation of foreign consular officials; as long as the exercise of the President's authority goes only to the extent of receiving "ambassadors" (consular officials?) jointly accredited, no problem would appear to arise.

(c) pardon and reprieves: Consistent with Section 102.

(d) appointment of officers: An internal matter, consistent with Section 102. Note that Section contemplates appointment of ambassadors; exercise of this power might conflict with U. S. foreign affairs authority under Title II. Query: is the Resident Commissioner to the United States an "ambassador" within the meaning of this Section?

Section 3 details certain duties of the President as head of Government, all of which are consistent with Section 102.

Section 4 details qualifications for the Presidency, and is consistent with Section 102.

Section 5 deals with election of the Vice-President, and is consistent with Section 102.

Section 6 deals with Presidential succession, and is consistent with Section 102.

Section 7 concerns compensation of the President, and is consistent with Section 102.

Section 8 deals with the establishment of executive departments, and is consistent with Section 102.

Section 9 provides for emergency powers in case of specified national emergencies. The Section is consistent with Section 102, and pending further research, appears to be consistent with the "principles of democracy" and "fundamental human rights" requirements of Section 101.

ARTICLE XI concerns the judicial establishment, and is fully consistent with Section 102, without significant qualification.

ARTICLE XII deals with Finance, and is fully consistent with Sections 101 and 102.

ARTICLE XIII. Section 1 prescribes rights to education, health care, and legal services, and is consistent with Section 102.

Section 2 prohibits the testing, storage, use, or disposal of radioactive, toxic chemical, and other harmful substances without the consent of the Government of Micronesia. This presents a latent conflict with US authority under Title III; if the US determines that defense requires the presence of such weaponry, a conflict would arise. Further, United States policy is never to indicate where nuclear weapons are stored, and it is considered likely that such weapons would be stored in Micronesia at the type of military installation currently planned. If the presence of such weaponry were discovered after the fact, the United States would have been in violation of the Micronesian Constitution; this then presents problems of appropriate remedy, since there would not appear to be any way to require the United States to cease such violation. It would seem that the Joint Committee has the responsibility to assure that the Micronesian Constitution is not violated by requiring renegotiation of offending provisions in Title III.

Section 3 requires the Government to uphold the Constitution and national unity, and is fully consistent with Section 102.

Section 4 prohibits noncitizen ownership of "title to land or waters" in Micronesia, and is fully consistent with Section 102. The Section raises the possibility of an "equal protection of the laws" argument, but the undersigned does not consider that such an argument is either valid or violative of the "fundamental human rights" requirement of Section 101.

Section 5 prohibits indefinite use rights agreements, and voids existing agreements of this nature five years after the effective date of the Constitution. As there are presently several such agreements in force, these would have to be renegotiated; this has been the position of the Joint Committee in its negotiations with the United States, but there has been no specific agreement on the point. Note that the Constitution does not contain any prohibition against a law impairing the obligations of contract, and the U.S. Constitution does.

Section 6 requires renegotiation of land use agreements with the United States. The Joint Committee has already taken this position with the United States.

Section 7 requires an oath of office, and is consistent with Section 102.

ARTICLE XIV. Section 1 deals with amendments to the Constitution, and is consistent with Section 102.

Section 2 deals with decennial ballot questions on constitutional conventions, and is consistent with Section 102.

ARTICLE XV. Section 1 deals with the transition of laws and court actions, and is fully consistent with Sections 101 and 102.

Section 2 deals with existing governmental rights, obligations, and liabilities, and is consistent with Section 102. It appears possible, but unlikely, that problems might arise in connection with the refusal to assume TTPI debts which benefit a district not ratifying the Constitution.

Section 3 provides that interests in property held by the TTPI is transferred to the national government, and is consistent with Section 102.

Section 4 deals with the establishment of municipal governments, and is consistent with Section 102.

Section 5 requires the Congress to provide for a smooth and orderly transition, consistent with Section 102. Note, however, that the power of the Congress of Micronesia in this respect is not unlimited during the pendency of the Trusteeship, since the United States has ultimate governmental authority under the Trusteeship Agreement.

