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## The Marianas Covenant Negotiations

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# The Marianas Covenant Negotiations

Arnold H. Liebowitz

## **Abstract**

In September 1969, the United States and the Congress of Micronesia's Joint Committee on Future Status began their negotiations. This article will examine the negotiations which commenced in December 1972 and will concentrate on the three areas which were central points of discussion: the political relationships between the United States and the Northern Marianas; issues of economic development and assistance; and problems of land policy.

# THE MARIANAS COVENANT NEGOTIATIONS

Arnold H. Leibowitz\*

## INTRODUCTION

During World War II United States strategists viewed the Islands of Micronesia<sup>1</sup> as essential to peace in the Pacific and American security.<sup>2</sup> Balancing the various international pressures against outright territorial acquisitions with the fear of Soviet territorial ambitions elsewhere, the United States sought to administer these Pacific Islands as a strategic trust territory, a unique relationship, under the United Nations.<sup>3</sup> Mounting pressure by the United Na-

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1. Micronesia consists of three island chains in the western Pacific, just above the equator: the Carolines, the Marshalls and the Marianas. The territory has more than 2,000 islands, fewer than 100 of which are inhabited. They are scattered across an ocean area roughly the size of the continental United States; yet the total land area (roughly 700 square miles) is only about half the size of Rhode Island. The total population is less than 120,000.

D. MCHENRY, *MICRONESIA: TRUST BETRAYED* 6 (1975).

2. For an explication of the strategic importance of the Mariana Islands in particular, see Comment, *The Marianas, The United States, and the United Nations: The Uncertain Status of the New American Commonwealth*, 6 CAL. W. INT'L L.J. 382, 382 n.5 (1976).

3. Trusteeship Agreement for the Former Japanese Mandated Islands, Approved by the Security Council on April 2, 1947, *entered into force* July 18, 1947, 61 Stat. 397, T.I.A.S. No. 1665, 8 U.N.T.S. 189 [hereinafter cited as Trusteeship Agreement]. The United Nations established ten other trust territories none of which was a strategic trust. This strategic trust territory status, as distinguished from the more customary trust relationship, allowed the United States to establish military bases, station troops in the territory, control fully the administration of the Islands, and report only to the Security Council, where the United States retained veto power, instead of to the General Assembly. Furthermore, the United States, as administering authority, could prohibit U.N. supervision in any areas specified as "closed for security reasons." *Id.* art. 13. In return, the United States agreed to promote the economic self-sufficiency of the territory, encourage agriculture, industry, and education, and promote the development of the inhabitants of the trust territory towards self-

tions on the United States to promote Micronesia's progressive development toward self-government or independence, and the Islanders' petition to President Lyndon Johnson in 1966 requesting the establishment of a joint status commission to study available political alternatives, caused President Johnson to ask Congress in August 1967 to select a Presidential Commission to consider the future status of the Trust Territory of the Pacific Islands (TTPI).<sup>4</sup> When the United States Congress did not act on the President's proposal, the Congress of Micronesia established its own status commission. In September 1969, the United States and the Congress of Micronesia's Joint Committee on Future Status began their negotiations.

Initially these status talks proceeded slowly, foundering over issues such as the United States military presence and land acquisition policies. Dissension among the Micronesians was a further impediment. When some TTPI representatives in the fall of 1971 strongly suggested independence as an option to be considered, representatives of the Marianas District broke with their fellow Micronesians and expressed their desire for a close and permanent political association with the United States. In April 1972, the Marianas representatives officially requested separate status negotiations. The following December, Ambassador F. Haydn Williams recognized the Marianas Future Political Status Commission (MPSC) and initiated separate talks with it. Thus the United States embarked on a set of parallel negotiations: one with the representatives of the Marianas moving towards a closer "commonwealth" relationship and the second with the remaining districts of Micronesia moving towards some sort of loose "associated state" status.<sup>5</sup>

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government or independence as may be appropriate to the freely expressed wishes of the people. *Id.* art. 6.

4. "The terms 'Micronesia' and 'Trust Territory of the Pacific Islands' [TTPI] are used interchangeably. Technically Guam and the Gilbert Islands are part of Micronesia, but the United States had already acquired Guam, and the United Kingdom the Gilberts by the time the United Nations Mandate was established." MCHENRY, *supra* note 1, at 6.

5. The Congress of Micronesia did not endorse these separate talks. *See* D. MCHENRY, *supra* note 1, 132-33. In a Senate Joint Resolution it announced that it is

the sole authority in the Trust Territory of the Pacific Islands which is legally authorized and empowered to conduct negotiations with regard to the future political status of the Trust Territory, including all parts thereof, and

When the United States and the Northern Marianas entered into the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" on February 15, 1975, it was the first United States acquisition of a populated territory in almost fifty years.<sup>6</sup> The Covenant was approved by a plebiscite conducted throughout the Northern Marianas on June 17, 1975,<sup>7</sup> and President Ford signed

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. . . Congress has the sole responsibility to negotiate on behalf of and provide for the future political status of the entire Trust Territory. . . .

Trust Territory of the Pacific Islands, S.J. Res. 38, 5th Cong. of Micronesia, 1st Sess. (1973). The Congress later reiterated its opposition in a harshly worded resolution:

WHEREAS, in its actions in this report, the United States has amply demonstrated the contempt in which it holds the recommendations of the United Nations Trusteeship Council and its 1973 Visiting Mission; the primacy of its own selfish interests over those of Micronesia which it has sworn to uphold and protect; and the complete and utter disregard which it has for the wishes of the people of Micronesia, as expressed through their lawful representatives in Congress assembled; now therefore,

BE IT RESOLVED by the Senate, Fifth Congress of Micronesia, First Special Session, 1974, the House of Representatives concurring, that it is the sense of the Congress of Micronesia that the separate administration of any part of the Trust Territory of the Pacific Islands, without the opportunity having been given to the inhabitants thereof to vote in the plebiscite and referendum as to the future political status and form of government of Micronesia, constitutes a violation of the obligations of the Administering Authority under the Charter of the United Nations and under the Trusteeship Agreement, and a breach of its solemn obligations to the people of all of Micronesia; and

BE IT FURTHER RESOLVED that the Congress hereby states in the strongest possible terms, its unequivocal and total opposition to and condemnation of such separation prior to the holding, throughout all parts of the Trust Territory, of a plebiscite on the future political status of Micronesia and of a referendum as to the form of its future Government; . . . .

Trust Territory of the Pacific Islands, S.J. Res. 131, 5th Cong. of Micronesia, 1st Spec. Sess. (1974).

The United Nations has consistently opposed division of colonial entities along regional, tribal, or ethnic lines. See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66 para. 6, U.N. Doc. A/4684 (1960). For a discussion of U.N. efforts at discouraging secessionist movements in trust territories, see Clark, *Self Determination and Free Association: Should the United Nations Terminate the Pacific Islands Trust?* 21 HARV. INT'L L.J. 1, 79-80 nn.422-23 (1980). The U.N. specifically warned of the dangers of fragmentation when the headquarters of the Trust Territory had been moved to Saipan.

6. In 1925 the United States annexed Swan's Island to American Samoa. *The Newest Frontier*, NEWSWEEK, June 30, 1975, at 23.

7. "Thus, of a total of 5,000 actual votes cast, 3,945, or 78.8 percent were cast in favour of the commonwealth as set forth in the Covenant, and 1,060 or 21.2 per cent,

it into law on March 24, 1976.<sup>8</sup>

The Covenant was a unique method of expanding the Union. Previous acquisitions were by purchase or by treaty. Regardless of the method of acquisition the federal power to unilaterally restructure the local government and its political and economic relationship with the United States was accepted. The term "Covenant" was used to remove the Marianas agreement from these precedents, and to require the federal government, not only morally but also legally to carry out the terms of the agreement. Its use in American law is unprecedented but its intention was to convey the solemn and binding character of the agreement.

This article will examine the negotiations which commenced in December 1972 and will concentrate on the three areas which were central points of discussion: the political relationships between the United States and the Northern Marianas; issues of economic development and assistance; and problems of land policy.<sup>9</sup>

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were cast against, a margin of nearly 4 to 1 in favour of the Covenant." Report of the United Nations Visiting Mission to Observe the Plebiscite in the Mariana Islands District, Trust Territory of the Pacific Islands, June 1975 43 U.N. TCOR, Supp. (No. 2) 34, U.N. Doc. T/1770 (1976) [hereinafter cited as Plebiscite Report]. See also letter from Erwin Canham, Plebiscite Commissioner, to President Ford (June 19, 1975), reprinted in S. REP. NO. 433, 94th Cong., 1st Sess. 413-14 (1975).

8. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, (1976) Pub. L. 94-241, 90 Stat. 263 [hereinafter cited as Marianas Covenant]. This concluded the long series of negotiations between U.S. government representatives acting generally through the Office of Micronesian Status Negotiations and the Island officials operating as the Marianas Political Status Commission (MPSC). The MPSC was created for the purpose of taking "appropriate and necessary steps" toward the resolution of the question of the future political status of the Northern Mariana Islands District. Act Creating the Marianas Political Status Comm.: Setting fourth [*sic*] its Powers and Duties: And for Other Purposes, Dist. Law No. 3-124, 3d Mariana Islands Dist. Legislature, 1st Spec. Sess. (1972) reprinted in Marianas Political Status Comm'n, The Future Political Status of the Mariana Islands District, Report on 1st Sess. of Status Negotiations, 4th Mariana Islands Dist. Legislature, 1st Sess., iii-vi (1973) [hereinafter cited as MPSC First Session Report].

9. This analysis of the Marianas Covenant is based on the five basic drafts developed during status negotiations which took place from December 1972 to February 1975. These documents are: (1) Draft Proposed by the U.S. Delegation (Dec. 1973) [hereinafter cited as U.S. Draft]; (2) Draft Proposed by the Marianas Political Status Commission (May 1974) [hereinafter cited as MPSC Draft]; (3) Working Draft of the Joint Drafting Committee (composed of representatives from both sides) (Nov. 1974) [hereinafter cited as Joint Draft]; (4) Draft Agreed to by the Parties, but with reservations by the U.S. Delegation, *ad referendum* (Dec. 1974) [hereinafter cited as Reserved Draft]; and (5) The Marianas Covenant, *supra* note 8.

## I. THE POLITICAL RELATIONSHIP

### A. Commonwealth Status

The United States Constitution speaks only of "states" and "territories."<sup>10</sup> The presently held territories<sup>11</sup> are neither states nor are they likely to become states soon. In the past, the United States imperial attitudes hindered the attainment of statehood for these areas. But now, in many cases, it is the territory's own desire to maintain its cultural identity which causes the delay.

If an organized area is a state, there are two constitutional limitations on federal authority: equality of treatment<sup>12</sup> and residual state powers.<sup>13</sup> A territory, however, does not benefit from such limitations. The Territorial Clause<sup>14</sup> of the Constitution was interpreted in the nineteenth century to permit the exercise of broad congressional and executive discretion with respect to territories.<sup>15</sup> The extent of this authority was premised upon certain recognized evolutionary stages,<sup>16</sup> originally set forth in the Northwest Ord-

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10. See, Leibowitz, *United States Federalism: The States and the Territories*, 28 AM. U.L.R. 449 (1979).

11. United States territories include Puerto Rico, Guam, the Virgin Islands, American Samoa, and formerly the Canal Zone. Branch, *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?*, 9 DEN. J. INT'L L. & POL'Y 35, 39 n.22 (1980).

12. See U.S. CONST. art. I, § 9, cl. 6; art. IV, § 1; art. IV, § 2, cl. 1 & 2; art. IV, § 4.

13. U.S. CONST. amend. X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

14. U.S. CONST. art. IV, § 3, cl. 2, states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

15. See *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135 (1892); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1889); see generally *City of Panama*, 101 U.S. 453 (1879); *Nat'l Bank v. County of Yankton*, 101 U.S. 129 (1879); *Hornbuckle v. Toombs*, 85 U.S. (18 Wall.) 648 (1873); *Snow v. United States*, 85 U.S. (18 Wall.) 317 (1873); *Freeborn v. Smith*, 69 U.S. (2 Wall.) 160 (1864); *Miners Bank of Dubuque v. Iowa*, 53 U.S. (12 How.) 1 (1851); *Benner v. Porter*, 50 U.S. (9 How.) 235 (1850).

16. During the first stage, a congressionally designated governor and other federally appointed judicial and executive officials would govern the territory. The territory would then be permitted to elect a legislative body and draft a permanent constitution. The final stage was the establishment of popular self-government. See Leibowitz, *United States Federalism: The States and the Territories*, 28 AM. U.L.R.

nance,<sup>17</sup> leading to statehood.