Section 6 deals with apportionment of the Congress for the first election, and is consistent with Sections 101 and 102.

ARTICLE XVI. Section 1 provides that the Constitution takes effect not later than one year after ratification. While there is no conflict with the Compact of Free Association, there would appear to be a latent conflict with the powers of the United States under the Trusteeship, as noted above. The United States Government is not, of course, bound by the provisions of this Section.

ANALYSIS OF COMPACT AGAINST CONSTITUTION

(Author's note: to a great extent this material will be duplicative of material appearing in the previous section. This section of the analysis is presented, however, in the effort to provide a ready cross-reference for the reader.)

The Preamble recognizes the sovereign right of Micronesian self-determination; contrast the Constitution's Preamble, which refers to inherent Micronesian sovereignty.

TITLE I. Section 101 provides for a Constitution, and requires that the Constitution shall guarantee "fundamental human rights" and be consistent with "principles of democracy". These phrases were intentionally left vague at the insistence of the Joint Committee. Both of the requirements would appear to be satisfied by numerous provisions in the Constitution, considered together.

Section 102 provides that the Government of Micronesia will have full authority for and responsibility over the internal affairs of Micronesia. The bulk of the Constitution deals with matters which are purely internal.

Section 103 recognizes Micronesia's right to amend or terminate the Compact and their future political status. While the Constitution is the supreme law of Micronesia, it is compatible with both free association as contemplated by the Compact, as well as an independent Micronesia. The Constitution, incidentally, is silent upon the subject of the termination of treaty obligations; the provisions of Title XI of the Compact provide a specific procedure for the termination of the Compact-Treaty.

TITLE II. Section 201 delegates certain authority in foreign affairs to the United States. While the Constitution in several instances provides for foreign affairs powers in the Government of Micronesia (see, e.g., Article IX, Section 2(b) and Article X, Section 2(b)), the Constitution also makes provision for the delegation of these powers by Treaty (the Compact). Such treaties, however, must be ratified in accordance with Section 4 of Article IX, which conflicts with the ratification procedure detailed in Section 1201 of the Draft Compact. The latter section requires renegotiation accordingly.

Section 202 permits the United States to apply certain treaties to Micronesia, and in some cases, without its consent. This raises a host of possible areas of conflict if the treaty and the laws required to implement it are inconsistent with the Constitution, which is supreme under its Article II. Treaties which can be applied to Micronesia only with the consent of Micronesia, however, must be ratified in accordance with the provisions of Section 4 of Article IX.

Section 203(a) requires the United States to extend diplomatic and consular protection to citizens of Micronesia abroad, and presents no conflict with the Constitution. Section 203(b) provides for joint approval of the establishment of consulates in Micronesia and the joint accreditation of consular officials. Contrast the powers of the President under Article X, Section 2(b), discussed in the earlier section of this analysis. Section 203(c) requires the United States to facilitate Micronesian participation in those areas of foreign affairs permitted by Annex A; see next paragraph.

Section 204 permits the Government of Micronesia to undertake the activities specified in Annex A, which does not present any inconsistency with the Constitution. The President and the Congress each have foreign affairs authority, as noted elsewhere in this Report.

TITLE III. Section 301 delegates to the United States "full responsibility for and authority over defense matters in Micronesia". As is the case with regard to foreign affairs, the Constitution grants powers to the Government in the field of defense, Article X Section 2(b) and Article IX Section 2(a), these are powers which may be delegated by treaty (the Compact) to the United States in accordance with Article IX Section 4.

Section 302 details specific defense responsibilities of the United States, and provides that for the exercise of its authority the United States may use Micronesian lands, waters, and airspace "necessary" therefor. This Section contemplates the use of lands, waters, and airspace in addition to those to be leased to the United States under Section 303, although the United States has indicated that such use will be limited to transit and other

temporary or emergency uses; query whether this constitutes an "agreement for the use of land for an indefinite term", prohibited by Section 5 of Article XIII of the Constitution.

Section 303(a) gives the United States the right to establish military facilities pursuant to Sections 302(b) and (c), the right to protect its military facilities in Micronesia, and full freedom of use and access of the same. Section 303(b) obligates the Government of Micronesia to assure the United States the use of the lands and waters specified in Annex B. The Constitution does not provide for any power of eminent domain in the central government, and in the absence of such a power, its exercise may be prohibited to the central government (See Section 2 of Article IX). If this is the case, there can be no assurances, although of course the Compact will not be approved by the United States until the leases are negotiated and approved. Section 303(c) requires the Government of Micronesia to "establish suitable procedures" to accommodate US requests for additional rights. Some sort of eminent domain law would appear to be required, either at the national or state level. Section 303(d) requires that the land leases not conflict with the Compact or US defense responsibilities under Title III. This raises the prospect of almost certain conflict with Section 2 of Article XIII of the Constitution, which prohibits the storage, use, etc., of nuclear weapons, etc., which the United States would be able to do under Article III. Section 303(e) provides that US rights and uses extend for the life of the Compact, or for the life of the particular agreement involved, whichever is longer, at US option. Note that (1) the Section contemplates some continuation of some existing agreements, which may be in conflict with Section 5 of Article XIII of the Constitution prohibiting indefinite use agreements, or with Section 6 of the same Article, which requires renegotiation of existing agreements; see previous section of this report; and (2) that the leases themselves would have to specify a term, because while the Compact could continue in force indefinitely, Section 5 of Article XIII prohibits indefinite agreements; query whether a lease for the life of the Compact violates this provision; if so, Section 303(e) requires renegotiation to require a definite term for all leases.

Section 304(a) prohibits countries other than the US to conduct military activities in Micronesia. Query: Does this include Micronesia itself? In any event, this section represents a commitment which may be made by treaty. Section 302(b) permits the United States to invite other countries to participate in joint military exercises, which again represents a commitment which may be made by treaty. Section 304(c) declares that the rights delineated in this Section are not assignable, and has no relation to the Constitution.

Section 305 provides for a status of forces agreement. There is no inherent conflict, but caveat that the states themselves may have to be parties to such an agreement. The built-in protection for the US here is that the Agreement is a prerequisite to US approval of the Compact.

Section 306 permits Micronesian citizens to volunteer for the US armed forces, but exempts them from the draft except if they become US residents. This Section represents no conflict with the Constitution.

Section 307 requires consultation on defense matters on the request of either party. Nothing in this Section is inconsistent with the Constitution; consultation would presumably be conducted by the President under Article X Section 2(b), subject to the authority of the Congress under Article IX, Section 2(a).

Note at this juncture the words of the Preamble to the Constitution: "Our ancestors, who made their homes on these islands, displaced no other people. We, who remain, wish no other hope than this. Having known war, we hope for peace. . . We extend to all nations what we seek from each: peace, friendship, cooperation, and love in our common humanity." The Preamble, of course, is not law, but there does appear to be some inconsistency between the language of the Preamble and the rights conferred upon the United States by Micronesia in Article III of the Compact.

TITLE IV. Section 401 obligates the United States to provide a specified level of financial support to Micronesia for a specified term, for "programs and operations of that Government or any subdivision thereof." The funds would have to be divided equally among the states and the national government, per Section 1(b) of Article XII of the Constitution, unless, of course, this Section were renegotiated to provide a specific allocation of the funds.

Section 402 requires the United States to pay an as-yet unspecified amount for the use of lands and waters as provided in Title III. As noted above, unless the funds are earmarked, they would be paid into the Foreign Assistance Fund and would have to be divided equally, Section 1(b) of Article XII. It is contemplated by the Joint Committee that some of these funds should be allocated to the landowners (including the government), some to the states in which the lands or waters are located, and some to the national government for the rights given in Article III. The Joint Committee may want to re-think this.