Article I of the Marianas Covenant provides that upon termination of the Trusteeship Agreement under which the United States governs the TTPI, the Northern Mariana Islands become "a self-governing commonwealth . . . in political union with and under the sovereignty of the United States of America."<sup>18</sup> Almost from the outset the Marianas agreed that it desired a commonwealth affiliation with the United States, though it could not decide on the form and nature of that relationship.<sup>19</sup>

Commonwealth status would permit a maximum degree of self-government within the limitations set by the United States Constitution, federal legislation implementing the commonwealth relationship, and federal laws generally applicable to all United States territories. There would be, however, no limitation on potential federal power.<sup>20</sup> The Northern Marianas desired restraint

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449, 451 (1979). The exercise of executive and congressional authority over the territories was limited both by time, the territory would shortly move on to statehood, as well as by the institutional limitations required to permit the evolution toward statehood. Where such an evolution is not envisioned or sought, however, the territorial clause authority can appear very threatening.

17. Northwest Ordinance of 1787, *full text cited* in Act of August 7, 1789, ch. 8, 1 Stat. 50.

18. Marianas Covenant, *supra* note 8, § 101; Marianas Political Status Comm'n Section by Section Analysis of the Covenant to Establish A Commonwealth of the Northern Mariana Islands 6 (February 15, 1975) [hereinafter cited as Covenant Analysis].

19. MPSC First Session Report, *supra* note 8, at 18. Both parties agreed that the term commonwealth implied something more than the term territory. To the U.S. Delegation, however, the major distinction was that a commonwealth was afforded a greater degree of self-government. *Id.* at 27.

20. Subsequent to the negotiations, the Supreme Court stated in *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976), that while commonwealth status has legal consequences different from territorial status, the nature of that difference is unclear. 426 U.S. at 594 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671 (1974) which held that Puerto Rico was to be treated as a state for purposes of the Three Judge Court Act, 28 U.S.C. § 2281 (repealed 90 Stat. 1119 (1976)). In *Examining Board*, local residents challenged a Puerto Rican statute restricting civil engineer licenses to U.S. citizens. The Court reviewed at considerable length the history of federal legislation with respect to Puerto Rico and then stated: "We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history. . . ." 426 U.S. at 596 (emphasis added). See also *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Califano v. Torres*, 435 U.S. 1 (1978). The effect of this unparalleled relationship remained unclear since, in the decision itself, the fact that Puerto Rico had commonwealth status was of no consequence at all. Rather, the Court followed traditional standards to declare unconstitutional the local government statute and to grant jurisdiction to the federal district court in Puerto Rico.

on federal power. The negotiations ultimately turned on the possibility of limiting federal authority operating under the Territorial Clause by requiring the Marianas' consent before it could be exercised. The Marianas officials, looking to the example of the Commonwealth of Puerto Rico, argued in favor of a compact requiring mutual consent.<sup>21</sup> The United States, however, likened the Marianas to a territory, permitting the exercise of federal authority, and believed that the term commonwealth was important in name and form only. In addition, the United States Delegation urged uniform treatment, whenever possible with Guam. Their reasons for this position were Guam's territorial status and Congress' hope that these Chamorro peopled islands would eventually be united. Subsequent to the first session of status negotiations in December 1972, the MPSC analyzed the available political status alternatives and for the foregoing reasons concluded that the alternative which would best serve the interests of the people of the Mariana Islands was a commonwealth arrangement.<sup>22</sup>

#### B. *The Territorial Clause and Mutual Consent*

In May 1973, during the second session of negotiations, the MPSC stated that the source of the political status between the United States and the Marianas would be three basic documents: a compact requiring mutual consent, a Marianas Federal Regulations Act and a commonwealth constitution.<sup>23</sup> As the negotiations progressed, however, the emphasis shifted to the compact and the constitution to the complete exclusion of the Marianas Federal Relations Act. The United States' view of a self-governing commonwealth with limited consequences required the reaffirmation of the territorial clause.<sup>24</sup> In response to the United States Delegation

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21. See, Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L.J. 219, 220-34 (1967).

22. Its position was that the basic document defining such arrangement should treat the following points: the source of political status; the amendment or termination of the political status; the right of local self-government; the applicability of U.S. Constitution and laws; the authority over defense and foreign affairs; and, representation in Washington. See Marianas Political Status Commission Position Paper Regarding the Future Political Status of the Mariana Islands (May 10, 1973), reprinted in Marianas Political Status Comm'n, Report on 2d Sess. of Status Negotiations, 4th Mariana Islands District Legislature, 8-9 (1973) [hereinafter cited as MPSC Report].

23. *Id.* at 9.

24. Summary of United States Informal Remarks on Marianas Political Status Commission Paper on Limitations on Federal Authority (1973) [hereinafter cited as U.S. Informal Remarks Summary].

tion's suggestion that the political relationship would be essentially territorial,"<sup>25</sup> the MPSC reemphasized its expectation of full self-government for the Marianas and questioned whether the principle of maximum self-government could be reconciled with the plenary powers of Congress under the Territorial Clause.<sup>26</sup> Thus it looked to a study of possible exemptions from legislation enacted pursuant to the Territorial Clause.<sup>27</sup> The compromise, which is reflected in the Covenant, is the acceptance of the Territorial Clause with the establishment of mutual consent as the key principle of the Covenant.<sup>28</sup>

The Covenant establishes an area which can not be changed without mutual consent. This area outside the reach of the Territorial clause was delineated without granting the Covenant the broad compact status which the MPSC wanted. Also it did not provide clear restrictions on Congress' Territorial clause powers. This compromise, put forth by the United States Delegation, was reluctantly accepted by the MPSC.

During the work seminar conducted in May 1973, and in the session following in December 1973, the United States Delegation argued that as a historical and practical matter, Congress had not interfered in the internal affairs of United States territories and that the "mutual consent" provision was a politically feasible device to insure against any feared interference.<sup>29</sup> The MPSC countered that Congress' power under the Territorial Clause was not necessa-

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25. See U.S. Statement on Political Status for May 16 (1973) Working Session, reprinted in MPSC Report, *supra* note 22, at 12.

26. See Position of Marianas Political Status Commission on Subject of Self-Government, reprinted in MPSC Report, *supra* note 22, at 28.

27. The Commission is not in any way seeking exemption from Federal legislation applicable to the states or territories which is enacted by Congress under Constitutional powers *other* than Article IV, Section 3, Clause 2. We are interested only in *exploring*—together with the U.S. Delegation—whether some specific limitations on the plenary powers of Congress under Article IV, Section 3, Clause 2, can be developed which would make clearer that the Commonwealth of the Marianas has maximum (or paramount) control over its internal affairs. Many approaches are possible, some involving express exemptions to Article IV, and others involving legislative history alone. . . .

*Id.* (emphasis in original). At this point, both sides were like trailblazers, negotiating the extent of the Territorial Clause powers and the possibility of restricting such power via a compact.

28. See Marianas Covenant, *supra* note 8, § 105. See generally Covenant Analysis, *supra* note 18, at 13-19.

29. See U.S. Informal Remarks Summary, *supra* note 24.

rily plenary and that it could be limited within the text of the Covenant as long as no other specific constitutional provision was brought into conflict.<sup>30</sup> In addition, the MPSC argued that unqualified application of the Territorial Clause might well undercut the "mutual consent" principle.<sup>31</sup> The United States Delegation responded by stating that Congress would not retain authority inconsistent with the "mutual consent" principle since that principle would be a clear limitation of congressional authority under the Territorial Clause. The first Position Paper of the MPSC had proposed a mutual consent provision; however, the provision was put forth primarily with regard to the issue of amendment or termination of the political status itself. The United States Delegation initially resisted the idea of the "mutual consent" principle, particularly since the principle had been linked by the MPSC to a notion of "compact" and to the sensitive issues of termination and separation.<sup>32</sup> In the course of the working sessions, however, the Delegation agreed to expand the coverage of the mutual consent principle to other areas, stressing "the necessity of exercising extreme care in the drafting process to insure that the mutual consent provision will apply only to *major* structural changes in the commonwealth arrangement."<sup>33</sup> Not surprisingly, the United States sought to limit the applicability of the "mutual consent" formula while the Marianas sought to extend it. Thus, the United States Draft provided for the inclusion of a list of "fundamental provisions," which would be subject to the mutual consent principle, but left the list blank pending future negotiations.<sup>34</sup> The MPSC Draft, for its part, delineated which provisions of the agreement establishing the commonwealth would be subject to the "mutual consent" principle.<sup>35</sup>

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30. Position of Marianas Political Status Commission on Subject of Self-Government (1973), *reprinted in* MPSC Report, *supra* note 22, at 28-29. The United States did not dispute this proposition on its merits, but expressed uncertainty concerning the fate of such limitations if subjected to judicial review. "The United States has no argument with this proposition as a legal matter. Of course, it cannot be said with certainty what courts will say about the restrictions which may be imposed in this agreement on Congress' authority under IV-3-2." U.S. Informal Remarks Summary, *supra* note 24, at 3.

31. Position Paper of Marianas Political Status Commission on Subject of Self Government, *reprinted in* MPSC Report, *supra* note 22, at 28-29.

32. See U.S. Statement on Political Status for May 16 (1973) Working Session, *reprinted in* MPSC Report, *supra* note 22, at 18-19.

33. *Id.* at 31 (emphasis in original).

34. U.S. Draft, *supra* note 9, § 102.

35. This list included all provisions of the Agreement, with the exception of the Preamble and Article IV, which dealt with the interim applicability of federal laws.

After the Joint Draft was completed, differences over the limitations placed on federal authority under the Territorial Clause remained. The MPSC favored a compelling national interest test, while the United States Delegation took the position that the territorial clause powers should be limited only where the Covenant required mutual consent. The Joint Drafting Committee ultimately recommended that the provisions of Articles I, II, and III, regarding United States citizenship and nationality, and of section 501, regarding the applicability of the United States Constitution, be subject to the mutual consent provision. The MPSC, however, continued to insist that additional provisions be subject to mutual consent.<sup>36</sup>

Differences also remained on the manner in which the mutual consent provisions would be implemented. The Joint Draft provided that upon approval of the agreement, such provisions would take effect immediately.<sup>37</sup> A statement was also included in the negotiating history stating that consent on behalf of the Marianas could not be given prior to termination of the Trusteeship Agreement except by the people of the Marianas or their duly elected representatives in accordance with their laws and constitution. This was designed to allay the MPSC's fears that the United States Commissioners in the Marianas would unilaterally consent to a change of fundamental provisions in the Covenant. In short, both sides agreed that, in defining the commonwealth relationship, they would be on the frontier of American constitutional law. The political relationship between the United States and the Marianas is defined and governed by the Covenant. In addition to applicable provisions of the United States Constitution, treaties, and laws, the Covenant is the supreme law of the commonwealth.<sup>38</sup> The legisla-

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36. Specifically the MPSC insisted on the inclusion of:

- (1) § 503, prohibiting application of certain federal laws, including immigration and naturalization laws and coastwise shipping laws, until Congress acts to make them applicable after the termination of the Trusteeship Agreement;
- (2) § 805, permitting the restriction of the alienation of long-term interests in real property to persons of the Northern Mariana Islands descent;
- (3) § 806, imposing procedural requirements upon the exercise of the eminent domain authority of the United States; and,
- (4) § 702, providing for multi-year direct financial assistance for a seven-year period.

37. See Joint Draft, *supra* note 9, § 100(4)(a).

38. Marianas Covenant, *supra* note 8, § 102; Covenant Analysis, *supra* note 18, at 6-9.

tive authority of the United States, as set forth in the Covenant, is limited.<sup>39</sup>

Thus the Covenant contains two limitations on federal legislative authority: a procedural requisite that federal legislation specifically mention the Northern Marianas if it is to be applicable to the commonwealth and the substantive requisite that the prior consent of the commonwealth be acquired before the implementation of federal law. The latter is a unique, specific limitation on Congress' territorial clause authority.<sup>40</sup>

### C. *Local Self-Government*

#### 1. Approval of the Local Constitution

The Covenant's limitation on the sovereign authority of the United States is evident in the provisions of Section 103 and Article II.<sup>41</sup> The Covenant follows standard enabling act procedure: approval by the people of the Northern Marianas in a referendum followed by submission to the Congress and the President for approval.<sup>42</sup> The United States Delegation agreed to this procedure for the passage of the Marianas Constitution as well, but wanted final approval of the constitution to be by the President alone. There is some precedent for this in state enabling act procedures, al-

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39. The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant, the United States agrees to limit the exercise of that authority so that *the fundamental provisions of this Covenant*, namely, Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

Marianas Covenant, *supra* note 8, § 105 (emphasis added).

40. Marianas Covenant, *supra* note 8, § 105; Covenant Analysis, *supra* note 18, at 13-19.

41. Marianas Covenant, *supra* note 8, § 103 states: "The people of the Northern Mariana Islands will have the right of local self government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption." See Covenant Analysis, *supra* note 18, at 10-12.

42. These provisions provide for the formulation, approval and possible amendment of the local constitution developed by the people of the Northern Mariana Islands. Marianas Covenant, *supra* note 8, § 201; Covenant Analysis, *supra* note 18, at 20-21.

though it is unusual. The Marianas delegation requested that approval of the Constitution be in the same fashion as the Covenant; namely, by the Congress as well. This would insure that the constitution would be equally binding on all branches of government.

The MPSC finally submitted to the United States Delegation's position. Presidential review, however, was limited to the question of the consistency of the constitution with the status agreement. Although the issue appeared to be settled, the United States Delegation modified its position, stating its preference for the United States government to have discretion to decide whether the President or Congress approves the constitution. Congressional interest in the terms of the constitution may well have caused this reversal. In line with its position, the United States Delegation also insisted that the wording be sufficiently flexible to permit either Congress or the President to approve the status agreement on behalf of the United States.

In response, the MPSC proposed language indicating that the United States would be deemed to have approved the constitution if no action were taken within a given period of time. After its initial hesitation, the United States Delegation accepted this suggestion, and the Covenant eventually included a six month time period.<sup>43</sup>

In approving the constitutions of Puerto Rico and other states, Congress had required the insertion of provisions based on its own preferences. Thus, the Covenant includes the express criteria to be used by Congress and clearly requires expeditious action.<sup>44</sup> In deciding whether to approve the Covenant, Congress is to determine the Constitution's "consistency with this Covenant and those provisions of the Constitution, treaties and laws of the United States to be applicable to the Northern Mariana Islands."<sup>45</sup> Unless it is earlier approved or disapproved, the constitution will be deemed to have been approved six months after its submission to the President of the United States.<sup>46</sup>

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43. Marianas Covenant, *supra* note 8, § 202; Covenant Analysis, *supra* note 18, at 21-22.

44. Marianas Covenant, *supra* note 8, § 202; Covenant Analysis, *supra* note 18, at 21-22. Originally the MPSC suggested sixty days. See Joint Draft, *supra* note 9, § 202.

45. Marianas Covenant, *supra* note 8, § 202.

46. See Covenant Analysis, *supra* note 18, at 21-23. For a discussion of the Constitution, see Branch, *The Constitution of the Northern Mariana Islands: Does a*

There was a considerable discussion of the procedure for amending the constitution. Under the terms agreed to, amendments do not have to be specifically approved by the United States, provided that they are consistent with the Covenant and applicable provisions of the United States Constitution, treaties and federal laws. To insure this consistency the Covenant provides that federal courts will review the amendments.<sup>47</sup>

## 2. Local Legislative and Executive Authority

The requirements of the Covenant which delineate the content of the constitution are standard. It must "provide for a republican form of government with separate executive, legislative and judicial branches, and . . . a bill of rights."<sup>48</sup> But, section 203(c) is a singularly exceptional provision for it insures the chartered municipalities of Rota and Tinian a degree of legislative representation somewhat beyond what would be their proportionate share. In doing so, it also attempts to avoid constitutional objection.<sup>49</sup>

The United States Draft spoke in terms of local legislative power over "all subjects of local application."<sup>50</sup> The MPSC argued that the language of section 304 of this draft was identical to that contained in the Guam Organic Act of 1950,<sup>51</sup> and therefore there was the danger that judicial construction of these provisions would be applied to the Covenant provision. Thus the MPSC Draft provided that the authority of the future Commonwealth would extend to "all matters of local concern;" such authority was to be exercised in a matter consistent with the Commonwealth Agreement, the

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*Different Cultural Setting Justify Different Constitutional Standards?*, 9 DEN. J. INT'L L. & POL'Y 35 (1980); Willens & Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovations in a Pacific Setting*, 65 GEO. L.J. 1373 (1977).

47. Marianas Covenant, *supra* note 8, § 202; *see* (Covenant Analysis, *supra* note 18, at 21-23.

48. Marianas Covenant, *supra* note 8, § 203(a); *see* Covenant Analysis, *supra* note 18, at 23-24.

49. Section 203(c) states: "The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature. . . ." This was promulgated in response to the criticism that the Saipanese had benefitted financially at the expense of these other islands where the military operations were actually to take place. *See* Covenant Analysis, *supra* note 18, at 24-25.

50. U.S. Draft, *supra* note 9, § 304.

51. Act of Aug. 1, 1950, ch. 512, § 11, 64 Stat. 387 (as amended codified at 48 U.S.C. § 1423a (1976)).

United States Constitution and applicable federal laws.<sup>52</sup> The United States Delegation rejected the use of the phrase "all matters of local concern," which had not been used previously in United States territorial experience, and proposed the phrase "to all matters of local application," the phrase used in the Virgin Islands Organic Act of 1936.<sup>53</sup>

The MPSC Draft omitted a provision of the United States Draft that would have authorized the Governor of the Commonwealth to request United States military assistance from the President in the case of an emergency.<sup>54</sup> The MPSC argued that it would be more appropriate if this power were granted by the constitution of the future commonwealth.<sup>55</sup> This position is reflected in the Covenant.

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52. MPSC Draft, *supra* note 9, § 205(a).

53. Act of June 22, 1936, ch. 699, § 1, 49 Stat. 1807 (codified at 48 U.S.C. §§ 1405-1406 (1976)). But this phrase had been somewhat narrowly construed by the Supreme Court in *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955). In this case the Court invalidated a Virgin Islands' statute which was designed to attract the divorce business to the Islands and suggested that territorial legislative powers may be limited to "subjects having relevant ties within the territory, to laws growing out of the needs of the Islands and governing relations with them." 349 U.S. at 10.

In response to a petition by the Virgin Islands, Congress amended the Revised Organic Act in 1958, Pub. L. No. 85-851, § 2, 72 Stat. 1094 (codified at 48 U.S.C. § 1574(a) (1976)), to substitute "rightful subjects of legislation," the term used in the Organic Acts of earlier territories, including Alaska, Act of Aug. 24, 1912, ch. 387, § 9, 37 Stat. 514, and Hawaii, Act of Apr. 30, 1900, ch. 339, § 55, 31 Stat. 150, for "subjects of local application." This appeared to be of some importance when federal courts subsequently sustained the Virgin Islands' tax incentive program. *See Post Constr. Co. v. Virgin Islands*, 359 F.2d 663 (3d Cir. 1966). In this case the Third Circuit also declared that the legislature of the Virgin Islands possesses full legislative power in this area, in common with the legislatures of the several states. 359 F.2d at 667-68.

Because "all rightful subjects of legislation," appeared to be the broadest formulation of the extent of a territory's legislative power, the MPSC continued to insist upon it and that phrase was used in the final version of § 203(c) of the Covenant. *See Covenant Analysis, supra* note 18, at 23.

54. U.S. Draft, *supra* note 9, § 303 provided: "Whenever it becomes necessary in case of disaster, invasion, insurrection, or rebellion, or imminent danger thereof, or to prevent or suppress lawless violence, the Governor of the Northern Mariana Islands may request Forces of the United States."

55. The MPSC analogized to the situation in Puerto Rico where similar power was not granted by statute but rather was granted in the constitution. *See P.R. CONST. art. IV, § 4.*

D. *Foreign Affairs and Defense*

The Covenant accords the federal government broad powers over the conducting of foreign affairs and defense.<sup>56</sup> This provision was never questioned; it appears in the same form in all of the early drafts.<sup>57</sup> The MPSC proposed that the United States seek "the fullest possible consultation" with the Marianas regarding foreign matters affecting the Marianas.<sup>58</sup> Where treaties which relate significantly to the Marianas are contemplated, the MPSC proposed that the consent of the Marianas be secured before the United States negotiates such treaties.

It was agreed during the third session of negotiations in December 1973 that the United States would have full responsibility and authority in matters of defense and foreign affairs. The United States in turn agreed to consider the advice of the future commonwealth as to pertinent international questions. There would be, however, no consultation as of right, and the commonwealth would not be able to exercise any veto power over pending treaty negotiations in which the United States Government was involved.<sup>59</sup> The United States Delegation also agreed to support the future commonwealth's membership in appropriate international and regional bodies concerned with economic, cultural and other matters of interest to the commonwealth. This represented somewhat of a breakthrough since the United States had generally opposed the admission of the territories into international bodies. Furthermore, the future commonwealth would be permitted to establish offices abroad for the promotion of local tourism and other economic interests.

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56. Marianas Covenant, *supra* note 8, § 104. See Marianas Political Status Commission Position Paper Regarding the Future Political Status of the Mariana Islands (May 10, 1973) reprinted in MPSC Report, *supra* note 22, at 13. See Covenant Analysis, *supra* note 18, at 12.

57. See, U.S. Draft, *supra* note 9, art. V.

58. MPSC Report, *supra* note 22, at 14.

59. See U.S. Statement on Political Status for May 16 (1973) Working Session, reprinted in MPSC Report, *supra* note 22, at 21. On the issue of direct participation by the future commonwealth in international and regional organizations, the Delegation gave a sympathetic but rather unenthusiastic response. See *id.*

## E. *Applicability of Federal Law*

### 1. The General Presumptions

The Covenant embodies general presumptions that certain federal laws either do or do not apply. It further provides that Congress retains the power to unilaterally alter these presumptions. Until such congressional action is taken, however, the presumptions remain in effect.<sup>60</sup>

The Joint Draft settled most problems of the applicability of federal law. Section 501, for example, provided that certain provisions of the United States Constitution, including all provisions identified by the MPSC Draft, would apply to the Marianas as it

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60. The following laws are presumed to apply to the Northern Mariana Islands under the Covenant: 1) Laws providing for federal services and financial assistance programs, and the banking laws, as they apply to Guam; 2) Section 228 of Title II and Title XVI of the Social Security Act, as they apply to the states; 3) The Public Health Services Act, as it applies to the Virgin Islands; 4) Those laws applicable to Guam, and of general application to the states, which are not covered in (1)-(3) *supra*, as they apply to the states; and, 5) Those laws applicable to the TTPI, not including subsequent amendments unless specifically made applicable, which are not covered in (1)-(4), *supra*, as they apply to the TTPI, until termination of the Trusteeship Agreement, after which time they will be inapplicable. Marianas Covenant, *supra* note 8, § 502(a); *see* Covenant Analysis, *supra* note 18, at 48-55.

In addition United States laws governing coastal shipments and conditions of employment, including wages and hours, will apply to the activities of the United States government and those of its contractors in the Marianas. Marianas Covenant, *supra* note 8, § 502(b); *see* Covenant Analysis, *supra* note 18, at 55. Also applicable are those provisions of the Immigration and Nationality Act which deal with the admission of "immediate relatives" of individuals in the Marianas who become United States citizens by way of the collective naturalization provision of art. III of the Covenant. Marianas Covenant, *supra* note 8, § 506; *see* Covenant Analysis, *supra* note 18, at 62-63. Finally, the United States income tax laws apply to the Marianas as those laws apply to Guam, namely as a local territorial tax. Marianas Covenant, *supra* note 7, § 601(a); *see* Covenant Analysis, *supra* note 18 at 67-71.

The following laws will not be applicable to the Marianas unless extended by Congress after termination of the Trusteeship: (1) United States immigration and naturalization laws, except as otherwise provided in § 502; (2) Coastwise laws, except as otherwise provided in § 502(b); (3) Laws prohibiting landing of fish or unfinished fish products by foreign vessels, except as otherwise provided in § 502(b); (4) United States minimum wage provisions of the Fair Labor Standards Act of 1938, Pub. L. No. 718, § 6, 52 Stat. 1062, as amended April 8, 1974, Pub. L. No. 93-259, §§ 2-4, 5(b), 7(b)(1), 88 Stat. 55, 56, 62. Marianas Covenant, *supra* note 8, § 503; *see* Covenant Analysis, *supra* note 18, at 55-58.

Furthermore, the Marianas will not be included within the United States customs territory. Local authority over customs, however, must be exercised in a manner consistent with the United States international obligations. Marianas Covenant, *supra* note 8, § 603(a); *see* Covenant Analysis, *supra* note 18, at 73.

would to a state.<sup>61</sup> This section also provided that other provisions of the United States Constitution which were inapplicable to the Marianas as a commonwealth, would not be applicable unless the parties mutually agreed.