Section 403(a) obligates the United States to provide to Micronesia, without charge, the services of the United States Postal Service (note that Section 2(j) of Article IX grants this power to the Congress), the United States Weather Service (probably also a power of Congress under the "interstate commerce" clause of Section 2(g)), and the United States Federal Aviation Administration (again, probably interstate commerce). These are probably powers which can be delegated by the Treaty-Compact. Micronesia is obligated to provide land for these uses; this could create the same problem discussed above in connection with Section 303(c). Section 403(b) permits future intergovernmental agreements for the extension of additional services; this would take the form of a treaty, which invokes the provisions of Section 4 of Article IX. Section 403(c) limits Micronesian taxing powers on U. S. property and personnel supplied under a Section 403(a) program; this represents a limitation on the powers of Congress (and the states) to tax under Article IX Section 2(d) and (e), but a limitation which may be accepted by treaty.

Section 404(a) provides for a specified level of financial support to Micronesia for capital improvement projects. See discussion above on Section 401. Section 404(b) provides for financial assistance loans from the United States to Micronesia, to which the Article XII Section 1(b) "equal distribution" requirement would probably apply as well. Note, however, that this particular paragraph has allocated the loan funds between the national and district governments to some extent already.

Section 405 requires future negotiations for financial assistance following the first fifteen years of the Compact. Any agreements would take the form of a treaty.

Section 406(a) provides that any unused 401 or 406 funds would remain available to Micronesia; these funds would still be subject to the "equal distribution" requirement of Article XII Section 1(b), to the extent that this requirement applies in the absence of allocation. Section 406(b) permits reallocation for funds between Sections 401 and 406(a); such reallocation would also presumably take the form of a treaty. Section 406(c)provides for an inflation factor, and does not present any problems of consistency with the Constitution. Section 406(d) requires periodic renegotiation of U. S. financial assistance levels; again, presumably any amendments to the Compact would have to be in the form of a treaty. Section 406(e) requires the joint determination of auditing procedures, which may also result in a treaty.

TITLE V. Section 501(a) provides that two classes of treaties will be applicable to Micronesia: those which were applicable on the day before the effective date of the Compact, and those which are applied to Micronesia under Section 202. The problems associated with the application of treaties to Micronesia without the consent of the Government of Micronesia are detailed in several other places in this Analysis. Section 501(b) provides that U.S. statutory law applicable to Micronesia under the Trusteeship will no longer apply, except as otherwise provided, a provision consistent with Article II of the Constitution only if no legislation inconsistent with the Constitution were applied to Micronesia by the United States; See Section 502(b).

Section 502(a) provides that self-executing treaties applicable to Micronesia have the force of internal law in Micronesia. Once the problem of the application of the treaty itself is resolved, the provisions of this Section would not create any problem. Section 502(b) requires the Government of Micronesia to enact appropriate legislation to implement non-self-executing treaties, and provides that, pending such enactment, United States law enacting such treaties has the force of law in Micronesia. This provision again raises the problem of treaties applied to Micronesia without Micronesian consent and which are inconsistent with the Constitution of Micronesia. Section 502(c) obligates Micronesia to comply with and enforce treaties applicable to it, creating the same problem mentioned in connection with Section 502(b).

Section 503(a) obligates Micronesia to enact laws protecting U.S. personnel, property, and so forth, in connection with U.S. programs and functions in Micronesia. This does not create an inherent conflict, but note that states may have at least concurrent jurisdiction to enact such laws as are contemplated by this Section. Section 503(b) permits the United States to withhold services provided under Section 403 if Micronesia does not comply with Section 503(a), a provision not creating an inherent conflict. Section 503(c) would permit Micronesia to utilize the services of U.S. "investigative and enforcement services" to assure compliance with the laws enacted under Section 503(a); this would not create a conflict if such assistance were provided under treaty duly ratified by Micronesia.

Section 504 requires intergovernmental cooperation on fugitives from the jurisdiction of each nation, and contemplates a separate agreement to this effect. Such agreement would presumably constitute a treaty, and would require ratification as required in the Constitution. Note that police power is reserved to the states, however.

Section 506 obligates the United States to protect Micronesia's environment in accordance with "standards no less restrictive than those established by United States law," and presents no problems of conflict with the Constitution.

TITLE VI. Section 601 permits Micronesia to regulate and tax imports and exports, which the national government has the power to do under Sections 2(d) and (g) of Article IX of the Constitution. Note, however, as pointed out in the discussion on those sections, that the authority of Micronesia might be limited by treaty applicable to Micronesia, as Section 601 itself provides.