Since section 501 of the Joint Draft provided that the Marianas was to be treated as a state for the purposes of the application of certain provisions of the United States Constitution, including the Bill of Rights, the question arose whether the Marianas should be bound by the requirements of a federal grand jury indictment under the Sixth Amendment and of a trial by jury under the Seventh Amendment. The United States Delegation was willing to treat the Marianas as a state, or to add language which would cause them to be bound by these provisions of the constitution which have not been extended to unincorporated territories. The MPSC, ultimately decided that the Marianas should be treated as a state. Accordingly section 501 of the Marianas Covenant provides, "neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law."<sup>62</sup>

## 2. The Commission on Federal Laws

To offset the restrictiveness of the general formula presumptions, section 402 of the MPSC Draft, like section 802 of the United States Draft, provided that the President would appoint a commission to survey the federal statutory laws and make recommendations to the Congress concerning which laws should be applicable to the Marianas. At least four of the seven members of the commission were to be Marianas residents who qualified under collective naturalization provisions<sup>63</sup> of the agreement.<sup>64</sup>

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61. The applicable provisions mentioned in the Joint Draft are: U.S. CONST. art. I, § 9, cl. 8; art. I, § 10, cl. 1; art. I, § 10, cl. 3; art. IV, § 2, cl. 2; amend. XIV, § 1, cl. 1. Joint Draft, *supra* note 9, § 501. With the exception of U.S. CONST. art. I, § 10, cl. 3, the Covenant includes the applicable provisions *supra* along with the following: U.S. CONST. art. I, § 9, cls. 2 & 3; art. IV, § 1; art. IV, § 2, cl. 1; amends. I-IX, XIII, XIV, XIX, and XXVI. Marianas Covenant, *supra* note 8, § 501; *see* Covenant Analysis, *supra* note 18, at 39-44.

62. Marianas Covenant, *supra* note 8, § 501; *see* Covenant Analysis, *supra* note 18, at 45-46. Section 501 also insures that future amendments to the United States Constitution can be reviewed before they become applicable to the Marianas unless they are so fundamental that they apply of their own force. *Id.*

63. *See* notes 76-77 *infra* and accompanying text.

64. A commission on the application of federal laws to a territory is standard

The MPSC argued that this delegation of legislative power to a commission would be upheld by United States courts as long as Congress provided a standard which was sufficiently precise to enable the courts to ascertain whether the congressional intent was being executed.<sup>65</sup> Thus section 402(a) of the 1974 Draft required that the commission consider the effect of each federal law on the local conditions in the Marianas, the federal policies embodied therein and the consistency of the law with the provisions and purposes of the Covenant.

The Joint Draft provided for a Commission on Federal laws which was to issue interim reports and a final report within one year after termination of the trusteeship. This was unlike the MPSC Draft which had provided for a final report within two years after the commission came into existence. The change was made to

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procedure. Puerto Rico (1947), Virgin Islands (1950), and Guam (1950) had congressionally established commissions on this question. The record of these commissions, however, is bleak. Congress rarely acted on the detailed recommendations contained in these reports. Section 402(b) of the 1974 Draft hoped to remedy this by providing that unless the House or Senate enacted legislation which specifically disapproves all or part of the recommendations of the Marianas Commission within one year after having received those recommendations, the recommendations would have the force of law.

65. *See, e.g.*, *United States v. Rock Royal Coop.*, 307 U.S. 533 (1939), *Yakus v. United States*, 321 U.S. 414 (1944). Also, in 1964 Congress delegated to the Secretary of Agriculture the power to establish agricultural programs in Guam "as are determined by the Secretary [to] promote the welfare of that island," despite the fact that Guam had originally been excluded by Congress from such programs. Act of Sept. 7, 1964, Pub. L. No. 88-584, 78 Stat. 926 (expired 1969).

Other precedents not cited by the MPSC appear to support its argument. Delegations of similar scope arose during the course of Federal administration of the Philippine Islands and Puerto Rico and both were sustained by the courts. As early as 1916, the authority to set tariffs was delegated to the Philippine Legislature, subject to the approval of the President. This was upheld by the Supreme Court in *Wright v. Ynchausti & Co.*, 272 U.S. 640 (1926). In Puerto Rico, following the hurricane of September 1928, Puerto Rico's coffee crop suffered sizeable losses. In order to assist the rehabilitation of Puerto Rico's coffee industry which was faced with low-priced Brazilian imports, Congress, in June 1930, empowered the Legislature of Puerto Rico to set a duty on coffee entering Puerto Rico, although no such duty was to be imposed on imports into the States. This delegation of authority was challenged but upheld as a valid delegation both before and after the establishment of the commonwealth. *See Porto Rico Brokerage Co. v. United States*, 76 F.2d 605, 611 (C.C.P.A. 1935); *Porto Rico Brokerage Co. v. United States*, 71 F.2d 469 (C.C.P.A. 1934); *Nestle Prods., Inc. v. United States*, 310 F. Supp. 792 (Cust. Ct. 1970). The Supreme Court also sustained a delegation of authority to the Philippine Executive, acting pursuant to the Philippine Legislature, concerning immigration. *Tiaco v. Forbes*, 228 U.S. 549 (1913).

allow the commission to gain experience with the problems actually created in the Marianas as a result of the application of federal laws. Substantive differences remained concerning the question of whether the commission's recommendations would automatically become law unless specifically disapproved by Congress. The United States Delegation argued that it was undesirable to allow recommendations coming to Congress from bodies other than the executive branch to become law simply by virtue of congressional inaction, because in such situations the President has no opportunity to veto the recommendations. The United States Delegation also refused to finance the work of the commission. The MPSC viewed such financing as a federal responsibility, for it believed that the limited resources of the Marianas should not be drained. Although the United States Delegation eventually agreed to federal financing, the commission's report was not to become effective without specific action by Congress.

#### F. *Jurisdiction of Courts*

The Marianas Covenant sets forth both the judicial authority of United States courts in the commonwealth and the relationship between these courts and those established by the commonwealth.<sup>66</sup> The Covenant follows territorial precedents by giving the United States district court special regional and appellate jurisdiction but it also contains unique options specifically for the Marianas. A United States District Court for the Northern Mariana Islands is established as part of the Ninth Circuit which includes Guam as well.<sup>67</sup> This court has "the jurisdiction of a district court of the United States,"<sup>68</sup> except that in federal question cases there is no monetary requirement as to the amount in controversy.<sup>69</sup> The court will also have original jurisdiction where the constitution or laws of the commonwealth have not vested jurisdiction in a local court.<sup>70</sup> In such cases the district court is to be considered a commonwealth

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66. Marianas Covenant, *supra* note 8, art. IV; see Covenant Analysis, *supra* note 18, at 32-39.

67. Marianas Covenant, *supra* note 8, § 401; see Covenant Analysis, *supra* note 18, at 32-33.

68. Marianas Covenant, *supra* note 8, § 402(a); see Covenant Analysis, *supra* note 18, at 34.

69. Marianas Covenant, *supra* note 8, § 402(a); see Covenant Analysis, *supra* note 18, at 34.

70. Marianas Covenant, *supra* note 8, § 402(b); see Covenant Analysis, *supra* note 18, at 34-35.

court for the purposes of determining the requirements of indictment by grand jury and trial by jury.<sup>71</sup> Furthermore, the commonwealth may vest the district court with appellate jurisdiction.<sup>72</sup>

As to the relationship between the United States courts and the courts to be established by the commonwealth, specifically with reference to appeals, certiorari, removal, issuance of writs of habeas corpus and like matters, the Covenant provides that these proceedings are to be governed by the same laws pertaining to the federal and state courts.<sup>73</sup> Nevertheless, for the first fifteen years after a commonwealth appellate court is established, the United States Court of Appeals for the Ninth Circuit, which includes the Marianas and Guam, is to have appellate jurisdiction over "all final decisions of the highest court of the Northern Mariana Islands . . . unless those cases are reviewable in the District Court for the Northern Mariana Islands pursuant to Subsection 402(c)."<sup>74</sup> The MPSC believed this facilitated federal review, which would otherwise depend solely on the United States Supreme Court, where review was most unlikely.

Originally, the MPSC anticipated that, as in the case of Guam, a district judge would be appointed to an initial eight year term. They hoped this would be followed by the appointment of a life-tenured judge as was done in Puerto Rico after the attainment of commonwealth status.<sup>75</sup> But the agreement reached in the Joint Draft, reflecting the terms of the United States Draft, limited tenure to eight years. The representatives of the MPSC on the Joint Drafting Committee accepted this significant change of position because their interests in securing a federal court in the Marianas, as

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71. Marianas Covenant, *supra* note 8, § 402(b); see Covenant Analysis, *supra* note 18, at 34-35.

72. The District Court will have such appellate jurisdiction as the Constitution or laws of the Northern Mariana Islands may provide. When it sits as an appellate court, the District Court will consist of three judges, at least one of whom will be a judge of a court of record of the Northern Mariana Islands. Marianas Covenant, *supra* note 8, § 402(c).

73. Those portions of Title 28 of the United States Code which apply to Guam or the United States District Court in Guam are to be applicable to the Marianas and the District Court in the Marianas, except as otherwise provided in Article IV. Marianas Covenant, *supra* note 8, § 403(b). See Covenant Analysis, *supra* note 18, at 38.

74. Marianas Covenant, *supra* note 8, § 403(a); see Covenant Analysis, *supra* note 18, at 37.

75. MPSC Draft, *supra* note 9, § 501.

well as the authority to grant that court jurisdiction over local cases, were sufficiently served by the terms of the Joint Draft.

### G. *Citizenship, Nationality and Restrictions on Immigration*

Article III of the Covenant sets forth the basic principles concerning the collective naturalization that will be implemented simultaneously with the termination of the Trusteeship Agreement.<sup>76</sup> The language used therein relating to collective naturalization is comparable to that used with respect to other territories of the United States.<sup>77</sup>

76. Marianas Covenant, *supra* note 8, § 1003(c) provides that the date of the termination of the Trusteeship Agreement will be the effective date for all the provisions of Article III, except for § 304 guaranteeing the citizens of the Northern Mariana Islands all privileges and immunities of citizens of the several States. *See generally* Covenant Analysis, *supra* note 18, at 132-33. This section is effective on a date to be determined by the President, which date will be not more than 180 days after the approval of the Covenant and the Constitution. Marianas Covenant, *supra* note 8, § 1003(b); *see* Covenant Analysis, *supra* note 18, at 132.

77. M.P.S.C. Position Paper on U.S. Citizenship and Nationality in the Commonwealth of the Mariana Islands (Dec. 6, 1973). The Covenant provides that the following persons, together with their children under 18 years of age, became citizens of the United States:

- (1) all persons born in the Northern Mariana Islands who are citizens of the TTPI on the day preceding the termination of the Trusteeship Agreement, and who on that date are domiciled in the Northern Marianas, the United States, of any territory or possession thereof;
- (2) all persons who are citizens of the TTPI on the day preceding the termination, who have been domiciled continuously in the Northern Marianas for at least five years immediately prior to that date, and who registered to vote in elections for the Mariana Islands District Legislature or for any municipal election in the Northern Mariana Islands prior to January 1, 1975, unless they are underage; and,
- (3) all persons domiciled in the Northern Marianas on the day preceding termination, who, although not citizens of the TTPI, on that date have been domiciled continuously in the Northern Marianas beginning prior to January 1, 1974.

Marianas Covenant, *supra* note 8, § 301; *see* Covenant Analysis, *supra* note 18, at 27-29. Any person who does become a citizen under the above provisions has the option under § 302 of making a declaration, under oath, before any federal or commonwealth court, stating his intention to be a "national," rather than a citizen, of the United States. Such a declaration must be made within six months after the termination of the Trusteeship Agreement, or within six months after reaching 18 years of age, whichever is later. Only persons subject to the original collective naturalization of § 301 will have this option. Thereafter, all persons born in the commonwealth on or after termination of the Trusteeship Agreement, and who are subject to United States jurisdiction will be United States citizens at birth. Marianas Covenant, *supra* note 8, § 303; *see* Covenant Analysis, *supra* note 18, at 30. For a discussion of the classes of people excluded from this grant of citizenship, see Note, *The Commonwealth of the*

The immigration and naturalization laws of the United States will not apply to the commonwealth unless Congress specifically acts to require their application.<sup>78</sup> The Marianas possess, at least temporarily, extraordinary control over immigration.<sup>79</sup> This potential control, however, must be balanced not only against the possibility that Congress may decide to apply the United States immigration and naturalization laws, but also against other limitations imposed by the Covenant itself, specifically the provisions applying the Fourteenth Amendment to the commonwealth.<sup>80</sup>

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*Northern Mariana Islands: A Mass Grant of United States Citizenship*, 8 U. CAL. D. L. REV. 453, 459-68 (1975).

78. Marianas Covenant, *supra* note 8, § 503(a):

The following laws of the United States, presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement: except as otherwise provided in Section 506, the immigration and naturalization laws of the United States . . . .

See Covenant Analysis, *supra* note 18, at 55-57.

A draft statement of intention by the parties makes clear that until Congress acts after termination of the Trusteeship, the TTPI immigration laws, as modified by the Marianas, would continue to apply. The Report of the Drafting Committee appended to the final version of the Marianas Covenant reaffirms this. Report of the Drafting Committee §§ 503(a) & 506, *reprinted in* U.S. Office for Micronesian Status Negotiations, Marianas Political Status Negotiations, Report on 2d Part of 5th and Final Session of Status Negotiations, app. 6 (Feb. 4-15, 1975) [hereinafter cited as Drafting Committee Report].

79. Under the Code of the Trust Territory of the Pacific Islands, 53 TTC § 2 (1966), § 3 (1966), and § 53 (1973) respectively, this control may include the power to naturalize citizens, to cancel naturalization, and to require travel documents before leaving, as well as the authority to control immigration through the use of entry permits.

80. See Marianas Covenant, *supra* note 8, § 501(a). One of the privileges and immunities of natural citizenship under the Fourteenth Amendment is the right to travel interstate. *Shapiro v. Thompson*, 394 U.S. 618 (1969). See *Edwards v. California*, 314 U.S. 160, 181, 183-85 (1941) (Douglas and Jackson JJ., concurring); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868). The right to travel interstate has also been grounded upon the Privileges and Immunities Clause of art. IV, § 2 of the Constitution. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Corfield v. Coryell*, 6 F. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1825). See also *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873). The Privileges and Immunities Clause now applies to the Marianas under § 501(a) of the Covenant. The freedom of Americans to travel outside the country has been found, based on the Due Process Clause of the Fifth Amendment. See *Zemel v. Rusk*, 381 U.S. 1, 14 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964); *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

The MPSC suggested that the choice between United States citizenship or national status be placed before the people in a referendum. On the basis of such a referendum, the language of the Covenant would presumptively grant either citizenship or national status, subject to an individual option for the other status.<sup>81</sup> The United States Delegation agreed that an option should be available, but it wanted the choice of status to be between citizen and resident alien, rather than citizen and national,<sup>82</sup> thus making the

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The control of immigration would seem to be limited to non-U.S. citizens. The Marianas' exclusive control is also limited by § 506 of the Covenant whereby the Immigration and Nationality Act will apply to the commonwealth to the following extent:

- (1) With respect to children born abroad to United States citizens or non-citizen nationals permanently residing in the Northern Marianas, the provisions of 8 U.S.C.A. § 1401 and 1408, providing respectively for nationality and citizenship at birth, and nationality without citizenship at birth, will apply.
- (2) With respect to aliens who are "immediate relatives" of United States citizens who are permanently residing in the Northern Marianas, all the provisions of the said Act will apply, commencing when a claim is made to entitlement to "immediate relative" status.
- (3) With respect to persons who will become citizens or nationals of the United States under either Article III or § 506 of the Covenant, the loss of nationality provisions of the Immigration and Nationality Act will apply.

Marianas Covenant, *supra* note 8, § 506; *see* Covenant Analysis, *supra* note 18, at 62-67.

81. Marianas Political Status Commission Position Paper Regarding the Future Political Status of the Mariana Islands (May 10, 1973), *reprinted in* MPSC Report, *supra* note 22, at 16. Upon reflection over the difference between "citizen" and "national" it becomes apparent that each status has symbolic overtones. This is especially true concerning the irrevocability of the choice of one status over the other. There is perhaps a greater possibility of being able to revoke "national" status. In addition, it may be difficult to inherit citizenship from a national. Thus, if a child is born abroad and both parents are U.S. citizens, the child is a U.S. citizen, as long as one of the parents has resided within the United States at some time prior to the birth of the child. 8 U.S.C. § 1401(a)(3) (1976). If only one of the parents is a U.S. citizen while the other is a U.S. national, the parent who is a citizen must have resided in the United States for at least one year prior to the birth of the child in order for the child to be a citizen. 8 U.S.C. § 1401(a)(4) (1976).

82. The fact that there was a substantive legal and practical difference between the status of a citizen and that of a national, contrary to the view of the U.S. Delegation, was affirmed in the course of the House of Representatives debate on the approval of the Covenant. Representative Don H. Clausen of the Committee on Interior and Insular Affairs stated:

[F]ollowing the implementation of the covenant, those born in the Marianas will become American citizens. For those persons born in the Marianas prior to becoming a commonwealth, American national status requires allegiance

choice of citizen more likely.<sup>83</sup> Consultations between the legal advisors during the remainder of the second session led to a compromise, as a result of which citizenship would be extended to the people of the Marianas, and the United States would accept the inclusion of a national status option, provided that such an option proved to be consistent with United States law and policy.<sup>84</sup>

The MPSC, however, was concerned that an increasingly large number of aliens might come to the Marianas under United States immigration laws.<sup>85</sup> Therefore, the MPSC argued that before ter-

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to the United States in return for which the American national is provided free access to the United States and is afforded protection under the U.S. consular system when abroad. On the other hand, American nationals are precluded from holding Federal public office and cannot participate in national elections.

121 Cong. Rec. 23670 (1975). For a decision upholding the citizenship by collective naturalization of the newly elected governor of the state, and discussing at length the history of collective naturalization provisions from 1776 through 1867, see *Boyd v. Nebraska*, 143 U.S. 135 (1892).

83. The Delegation argued:

It has been our assumption that those rejecting citizenship will become resident aliens in the new commonwealth. The concept of "U.S. national" has little practical significance other than in the context of the workings of the U.S. Immigration and Nationality Act. The acceptance of a citizen-national option would prove to be a serious administrative inconvenience and would confer upon those inhabitants of the Mariana Islands who accept it an inferior and awkward status, especially if they should move into the rest of the United States. We would therefore prefer to omit that option unless you can demonstrate to us its significant practical utility.

U.S. Statement on Political Status for May 16 (1973) Working Session, *reprinted in* MPSC Report, *supra* note 22, at 22.

84. See U.S. Summary of Status Issues, *reprinted in* MPSC Report, *supra* note 22, at 26-27. The Delegation's summary on this point concluded: "We have no objection in principle with this proposition but this is a technical matter which the U.S. Delegation believes should be studied further by both parties in Washington." *Id.* This choice followed the MPSC Position Paper which presented a novel approach to the issue. MPSC, Position Paper on U.S. Citizenship and Nationality in the Commonwealth of the Mariana Islands (December 6, 1973). Past legislative precedents offered *inhabitants* a choice between citizenship, collectively extended, and retention of their foreign nationality upon express declaration. Furthermore, the term *inhabitant*, traditionally used in collective naturalization, has generally been interpreted to include anyone residing in the territory and has not been restricted to domiciliaries. See *Crane v. Reeder*, 25 Mich. 303 (1872) (British subjects who resided in Detroit became citizens under the Jay Treaty of 1794).

85. [The proposed immigration provision] deals with the post-termination period and is designed to assure, first, that children born of Marianas citizens will be entitled to United States citizenship even if they are born overseas. The subsection also provides that the residency requirements for citizenship through naturalization will be satisfied by residence in the Marianas—but only for "immediate relatives" of

mination of the Trusteeship Agreement, the local Marianas government should be vested with the same control over immigration as had existed under the TTPI. The MPSC Position Paper of May 28, 1974 thus urged that the Marianas eventually have the power to issue and to regulate "[e]ntry permits authorizing entry and continuing presence in the [commonwealth] for periods of more than one year for the purpose of conducting business or residing in the [commonwealth],"<sup>86</sup> subject to further amendment by the commonwealth and subject to the power of Congress to extend the application of United States immigration and naturalization laws to the area.<sup>87</sup> The Position Paper further emphasized the desirability of adjusting the application of United States immigration and naturalization laws to provide that residence or physical presence in the Marianas after termination of the TTPI would satisfy any requirement of those laws just as residence or physical presence in a state. But this adjustment would apply only to the following groups of people: children, spouses, parents, brothers and sisters of United States citizens or nationals who are domiciled in the Marianas; persons born outside of the United States of parents either or both of whom are citizens or nationals of the United States domiciled in the Marianas; and United States nationals.<sup>88</sup>

The MPSC Draft provided that for purposes of satisfying any residence or physical presence requirement of the immigration and naturalization laws of the United States, time spent in the Marianas would be counted only for either "immediate relatives" of persons who are United States citizens or nationals domiciled in the commonwealth, or for persons who themselves are nationals of the

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those persons who become United States citizens or nationals under this section. Other immigrant aliens must satisfy this residency requirement elsewhere. This feature would discourage immigration of persons merely wishing to take advantage of the availability of United States citizenship. MPSC Position Paper on U.S. Citizenship and Nationality in the Commonwealth of the Mariana Islands app. at 4 (Sept. 6, 1973).

86. See Paper of the Marianas Political Status Commission Regarding Immigration I-2 (May 18, 1974).

87. Marianas Covenant, *supra* note 8, § 503; see Covenant Analysis, *supra* note 18, at 55-58. This seemed consistent with the U.S. Draft which provided that, in general, the laws of the United States would not become applicable until termination of the Trusteeship Agreement.

88. This was essentially the same proposal put forth in connection with the previous discussion of citizenship. It is somewhat similar, though less restrictive, than the treatment of American Samoa. See A.S. CODE tit. 9, § 201(b).

United States.<sup>89</sup> The United States Delegation considered this feature of the MPSC Draft unduly restrictive. It believed that such a restriction would prevent the immediate families of permanent resident aliens from entering the Marianas as nonquota immigrants.

The MPSC Draft also provided that both the courts of general jurisdiction established under the constitution of the commonwealth and the United States District Court for the Mariana Islands would have jurisdiction to naturalize persons as citizens of the United States in accordance with applicable law.<sup>90</sup> Although the United States Draft had not expressly vested the federal district court with jurisdiction over naturalization, such an express provision was not necessary since naturalization is traditionally a matter of federal concern.<sup>91</sup>

The naturalization and immigration laws would not take effect until after termination of the Trusteeship Agreement, and even then, not automatically.<sup>92</sup> Although there was no guarantee that Congress would eventually decide not to treat the commonwealth as it had treated other territories, the scheme devised provided for a transitional period. In any event, the Northern Mariana Islands would still have an opportunity to present its recommendations to Congress concerning the manner and the extent to which these laws should be applied, before Congress acted. Until such time, the immigration laws of the TTPI, as modified by the future commonwealth government, would continue to apply.

#### H. *Political Representation*

The Marianas Covenant does not give the Northern Marianas representation in Congress.<sup>93</sup> On this point, the Covenant repre-

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89. MPSC Draft, *supra* note 9, § 304(c).

90. *Id.* § 305.

91. U.S. Draft, *supra* note 9, § 103(e).

92. Joint Draft, *supra* note 9, § 503.

93. The constitution or laws of the Northern Mariana Islands may provide for the appointment or election of a Resident Representative to the United States, whose term of office will be two years, unless otherwise determined by local law, and who will be entitled to receive official recognition as such Representative by all of the departments and agencies of the Government of the United States upon presentation through the Department of State of a certificate of selection from the Governor. The Representative must be a citizen and resident of the Northern Mariana Islands, at least twenty-five years of age, and, after termination of the Trusteeship Agreement, a citizen of the United States.

sents a considerable concession by the MPSC, which had originally proposed that the future commonwealth have a nonvoting delegate in the United States House of Representatives. The MPSC wanted this delegate to receive the same compensation, allowances and benefits as a full member of the House, to be authorized to introduce legislation, to be assigned to committees and have the right to speak on the floor of the Congress, in committee, and to vote in committee.<sup>94</sup> Such a status was similar to that accorded the delegates from Puerto Rico, Guam and the Virgin Islands. The MPSC indicated that the long-term aspiration of the Marianas people was "to have a *voting* representative in Congress who will have all the rights and privileges of other members of the U.S. House of Representatives."<sup>95</sup>

The United States Delegation was not supportive, stressing that Congress would be unwilling to permit representation to this small area.<sup>96</sup> Trying to insure some political representation to the Marianas in the United States Congress, the MPSC addressed these objections. The MPSC Draft provided that the commonwealth would be entitled to a nonvoting delegate in Congress when the population of the commonwealth reached 50,000, or earlier if Congress should so provide.<sup>97</sup> Until that time, with the approval of the people of Guam, there would be a nonvoting delegate representing both the Marianas and Guam.<sup>98</sup> Until either of these conditions was met, the commonwealth was to be represented by a resident commissioner accorded official recognition before all departments and agencies of the United States, but who would be without privileges or status in Congress.<sup>99</sup>

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Marianas Covenant, *supra* note 8, § 901; see Covenant Analysis, *supra* note 18, at 122-23.

94. MPSC Position Paper Regarding the Future Political Status of the Mariana Islands, *reprinted in* MPSC Report, *supra* note 22 at 14.

95. *Id.* (emphasis in original).

96. U.S. Statement on Political Status for May 16, 1973 Working Session, *reprinted in* MPSC Report, *supra* note 22, at 21. Congressional resistance which made resolution of the political representation issue difficult, continued throughout the negotiations on this point. See U.S. Informal Summary of Status Issues, *reprinted in* MPSC Report, *supra* note 22, at 25. The U.S. Delegation, which negotiated on behalf of the executive branch assured the MPSC of their support on this issue but did not mention political representation in their Draft.