Section 602 requires each nation to give "most-favored-nation treatment to the products of the other. This presents no conflict with the Constitution once the Compact is ratified as a treaty.

Section 603 delegates to Micronesia the right to regulate wholly domestic air and maritime commerce, subject to applicable treaties and FAA regulations, the implications of which are discussed elsewhere. Sections 2(g) and (h) provide for the exercise of this authority by the national government. Section 603(b) essentially requires mutual consent for international air route authority, a power which Micronesia can delegate by the Treaty-Compact.

Section 604 provides that U.S. currency will be legal tender in Micronesia, unless and until Micronesia adopts its own. See Section 2(f) of Article IX.

TITLE VII. Section 701 provides for U. S. nationality for Micronesian citizens. The implications of this Section are discussed in connection with Article III of the Constitution.

Section 702 provides for the loss of U. S. nationality by citizens or nationals of third countries. See discussion of Article III of the Constitution.

TITLE VIII. Section 801(a) provides that the Government of Micronesia may regulate immigration and entry of noncitizens (subject to limitations imposed under Titles II and III). This is included within the powers of the national government by Article IX Section 2(d). Section 802(b) provides for free entry and exit of U. S. citizens and nationals, but limits freedom to establish residence. The section is a limitation on the powers of the national government under (a) above, but is a limitation which may be accepted by ratification of the Treaty-Compact. The section also provides for the rights of Micronesian citizens to establish residence in the U. S. and its territories, and is again a permissible limitation on the right of the national government to regulate emigration under Section 2(c). Section 801(c) provides that entry and exit of non-Micronesian citizen U. S. nationals will not be more restrictive than U. S. regulations concerning U. S. nationals who are Micronesian citizens, a limitation on the power of the Government of Micronesia under Section 2(c) of Article IX which may be accepted by treaty.

TITLE IX. Section 901 provides for the establishment of Resident Commissioners' Offices in each country, and incorporates Annex C relating to privileges and immunities. This raises a possible conflict in that some of the privileges and immunities may be properly matters of state jurisdiction. Actual conflict is, however, deemed unlikely.

TITLE X. Section 1001 provides for mutual consultation in the effort to settle disputes. This is properly the subject of a treaty.

TITLE XI. Section 1101 provides that the Compact may be amended at any time by mutual consent. Any such amendment would, of course, constitute a treaty which would require ratification.

Section 1102(a) provides that the Compact may be terminated at any time by mutual consent. Termination would require a treaty, which would be in turn require ratification. Section 1102(b) spells out the procedure for unilateral termination by each country. Section 1102(c) permits a district not agreeing to the termination of the Trusteeship to negotiate with the United States during the two-year transition to termination of the free association status. This provision is a direct violation of the Constitution, which does not expressly permit secession and which, while it does not expressly prohibit it either, is drafted so as to create the legal impression that secession is not permissible.

Section 1103(a) requires a mutual security agreement to be concluded prior to the effective date of termination. Such an agreement is a treaty, and would have to be ratified in accordance with the Constitution. Query: does the requirement that the treaty be entered into violate the Constitution per se? Section 1103(b) obligates each side to negotiate in good faith toward such agreement, and provides for other transitional measures. This does not represent any conflict with the Constitution.

TITLE XII. Section 1201(a) provides for approval of the Compact. The Compact is a treaty, and one which proposes to delegate powers of government. As such, the provisions of Section 4 of Article IX of the Constitution would govern ratification procedure. The provisions of Section 1201(a) are in direct conflict with Section 4, and must be renegotiated. Note, e.g., that ratification of treaties under Section 4 does not require plebiscite. Note also that this section impliedly permits secession, apparently prohibited by the Constitution. Section 1201(b) provides for approval by the United States, and does not conflict with the Constitution.

Section 1202 provides for the proclamation of the effective date of the Compact by the President of the United States. This provision represents no conflict with any provision of the Constitution, except that the principle of Micronesian sovereignty would seem to require a joint proclamation.

SPECIAL NOTE

This paper has not raised other issues which bear upon the need to renegotiate certain provisions of the Compact.