97. MPSC Draft, *supra* note 9, § 1101.

98. See *id.* § 1102.

99. See *id.* § 1103. The MPSC proposals contained a number of subtleties consistent with their desire to follow the Puerto Rico precedent rather than those of the

Because of opposition anticipated in Congress, the United States Delegation continued to take the position that the Marianas should have a resident agent entitled to official recognition, but that expenses consequently incurred should be paid by the commonwealth. Furthermore, there was a dispute concerning the title of the representative, irrespective of his status.<sup>100</sup> The compromise reached was that the representative is referred to as "Resident Representative," rather than "commissioner," "delegate," or "agent."<sup>101</sup> He is entitled to official recognition by all United States departments and agencies after presentation of a certificate of selection from the commonwealth Governor, through the Secretary of State.<sup>102</sup>

## II. ECONOMICS AND FINANCE

The negotiations concerning the financial arrangements to be made between the future commonwealth and the United States were some of the most protracted and contested of the status negotiations. They were complicated by the connection between this issue and that of eminent domain.

In the matters of tax, trade, and economic participation in federal grant-in-aid programs, both parties relied upon Guam as a model. As a result, the Covenant provides that income tax laws in force in the United States are applicable to the Marianas as a local territorial income tax on the first day of January following the effective date set by the President, just as those laws are presently in

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Pacific areas. See 48 U.S.C. §§ 891-894, 1712 (1976). Election of the delegate would be determined by local, rather than federal law. Official recognition of the delegate's status would be conferred upon presentation of a certificate of election from the Chief Executive of the Commonwealth or from both the Chief Executive and the Governor of Guam to the Department of State. Finally, the United States government would pay the delegate's salary and a variety of the costs of office.

100. The U.S. version used the term "resident agent" rather than "resident commissioner" because it was said congressional representatives had expressed opposition to the term on the grounds that resident commissioner implied a higher status than "delegate," the title used for the representatives of Guam and the Virgin Islands.

101. See note 93 *supra* and accompanying text.

102. This representative does not have privileges in Congress, but the official Report of the Draft Committee indicates that § 901 of the Covenant, "is not intended to preclude the Government of the Northern Mariana Islands from requesting the Congress of the United States to confer non-voting delegate status on the Resident Representative provided for in this Section." Drafting Committee Report, *supra* note 78, at C-4.

force for Guam.<sup>103</sup> References to Guam in the Internal Revenue Code would be deemed to also refer to the Marianas, except where these provisions are incompatible with the intent of the Covenant.<sup>104</sup> Unlike Guam, however, the commonwealth may impose, by local legislation, additional taxes, *e.g.*, provide for rebates of any taxes received, upon income derived from sources within the commonwealth.<sup>105</sup>

The Northern Mariana Islands are not included within the customs territory of the United States.<sup>106</sup> Imports from the Northern Mariana Islands into the United States customs territory are subject to the same treatment as are imports from Guam.<sup>107</sup> But the similarity with arrangements concerning Guam cease here, for the Covenant provides that the United States government agrees to seek to obtain favorable treatment from foreign countries for Marianas exports and to encourage those countries to consider the Marianas as a developing territory.<sup>108</sup> The government of the Northern Mariana Islands is given the authority to impose such excise taxes within its territory as are consistent with United States international obligations.<sup>109</sup> The United States also agrees to pay into the Commonwealth Treasury, as it does in the case of Guam, to the benefit of the people of the Marianas, the proceeds of all customs duties and federal income taxes derived from the Northern Mariana Islands; all taxes collected under United States internal revenue laws on articles produced in the Northern Mariana Islands and transported to the United States, its territories or possessions, or consumed in the Northern Mariana Islands; any other taxes levied by the Congress on the inhabitants of the Marianas; and all

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103. See Marianas Covenant, *supra* note 8, § 601(a); Covenant Analysis, *supra* note 18, at 67.

104. Marianas Covenant, *supra* note 8, § 601(c); see Covenant Analysis, *supra* note 18, at 70.

105. Marianas Covenant, *supra* note 8, § 602; see Covenant Analysis, *supra* note 18, at 71.

106. Marianas Covenant, *supra* note 8, § 603(a).

107. *Id.* § 603(b). The United States may levy excise taxes on goods manufactured, sold or used and services rendered in the Marianas in the same manner and to the same extent as such taxes are applicable within Guam. *Id.* § 604(a); see Covenant Analysis, *supra* note 18, at 76.

108. Marianas Covenant, *supra* note 8, § 603(a); see Covenant Analysis, *supra* note 18, at 73.

109. Marianas Covenant, *supra* note 8, § 604(b); see Covenant Analysis, *supra* note 18, at 77.

quarantine, passport, immigration and naturalization fees collected in the Northern Mariana Islands.<sup>110</sup>

Those United States laws in existence on the effective date of section 502(a) of the Covenant which provide federal services and financial assistance programs, as well as the federal banking laws, will apply to the Northern Mariana Islands just as they apply to Guam.<sup>111</sup> In addition, the Micronesian Claims Act,<sup>112</sup> which provided for a \$500,000 TTPI war fund, to be matched by Japan, and an additional post-war claims fund with a ceiling of \$20,000,000, was applicable to the commonwealth.

The Covenant also sets forth provisions concerning United States financial assistance to the future commonwealth.<sup>113</sup> The United States agrees to provide direct multi-year financial support to the commonwealth government for local government operations, capital improvement programs and economic development; the initial period of financial assistance will be seven years.<sup>114</sup> Funds so provided but not obligated or expended by the commonwealth during any fiscal year would remain available for obligation or expenditure in subsequent fiscal years for the original purposes for which the funds were appropriated.<sup>115</sup> Furthermore, approval of the Cov-

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110. Marianas Covenant, *supra* note 8, § 703(b); see Covenant Analysis, *supra* note 18, at 92-93.

111. Marianas Covenant, *supra* note 8, § 502(a); see Covenant Analysis, *supra* note 18, at 48-55.

112. Micronesian Claims Act of 1971, Pub. L. No. 92-39, 85 Stat. 92 (terminated by its terms Aug. 3, 1976, 50 U.S.C. App. § 2018).

113. Marianas Covenant, *supra* note 8, art. VII; see Covenant Analysis, *supra* note 18, at 85-95.

114. Approval of the Covenant constitutes "a commitment and pledge of the full faith and credit of the United States for the payment, as well as an authorization for the appropriation," of guaranteed annual levels of direct grant assistance for each of the seven fiscal years, as follows:

- (1) \$8.25 million for government operations, \$250,000 each year to be reserved for a special education training fund connected with the change in the political status;
- (2) \$4 million for capital improvement projects, \$500,000 each year to be reserved for Tinian and \$500,000 each year to be reserved for Rota; and,
- (3) \$1.75 million for an economic development loan fund, \$500,000 each year to be reserved for small loans to farmers and fishermen and to agricultural and marine cooperatives, of which \$250,000 each year will be reserved for a special program of low interest housing loans for low income families.

Marianas Covenant, *supra* note 8, § 702; see Covenant Analysis, *supra* note 18, at 86-90.

115. Marianas Covenant, *supra* note 8, § 704(a); see Covenant Analysis, *supra* note 18, at 93.

enant will constitute an authorization for the appropriation of a pro-rata share of the funds for the period between the effective date of section 704 and the beginning of the next fiscal year.<sup>116</sup> These amounts will be adjusted for inflation for each fiscal year on the basis of the percentage change in the composite price index issued by United States Department of Commerce using the beginning of fiscal year 1975 as the base.<sup>117</sup> Upon expiration of the initial seven year period, the annual level of payments in each category is to continue until Congress appropriates a different amount or provides otherwise.<sup>118</sup>

#### A. *Direct Financial Assistance*

The MPSC reasoned that there should be at least three separate phases to the financial aspects of transition.<sup>119</sup> The first phase, probably extending one year, would be a planning period to facilitate changes required due to the new status. The second phase, probably consisting of seven years, would be an implementation period for those plans to establish the base for long-term growth and development for the Marianas. The third phase, possibly twenty years or more in length, would be a development period during which increasing responsibility for the support of the local government would be assumed by the Marianas. It proposed that Phase I funds, estimated at \$4,500,000,<sup>120</sup> be made available by the United States, as a grant to the MPSC immediately upon conclusion of successful negotiations. In formulating their assessment of Phase II budget support, the MPSC assumed that by 1981 the per capita income in the Marianas would be somewhat less than one-half of the United States per capita income, and that there would be a tax burden in the Marianas equal to approximately fifty percent of the tax burden borne by the people of the United States.<sup>121</sup> The MPSC proposed that, in the fifth year of Phase II,

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116. Marianas Covenant, *supra* note 8, § 704(b); see Covenant Analysis, *supra* note 18, at 94.

117. Marianas Covenant, *supra* note 8, § 704(c); see Covenant Analysis, *supra* note 18, at 94.

118. Marianas Covenant, *supra* note 8, § 704(d); see Covenant Analysis, *supra* note 18, at 94-95.

119. See Position Paper Regarding Economic Aspects of the Revised Political Status of the Mariana Islands (May 14, 1973) reprinted in MPSC Report, *supra* note 22, at 33.

120. *Id.* at 34-35. See D. MCHENRY, *supra* note 1, at 159.

121. The result showed large commonwealth government deficits and therefore

the two governments would explore budget support requirements for Phase III, based on progression to that point.

The response of the United States was mixed; it stressed a need for agreement on basic principles, resisting any immediate discussion of the details of financial assistance arrangements. The Delegation suggested that future financial arrangements with the Marianas follow the traditional territorial approach which links financial assistance to future needs.<sup>122</sup> In determining these needs the United States Delegation noted that revenues from present local sources, together with certain increased revenue attributable to federal presence would represent a considerable source of income. The Delegation particularly emphasized that the United States military presence in the Marianas would be an indirect source of revenue if current plans were implemented, and that the Marianas would additionally benefit from payments made for land required for military purposes.<sup>123</sup>

The United States Delegation agreed with the long-range economic objectives and the three-phase approach set forth in the MPSC Position Paper.<sup>124</sup> The Delegation expressed grave doubts,

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the MPSC proposed that the United States provide budget support during Phase II as follows:

<i>Year</i>	<i>Support (millions of current \$)</i>
1975	19.2
1976	22.4
1977	23.9
1978	28.3
1979	27.5
1980	21.6
1981	19.9

D. MCHENRY, *supra* note 1, at 159.

122. U.S. Response on Economics and Finance, *reprinted in* MPSC Report, *supra* note 22, at 48. The United States would assume certain limited obligations to provide budgetary support and economic assistance to the Marianas. Additional financial assistance, in the form of either direct financial grants to support government operations or capital improvements, would depend largely upon mutually determined needs.

123. The Delegation emphasized the importance of the construction and the operation of the base on Tinian, and underlined the basic interests of the two parties to the negotiations. The United States' interests were military in nature while the Marianas' were financial. It would take six years to construct the U.S. base and during that time, \$39.8 million dollars was expected to flow into the local economy. It was estimated that the economic impact of the operation of the base would be \$15 million per year.

124. See U.S. Commentary on MSC [*sic*] Paper on Economics and Finance, (May 23, 1973), *reprinted in* MPSC Report, *supra* note 22, at 55.

however, concerning the details of the development plan put forth by the MPSC, particularly with regard to rates of growth, the use of unusually high pay scales, and the low estimates of non-assistance sources of revenue.<sup>125</sup> The MPSC continued to defend its estimates as reasonable and to express its own doubts about the optimistic estimates of non-assistance revenue sources provided by the United States Delegation.<sup>126</sup>

Toward the close of the second session, the focus of the negotiations shifted from a discussion of the relative merits of a deficit support assistance program as opposed to a fixed annual assistance program to the practical application of both. During these negotiations, the United States agreed to a financial commitment "over an initial period of years," while the two delegations agreed<sup>127</sup> to appoint a joint working committee on economics and finance to review detailed plans and cost estimates.<sup>128</sup>

By the close of the third negotiating session, a tentative agreement had been reached on the principles governing the economic and financial provisions of the Covenant.<sup>129</sup> The United States also agreed tentatively to provide both funds for transitional programs and activities, and financial support over an initial period of years at fixed levels.<sup>130</sup> The United States Delegation proposed direct federal assistance for the first five years of the new political status as follows: \$7.5 million annually to support government operations, \$3 million annually for capital improvements; and, \$1 million annually for a Marianas development loan fund. Such support was to be reviewed before the end of that period to determine future levels of support. Furthermore, it was estimated that \$3 million would be available annually in the form of federal financial assistance programs and services. The MPSC stated, however, that a level of di-

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125. *Id.* at 62-63.

126. See Response to Comments of Ambassador Williams and Mr. J. Wilson on the MPSC Economic and Financial Position Paper, *reprinted in* MPSC Report, *supra* note 22, at 59.

127. Joint Press Release (May 29, 1973), *reprinted in* U.S. Office for Micronesian Status Negotiations, Marianas Political Status Negotiations, Report on 2d Sess. of Status Negotiations 5 (May 15-June 4, 1973).

128. MPSC Report, *supra* note 22, at 64.

129. See notes 103-09 *supra* and accompanying text.

130. Final Joint Communique (Dec. 19, 1973), *reprinted in* U.S. Office for Micronesian Status Negotiations, Marianas Political Status Negotiations, Report on 3d Sess. of Status Negotiations 9 (Dec. 6-19, 1973).

rect assistance higher than the total of \$14.5 million would be required during the first five years.<sup>131</sup>

The reason given in the MPSC Draft, for United States support differed from that given in the United States Draft. It provided that the United States would supply direct financial assistance for government operations and programs, capital improvement and economic development.<sup>132</sup> Such support was to continue until a standard of living had been achieved which was comparable to that found in other parts of the United States and the commonwealth government was able to meet its financial responsibilities from its own resources.

The United States Draft provided for United States financial support to "facilitate the achievement of economic self-sufficiency and higher standards of living."<sup>133</sup> The MPSC argued that the term "facilitate" indicated only a short-term commitment. Furthermore, the United States Draft referred to a "higher standard of living," whereas the MPSC argued that the appropriate reference point was the standard of living found in other parts of the United States.<sup>134</sup> Because the United States continued to oppose the MPSC's reference point, Covenant does not include such an economic objective.

The United States Draft also provided for direct financial assistance for five years but it was silent about future aid for multi-year periods.<sup>135</sup> The MPSC Draft, provided for direct financial assistance at guaranteed levels for not less than seven years, and for continued multi-year commitments.<sup>136</sup> These drafts both provided

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131. *Id.* See also D. MCHENRY, *supra* note 1, at 160.

132. MPSC Draft, *supra* note 9, § 801.

133. U.S. Draft, *supra* note 9, § 601.

134. The United States ceased emphasizing per capita income and the progressive development toward economic self-sufficiency when the MPSC argued that "economic self-sufficiency" was not a legitimate goal and that the complete transition to a new political status could not be accomplished until the Marianas were a self-sufficient unit with a standard of living comparable to that enjoyed in other parts of the United States. The United States also ceased using the words "joint effort" and instead focused on its obligation to the economic development of the commonwealth without referring to contributions which the commonwealth would make. See United States Presentation on Phase II Goals and Financial Assistance (Dec. 13, 1973); MPSC Response to the United States Presentation on Phase II Goals and Financial Assistance, (Dec. 15, 1973).

135. U.S. Draft, *supra* note 9, § 602(a)(1).

136. MPSC Draft, *supra* note 9, § 802.

the same basic categories of assistance. Despite this, the MPSC argued that the language of the United States Draft appeared to require that the economic development loan program funds be made available to individuals as long-term, low-interest rate loans. This requirement was not included in the MPSC Draft since it was believed that the commonwealth, in accordance with the principles of self-government, should determine for itself the terms of the loans. Nevertheless, the MPSC did admit that the most practical use of the loan fund would be long-term, low interest loans. They also admitted that even if the Marianas had complete authority, the suggested United States terms were likely to be implemented.

The MPSC had also argued in favor of inserting language which would have made approval of the agreement by the United States an *appropriation*, as well as an authorization, of funds for multi-year direct financial assistance. Rejecting this position, the United States Delegation argued that the status agreement should not, and perhaps could not, serve as an appropriation of funds. To give the Marianas the multi-year assurance it wanted, the Covenant states that United States approval will constitute:

a commitment and pledge of the full faith and credit of the United States for the payment, as well as an authorization for the appropriation, of the indicated guaranteed annual levels of direct grant assistance to the Government of the Northern Mariana Islands for each of the seven fiscal years. . . .<sup>137</sup>

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137. Marianas Covenant, *supra* note 8, § 702. See also Joint Draft, *supra* note 9, § 606(b):

During the initial seven year period of financial assistance provided for in Section 702, and during such subsequent periods of financial assistance as may be agreed, the Government of the Northern Mariana Islands will authorize no public indebtedness (other than bonds or other obligations of the Government payable solely from revenues derived from any public improvement or undertaking) in excess of ten percentum of the aggregate assessed valuation of the property within the Northern Mariana Islands.

The MPSC had argued that a limitation on public indebtedness is a restriction inconsistent with the principle of self-government. As a result, the MPSC Draft contained no provision limiting the public debt. In contrast, § 503(b) of the U.S. Draft placed a ceiling on the public debt without specifying the length of the term for which the ceiling would be imposed. The compromise recognized the United States' interest in the finances of the Marianas for the period during which the United States was to provide substantial sums of money, and yet allowed for the exercise of self-government appropriate to the gradual attainment of the goal of economic self-sufficiency.

### B. *Taxation Provisions*

The first six sections of Title VI of the 1974 Draft treated the application of United States income, estate and gift taxes to the commonwealth based upon tentative understandings expressed in the Joint Communique of December 19, 1973. Persons residing in the commonwealth and who became citizens or nationals pursuant to Title III<sup>138</sup> or prior to termination of the Trusteeship Agreement would be subject to federal income tax on United States source income, but not on income earned in the commonwealth. Furthermore, they would not be subject to federal gift and estate taxation except with regard to property situated in the United States outside the commonwealth.<sup>139</sup> As drafted, these sections would not have exempted residents of the Marianas who were already citizens and who were expected to receive some protection under section 931 of the Internal Revenue Code (IRC).<sup>140</sup> These sections would preserve the status quo, since United States citizens in the Marianas were then subject to such taxes.

Under the MPSC Draft the commonwealth would have had exclusive authority to enact, amend, or repeal its internal revenue laws.<sup>141</sup> This position seemed similar to that taken in the United States Draft, which provided that the commonwealth was to enact a non-discriminatory, comprehensive internal revenue law which would be progressive and reflect local economic conditions.<sup>142</sup> The MPSC Draft omitted the "non-discriminatory" and "comprehensive" requirements since the imposition of those requirements through the Covenant would infringe the Commonwealth's right to self-government. The United States Delegation then receded from its position and granted the Marianas exclusive tax authority but it proposed that this authority extend for a period of only ten years subject to the limitation that the commonwealth could enact no law imposing any tax upon United States or TTPI property.<sup>143</sup>

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138. See notes 76-92 *supra* and accompanying text.

139. Final Joint Communique, *supra* note 130, at 7.

140. Section 931 provides that United States citizens doing business in the Marianas are not subject to federal income tax on any foreign source income, including income earned in the Marianas, if they derive 80 percent of their gross income from Marianas sources and 50 percent from the active conduct of a trade or business in the Marianas. I.R.C. § 931.

141. MPSC Draft, *supra* note 9, § 605.

142. U.S. Draft, *supra* note 9, § 601.

143. This provision was similar to section 503 of the U.S. Draft, except that it

Sections 607 through 612 of the MPSC Draft dealt with customs and excise taxes applicable to the commonwealth. They essentially reflected the tentative agreement reached on customs duties and excise taxes in the Joint Communique which ultimately became the Covenant provisions.<sup>144</sup>

The parties continued to differ over economic and financial provisions into the final drafting stages. In May 1974, the United States Delegation informally abandoned its agreement to give the Marianas exclusive control over internal taxation, instead proposing that the IRC be made applicable as a local tax ten years after the effective date of the status agreement. By the time of the drafting of the Joint Draft, the Delegation had again changed its position, primarily due to the opposition of Representative Phillip Burton, Chairman of the House Subcommittee on Territorial Affairs to the May 1974 proposal.<sup>145</sup> The Delegation advanced the position that the IRC should apply to the Marianas as it does in Guam, a "mirror image" system.<sup>146</sup>

The representative of the MPSC to the Joint Drafting Committee then put forward a tentative proposal which was based primarily on the Puerto Rican model. Pursuant to this proposal, the IRC would be applicable as a territorial income tax, but the authority to amend, alter, modify or repeal the tax would be reserved to the Legislature of the Northern Mariana Islands. It was argued that such a proposal would satisfy the United States desire to have a fully functioning tax system based on the IRC in effect when the commonwealth government was established.<sup>147</sup> Moreover, the proposal would insure local self-government in the commonwealth by permitting the local legislature to make such modifications of the tax as appropriate; it provided for the IRC to apply as a federal tax. The United States Delegation rejected this proposal, arguing that the Marianas should be treated in the same manner as Guam. The

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expressly provided that the commonwealth's taxing power would be the same as that of a state.

144. See notes 106-10 *supra* and accompanying text.

145. See Memorandum for the Marianas Political Status Commission (Nov. 1974), Joint Drafting Committee Working Status Agreement at 25-26.

146. The U.S. Delegation felt the mirror image system had the following advantages: favorable results in Guam; greater uniformity among the territories; and simplicity. Moreover, only a single tax return would be required.

147. Memorandum for the Marianas Political Status Commission (Nov. 1974) at 26.

MPSC's own advisor indicated that whatever merits there might be to the proposal of the MPSC, if congressional resistance to that proposal continued, acceptance of the "mirror-image" tax system might be prudent. Thus the United States version was eventually adopted.<sup>148</sup>

### III. LAND

The status negotiations concerned two basic land issues: the timing and disengagement of Marianas land from the rest of the Trust Territory, and the extent of United States military rights on Marianas land. Under the Covenant, all real property interests of the TTPI are transferred to the commonwealth government, and all TTPI personal property interests are to be distributed equitably no later than the date of the termination of the Trusteeship Agreement.<sup>149</sup> At that time, the commonwealth government would assure the United States of continued use, on comparable terms, of the real property then actively used for civilian governmental purposes. Furthermore, the Covenant provides that the Isely Field facilities that had been developed with federal aid, and all facilities for aircraft, would continue to be available for use by United States military and naval aircraft without charge, unless such use proved to be substantial.<sup>150</sup> In that event, a share of the operating and maintenance costs could be charged.<sup>151</sup>

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148. Marianas Covenant, *supra* note 8, § 601(a); see Covenant Analysis, *supra* note 18, at 67.

149. Marianas Covenant, *supra* note 8, § 801; see Covenant Analysis, *supra* note 18, at 95-96.

150. Marianas Covenant, *supra* note 8, § 804; see Covenant Analysis, *supra* note 18, at 113-16.

151. Marianas Covenant, *supra* note 8, § 804(b). *Id.* § 802(a) provides for the leasing of land by the United States "to carry out its defense responsibilities. . . ." See generally Covenant Analysis, *supra* note 18, at 96-100. The Covenant's provision specifically sets out the land available for defense purposes: (1) on Tinian Island, approximately 17,799 acres and the waters immediately adjacent thereto; (2) on Saipan Island, approximately 177 acres at Tanapag Harbor; and (3) on Farallon de Medinilla Island, approximately 206 acres [encompassing the entire island] and the waters immediately adjacent thereto. Marianas Covenant, *supra* note 8, § 802(a).

The commonwealth government is to lease this property to the United States for a term of fifty years, with an option for renewal for all or any part of such property for an additional fifty years. Marianas Covenant, *supra* note 8, § 803(a); see Covenant Analysis, *supra* note 18, at 100. In return, the United States agrees to pay \$19,520,600 in full settlement of the lease, including the renewal option, based on the following allocations: (1) for the property on Tinian, \$17.5 million; (2) for the property at Tanapag Harbor, \$2 million; and (3) for Farallon de Medinilla, \$20,600.

A separate agreement, entitled "Technical Agreement Regarding Use of Land to Be Leased by the United States in the Northern Mariana Islands" (Technical Agreement), was executed simultaneously with the Covenant.<sup>152</sup> This agreement temporarily deferred United States utilization of land and established the principles which govern the relations between the United States military and the Marianas civil authorities.<sup>153</sup> The United States agreed to lease back, for the sum of one dollar per acre per year, approximately 6,458 acres on Tinian and approximately 44 acres at Tanapag Harbor on Saipan, to be used for purposes compatible with future military use.<sup>154</sup> The United States further agreed to make available at no cost, 133 acres at Tanapag Harbor for public use as a memorial park to honor the American and Marianas dead of World War II,<sup>155</sup> and as much as possible to preserve land for the local population.<sup>156</sup> Furthermore, in the Technical Agreement, the United States also "affirms" that it has no present need for, nor present intention to acquire, any greater interest in property than that of the long-term lease and option granted to it to carry out "defense responsibilities" in addition to that granted under section 802(a) of the Covenant.<sup>157</sup>

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Marianas Covenant, *supra* note 8, § 803(b); *see* Covenant Analysis, *supra* note 18, at 101-102. The agreed sum was to be adjusted for inflation by the percentage change in the U.S. Department of Commerce composite price index, from the date of signing the Covenant. Marianas Covenant, *supra* note 8, § 803(b).