While the Preamble does not have substantive effect, it can bear upon the interpretation of the document as a whole. In light of the fact that the tone of the Preamble impliedly indicates that Micronesia's right to self-government is a right which must be sanctioned under an agreement with the United States rather than by an act of self-determination by the people of Micronesia themselves, certain changes in the Preamble are recommended.

Recommended text:

The peoples of the United States and Micronesia,

Recognizing that among the obligations of the United States as Administering Authority of the Trust Territory of the Pacific Islands is the promotion of the development of the people of Micronesia toward self-government or independence, in accordance with the freely-expressed wishes of the people of Micronesia, and appropriate to the particular circumstances of Micronesia, and

Recognizing their common interest in the development of a new political status for the people of Micronesia to replace the present Trusteeship,

Agree that this Compact, approved by the people of Micronesia through their sovereign right of self-determination, and approved by the Governments of the Federated States of Micronesia and the United States, shall determine the relative rights and responsibilities of the Government of the Federated States of Micronesia and the Government of the United States of America.

Section 101 implies that the Constitution of Micronesia is a document whose authority flows from the Compact, rather than the inherent right of the people to adopt their constitution which the Section purports to recognize. The draft Constitution is not (or after the changes proposed will not be) inconsistent with the Compact, and the United States has the right to terminate the Compact if any future amendments to the Constitution are inconsistent with the Compact. The Draft Constitution does guarantee to the people of Micronesia their fundamental human rights, and does establish a governmental structure consistent with the principles of democracy. The following changes are therefore recommended:

Section 101 The people of Micronesia have the right to adopt their own Constitution and form of government and to amend or change such constitution or form of government at any time.

Section 102 again contemplates a Constitution whose authority flows from the Compact, rather than the people. In light of the fact that the Constitution has already been drafted and will be approved prior to the effective date of the Compact, it would seem more preferable to recognize Micronesia's right to internal self-government rather than to imply that the Compact confers that right. The following changes are therefore recommended:

Section 102 The duly-constituted Government of the Federated States of Micronesia has full responsibility for and authority over the internal affairs of Micronesia.

Section 202 raises the possibility of a host of conflicts with the Constitution, all stemming from the application to Micronesia by the United States of treaties which are in themselves or require executing laws inconsistent with the Constitution. The consultation provisions of Section 201(b), while likely to resolve many of these potential problems as they occur, cannot possibly eliminate the possibility of conflict. While Micronesia recognizes the United States interest in applying treaties to Micronesia as an aspect of the authority and responsibility which the United States is to have in the field of foreign affairs, Micronesia believes that it must have some control over the process to protect the integrity of its Constitution. The Joint Committee believes that the interests of both nations can be resolved by requiring Micronesian approval of all treaties, but providing that approval of treaties which could be applied under the existing language of Section 202 without consent shall not be unreasonably withheld or delayed. The following changes are therefore recommended:

Section 202 The authority of the United States under Section 201 includes the right to apply to Micronesia any appropriate treaty or other international agreement to which the United States is a party, with the consent of the Government of the Federated States of Micronesia in accordance with its constitutional processes; provided, that such consent shall not be unreasonably withheld or delayed as to any treaty or other international agreement which in its effect does not relate exclusively to Micronesia or predominantly to Micronesia rather than to the United States.

Section 303(d) of the Compact would permit the United States to contravene the provisions of Section 2 of Article XIII of the Constitution by, for example, storing nuclear weapons in Micronesia if the United States deemed that it would be consistent with its basic authority and responsibility in the field of defense in Micronesia to do so. The only satisfactory method of resolving this latent conflict short of the deletion of Section 303(d) is the amendment of that Section to prohibit the activities proscribed by Section 2 of Article 13. The proposed change is as follows:

(d) The agreements for the lands and waters listed in Annex B shall conform with the provisions of this Compact, and shall not contain any limitations on the use of such lands and waters which conflicts with the basic authorities and responsibilities of the United States under Sections 301, 302, and 303 of this Title except as follows: the testing, storage, use, or disposal of radioactive, toxic chemical, or other harmful substances within Micronesia is prohibited without the express approval of the Government of the Federated States of Micronesia.

Section 303(e) provides that the life of the Annex B lease agreements extends for the life of the Compact or for a longer term if provided by any specific lease. Since the Compact has an indefinite term -- that is, it continues in force automatically unless terminated in accordance with the provisions of Section 1102 -- then the lease agreements also are for an indefinite term, since there is no authority to provide for a term shorter than the life of the Compact. Leases of land for an indefinite term are prohibited by Section 5 of Article XIII of the Compact.

The leases themselves can be drawn for a term sufficiently long enough, without being possibly indefinite, to satisfy United States interests. The United States has the prerogative not to approve the Compact until it has obtained satisfactory leases.

It is therefore recommended that Section 303(e) be deleted in its entirety.

Section 305 of the Compact, while not requiring amendment to the October, 1974 draft, does contemplate a separate agreement between Micronesia and the United States. This Agreement will, of course, have to be ratified in accordance with the provisions of the Constitution. Further, the several states of the Federation, within whose jurisdiction will fall the matters contemplated to be included in any status of forces agreement, will have to be parties to such an agreement if it is to affect their respective jurisdictions.

With regard to Sections 401 and 404, the Joint Committee again draws to the attention of the United States that the dollar amounts of funds for programs and operations of the future Government of the Federated States have been rejected by the Congress of Micronesia, per Senate Joint Resolution No. 6-45. The Congress has also criticized the theory of declining support during the Compact period. These merit ~~an~~ exclusive renegotiation.

The Joint Committee believes that Paragraph (a) of Section 403 requires substantial re-evaluation by both parties with regard to the nature and scope of United States programs to be provided to Micronesia after termination of the Trusteeship. Further, as with Section 303(c), it is quite possible that the Government of the Federated States would not have the power to condemn private land for public use; as the central government cannot compel the several states to make land available, it is recommended that the last sentence of this Paragraph be reworded to release the United States from its obligations if the necessary land is not provided.

Section 501(a) raises problems quite similar to those raised by Section 202. The Joint Committee sees no reason not to require ratification of pre-termination treaties in accordance with the provisions of the Constitution. Accordingly, the Joint Committee recommends the following changes:

(a) The treaties and international agreements applicable to the Trust Territory of the Pacific Islands on the day preceding the effective date of this Compact shall, with the consent of the Government of the Federated States of Micronesia in accordance with its constitutional processes, be applicable to Micronesia; provided, that such consent shall not be unreasonably withheld or delayed as to any such treaty or international agreement which in its effect does not relate exclusively or predominantly to Micronesia rather than to the United States. The treaties and international agreements made applicable to Micronesia pursuant to Section 202 of this Compact shall also be applicable to Micronesia.

Section 501(b), insofar as it permits United States legislation possibly inconsistent with the Constitution to become applicable to Micronesia, likewise represents a conflict with the provisions of the Constitution. The legitimate interests of the United States, however, will be protected by the fact that, once the consent of the Government of the Federated States has been given to a treaty, there would appear to be no reason for withholding approval of any necessary implementing legislation. Accordingly, the Joint Committee recommends that Section 501(b) be amended to read as follows:

(b) The statutory law of the United States applicable to the Trust Terriotory of the Pacific Islands on the day preceding the effective date of this Compact shall not be applicable to Micronesia.

Section 502(b) is discussed in connection with Section 501(b). The final sentence of this Paragraph raises the latent possibility of conflict between laws applied to the United States under this Paragraph, on the one hand, and the Micronesian Constitution, on the other. Accordingly, it is the recommendation of the Joint Committee that the final sentence of this Paragraph be deleted.

Section 502(c) raises no problems if the proposed changes to United States treaty powers are adopted.

Section 603 requires complete renegotiation, primarily in light of the lessons Micronesia has learned from United States actions in connection with the Service to Saipan Case, as well as of the problems associated with treaties, discussed elsewhere. Accordingly, the Joint Committee recommends the following revision of Section 603:

Section 603: The Government of Micronesia shall have the sole power to regulate air and maritime commerce to, from, and within the jurisdiction of the Federated States of Micronesia, to the extent that such regulation does not conflict with (a) treaties and international agreements applicable to the Federated States of Micronesia pursuant to Section 501(a); (b) applicable regulations of the United States Federal Aviation Agency; and (c) the activities of the United States in Micronesia under Title III.

With regard to Title VII, the Joint Committee would appreciate receiving the benefit of the detailed legal opinion of the United States delegation as to the obligations imposed by United States nationality upon Micronesian citizens and nationals. The Joint Committee is particularly concerned as to whether any positive allegiance to the United States, as opposed to Micronesia or any other nation, is required by United States nationality.

When this opinion is received, the Joint Committee believes that re-examination of the provisions of this Title can better be undertaken, as and if required.

The provisions of Section 1102(b) were negotiated at the time when the question of the participation by the Mariana Islands District in the future Government of Micronesia remained a possibility. Accordingly, the Joint Committee agreed to provisions for Micronesian termination of the Compact which could theoretically require a vote of 90% or more in favor of termination before it could take effect.

The situation with regard to the Marianas has, of course, been changed substantially. Therefore, while the Joint Committee reaffirms its desire for a close and lasting relationship with the United States, other considerations now dictate that this Paragraph be renegotiated in accordance with the principles of equity between the two parties.

The Joint Committee therefore recommends the following amendment:

"(b) After the expiration of the first fifteen years following its entry into force, this Compact may also be terminated unilaterally by either the Government of the United States or the Government of the Federated States of Micronesia, in accordance with their respective constitutional processes, such termination to be effective on a date not earlier than two years following receipt by either government of notice of the intention of the other government to terminate."

Section 1102(c) represents a direct conflict with the Constitution, which impliedly does not permit the secession which would be necessary if one of the Federated States were not to approve termination of the Compact.

The Joint Committee believes that the separation of any of the Federated States is an internal problem which must be resolved within Micronesia first. Upon such resolution, any state desiring to retain the ties of free association with the United States, in accordance with the Compact, would presumably be free to do so by a separate agreement.

The Joint Committee therefore recommends that Paragraph (C) of Section 1102 be deleted.

Section 1201(a) constitutes a direct conflict with the Constitution of the Federated States of Micronesia. The Compact is a treaty in accordance with the terms of the Constitution, and specific procedures are spelled out therein for the ratification of treaties. These provisions must also apply to the ratification of the Compact.

The Joint Committee recognizes, however, that a plebiscite is certainly usual, and may well be required by the United Nations in connection with the termination of the Trusteeship. The Joint Committee also recognizes the desirability of holding such a plebiscite. In light of the Constitution, however, we believe that the plebiscite is better framed as the question of whether or not the Trusteeship will be terminated. Since the Compact would take effect upon termination, the plebiscite will in practical effect be a plebiscite upon the Compact.

The Joint Committee therefore recommends the following amendment to Section 1201:

Section 1201. This Compact will be approved by the Government of the United States and by the Government of the Federated States of Micronesia in accordance with their respective constitutional processes.

Section 1202 requires amendment to (1) reflect the fact that the people of Micronesia have already adopted a Constitution, and (2) re-insert provisions calling for a plebiscite. The recommended amendment is as follows:

Section 1202. The President of the United States and the President of the Federated States of Micronesia shall jointly issue a proclamation announcing a mutually acceptable date on which this Compact will come into effect, when they find that:

1. This Compact has been approved as provided for in Section 1201; and that

2. The people of Micronesia have approved the termination of the Trusteeship Agreement, in a plebiscite in which a majority of at least 55% of those voting approve such termination, including a majority in each of the Federated States of Micronesia; provided, that all persons who would be eligible to vote in elections for the Congress of Micronesia, if such elections were held on the day the plebiscite is conducted, shall be eligible to vote in the plebiscite; and provided further, that in determining whether a majority has voted for or against the termination of the Trusteeship Agreement, only the affirmative and the negative votes shall be counted; and that

3. The Trusteeship between the United States and the Security Council of the United Nations for the former Japanese Mandated Islands has been terminated or will terminate on the day on which this Compact becomes effective.