152. Marianas Covenant, *supra* note 8, § 803(c); *see* Covenant Analysis, *supra* note 18, at 103-109.

153. Marianas Covenant, *supra* note 8, § 803(c); *see* Covenant Analysis, *supra* note 18, at 105-109.

154. Marianas Covenant, *supra* note 8, § 803(d); *see* Covenant Analysis, *supra* note 18, at 109-11.

155. Marianas Covenant, *supra* note 8, § 803(e); *see* Covenant Analysis, *supra* note 18, at 112-13.

156. Marianas Covenant, *supra* note 8, § 803(e); *see* Covenant Analysis, *supra* note 18, at 112-13.

157. Marianas Covenant, *supra* note 8, § 802(b). If the United States should need to acquire any additional interest in real property:

it will follow the policy of seeking to acquire only the minimum area necessary to accomplish the public purpose for which the real property is required, of seeking only the minimum interest in real property necessary to support such public purpose, acquiring title only if the public purpose cannot be accomplished if a lesser interest is obtained, and of seeking first to satisfy its requirement by acquiring an interest in public rather than private real property.

Marianas Covenant, *supra* note 8, § 806(a); *see* Covenant Analysis, *supra* note 18, at 118-22.

In addition, before exercising the power of eminent domain, the United States must comply with the procedural requisites of written notice and must attempt to first acquire any real property by voluntary means.<sup>158</sup> If it is not possible to obtain the interest by voluntary means, the United States then "may exercise within the commonwealth the power of eminent domain to the same extent and in the same manner as it has and can exercise the power of eminent domain in a State of the Union."<sup>159</sup> Furthermore, this power is to be exercised "only to the extent necessary" and in compliance with United States laws.<sup>160</sup> Finally, the Covenant requires the commonwealth government to restrict the alienation of land to persons of Northern Mariana Islands descent during the first twenty-five years of commonwealth.<sup>161</sup> Thereafter the commonwealth may continue regulation as it deems appropriate.<sup>162</sup>

#### A. *Extent of Acquisition*

On May 29, 1973, the United States Delegation presented its position on future land requirements to the MPSC. Minimum United States military land requirements were: indefinite continued use of Farallon de Medinilla, an uninhabitable island of 229 acres used since 1970 for target practice under an agreement with the TTPI; retention of 320 acres in Tanapag Harbor, Saipan, for future contingencies; joint use of Isley Field, Saipan; retention of 500 acres south of Isley Field for possible future development of a maintenance and logistics area; and all of Tinian, the northern two-thirds for a joint services military base, the southern third for civilian use.<sup>163</sup> The MPSC expressed resistance to such sweeping needs. In response, the United States Delegation emphasized the obligations involved in forming the political union, arguing that contribution to

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158. Marianas Covenant, *supra* note 8, § 806(b); *see* Covenant Analysis, *supra* note 18, at 119-20.

159. Marianas Covenant, *supra* note 8, § 806(c); *see* Covenant Analysis, *supra* note 18, at 120-21.

160. Marianas Covenant, *supra* note 8, § 806(c); *see* Covenant Analysis, *supra* note 18, at 120-21.

161. Marianas Covenant, *supra* note 8, § 805(a); *see* Covenant Analysis, *supra* note 18, at 116-17.

162. Marianas Covenant, *supra* note 8, § 805(b); *see* Covenant Analysis, *supra* note 18, at 117.

163. *See* Land Statement of Ambassador Williams (June 3, 1973) *reprinted in* MPSC Report, *supra* note 22, at 67.

the common defense is one of the most fundamental of these obligations.<sup>164</sup>

The MPSC preferred that the United States select one of the more distant Northern Islands, rather than Farallon de Medinilla. Furthermore, the MPSC wanted assurances that safety precautions would be implemented by the United States if the parties later agreed that Farallon de Medinilla could be used for target practice. Tanapag Harbor was potentially significant for the future economic development of Saipan. The MPSC indicated that it might consider leasing some of the area to the United States, provided that it was used immediately for the development of facilities within the civilian community, with possible military use dependent upon future requirements. The MPSC had no objection to the continued joint use of rights of Isley Field but it rejected the request for 500 acres south of, and adjacent to, the field because of its importance for the future economic development of Saipan. The MPSC opposed the lease of the entire island of Tinian to the military, even if there were a provision for a lease-back of one-third of the land for community related civilian use. It was prepared to negotiate a lease only for that portion of the island actually required for military purposes. The MPSC also wanted civilian control over the portion of Tinian not included with the military base.<sup>165</sup>

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164. *Id.* The MPSC believed that the U.S. requests for land on Saipan for military purposes were unreasonable. It noted that these requests were made solely for contingency purposes. They argued that the presentation of these requests at that point in the negotiations reflected a lack of confidence in the future commonwealth's willingness to honor its responsibilities within the political union if a contingency arose.

165. In a Position Paper of May 24, 1974, the MPSC was more forthcoming: agreeing to allow the continued use of Farallon de Medinilla as a target area; agreeing to make available almost all of the approximately 320 acres adjacent to Tanapag Harbor, Saipan, with the remainder to be available on certain conditions, namely, U.S. permission for maximum feasible joint use of all land and facilities developed for military purposes and the creation of a joint U.S.-Marianas venture to develop the "A" Dock for civilian use. Furthermore, the MPSC was willing to make available approximately 500 acres at Isley Field if the U.S. would consider in good faith future reasonable requests for lease-back. The MPSC would consider making available approximately 17,500 acres on Tinian for the proposed joint service military base, provided the U.S. reevaluate its acreage needs in good faith. Finally, the MPSC articulated the link between any concessions in these areas and the level of Phase II financial assistance: "[T]he Commission is not prepared to agree to any public announcement (joint or unilateral) of its decision regarding land requirements until the United States agrees to a satisfactory level of Phase II financial support for the Marianas."

### B. *Form of Acquisition*

Acknowledging the importance which the Marianas people attach to land, the United States Delegation agreed to the principle that all public lands would be returned to the Marianas people and offered to protect the land from attempts at control by outside private interests.<sup>166</sup>

By way of leavening this position, the Delegation suggested that the United States *might*

be willing to commit itself, if at some time in the future a decision was made to close the Tinian base, to make the land available to the people of the Marianas through some kind of covenant within the purchase arrangement. There is some precedent for such a procedure. However, such a qualification would in turn have a marked effect on the initial purchase price which the U.S. was able to pay.<sup>167</sup>

Pursuant to the provisions of the Use and Occupancy Agreements for land used for military purposes within the TTPI, particularly within the Marianas District, the United States need for land was to be reviewed every five years by a representative of the TTPI and a representative of the Navy Department. If such review did not result in agreement concerning the necessity of continued operation of any Use and Occupancy Agreement, the matter was to be presented to the President for final decision.<sup>168</sup>

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Position Paper of Marianas Political Status Commission Regarding U.S. Military Land Requirements in the Marianas 6 (May 24, 1974).

166. The Delegation stated its basic position on the method of acquisition:

The U.S. Government historically purchases, not leases, land when it acquires land for the public good and for uses involving substantial investment over a long period of years. This is as true in the acquisition of land for the building of dams, hospitals, schools, post offices, etc., as it is with military bases. The U.S. Congress is reluctant to commit large sums to projects with only the protection of a lease. The proposals for land acquisition which have been discussed here certainly fall in this category.

Land Statement of Ambassador Williams (June 3, 1973), *reprinted in* MPSC Report, *supra* note 22, at 157.

167. *Id.*

168. *See, e.g.,* Use and Occupancy Agreement for Land in the Trust Territory of the Pacific Islands, Saipan District, 2(B) which provides:

On or about June 30, 1961 and on a similar date each five year period thereafter, the agency of grantee, *i.e.*, the United States having the use and occupancy of said land or the Department of the Navy as the representative thereof, and the grantor, *i.e.*, The Government of the TTPI, Saipan District shall jointly review and determine the need for continuing the use and occupancy granted hereby.

During this period of the negotiations, the United States Delegation claimed that under the Use and Occupancy Agreements, it had obtained permanent use rights in the land, and was therefore not required to pay the fair market value of any portion of military retention land which it wished to use after termination of the Trusteeship.<sup>169</sup> The MPSC contended that such a construction of the Agreements was inconsistent with their terms as well as those of the Trusteeship Agreement itself. The United States claim was eventually dropped. It was subsequently decided that all such agreements would be terminated one hundred eighty days, at the latest, after the approval of the Covenant and the local constitution.<sup>170</sup>

The United States Delegation stressed that, although no immediate development as planned, the requirements for areas like that around Isley Field was "not hypothetical but contingent; that is, it will be needed immediately if we were to move out of some other location or if another location could handle a new requirement."<sup>171</sup> In the Tanapag Harbor area, where the United States currently held 640 acres, the bulk of the current industrial development was in the 320 acres the United States was prepared to release. The Delegation indicated that the United States govern-

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Sections (C) and (D) provide:

(C) *Review by the President.* In the event the review provided for in paragraph (B) does not result in agreement as to the need for continuing grantee's use and occupancy, the matter shall be presented to the President of the United States for final decision.

(D) *Termination of Use and Occupancy.* In the event of a decision pursuant to paragraphs (B) or (C) that a need for the continued use and occupancy of said land does not exist, the estate granted hereby shall terminate thirty days from the date of such decision, and revert to the grantor. During said thirty day period the grantee may if it elects remove any structure or improvements it has heretofore erected or may hereafter erect on the land and if the structures or improvements cannot be removed during said thirty day period, the grantee shall be permitted such additional reasonable time as may be required.

Under § 3, land which the grantee does not actively use is to be made available to the grantor on a license basis for the use and benefit of the people. *See also* Memorandum for the Marianas Political Status Commission Concerning Military Retention of Land in the Northern Mariana Islands 12-13 (Oct. 1974) [hereinafter cited as *Memo on Military Retention of Land*].

169. *Memo on Military Retention of Land*, *supra* note 168, at 1-3.

170. *Marianas Covenant*, *supra* note 8, §§ 804(a), 1003(b); *see* *Covenant Analysis*, *supra* note 18, at 113-15, 132-33.

171. *U.S. Comments on MPSC Responses on Land 2* (May 29, 1974).

ment was willing to consider reducing the size of the area described in its requirements in favor of local industrial development, provided assurances could be given that such development was harbor-oriented. Furthermore, the United States was prepared to continue the practice of allowing harbor-oriented activities to be placed on this land for private commercial purposes.

In the view of the United States Delegation, the only question with regard to Tinian was whether the United States needed all the 18,500 acres it was requesting for its operational base. The Delegation argued that, while the requirements might appear large, they were actually small compared to comparable facilities elsewhere. The decision had been made to combine all operations on Tinian in order to save land elsewhere in the Marianas. On the question of the proposed development of San Jose Harbor, Tinian, and the resultant displacement of civilian activities, the Delegation indicated that joint use of the harbor was acceptable to the United States and compatible with military requirements. Such use could include construction of harbor-oriented facilities and normal commercial operations in port, except when safety required otherwise. It was estimated that ammunition handling, which would limit harbor activity, would occur infrequently in any given year. In practical terms, areas on the island could probably still be used for agricultural and recreational purposes, including the present beach at San Jose Harbor. Warehouses and the necessary equipment for handling and processing civilian cargo could still be built. Historical sites would be left untouched, and the church would remain undisturbed and could be used.

The MPSC was critical of article VII, section 702 of the United States Draft. It considered this section to be vague on the specific interests and extent of land necessary to the United States. The MPSC stated emphatically that it would not agree to the sale of land on Tinian for military purposes although it would agree to a lease.<sup>172</sup> It recognized the United States' preference for outright purchase, but noted that:

the prevailing practice in the United States has little relevance to the Mariana Islands, where land is scarce and has a special cultural significance to the people. Regardless of the guarantees

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172. Response of Marianas Political Status Commission to the United States Position Paper on Land and Military Requirements, *reprinted in* Report of the Marianas Political Status Commission at 112.

which the United States might make, the members of the Commission could not possibly justify or explain to their constituents or families the seemingly *permanent* transfer of so much of the Marianas limited land to the United States for military purposes.<sup>173</sup>

At this point, the United States position wavered. Although the Delegation still refused to accept the notion of periodic payments and continued to insist on a lump-sum payment, it no longer opposed a long-term lease arrangement.<sup>174</sup>

The Joint Draft did not resolve either the question of whether

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173. *Id.* at 113 (emphasis in original).

174. The Delegation suggested the following *quid pro quo*:

Neither the Executive Branch nor the Congress would be willing to consider periodic adjustments. Indeed *the U.S. would be willing to consider a long term lease only if it were spread over 99 years or 50 years with an automatic 50 year renewal at U.S. option and a single lump sum payment covering both the initial period and the renewal option.* Periodic adjustments represent a thoroughly unsatisfactory way of doing business and can only lead to untold future difficulties. . . .

U.S. Comments on MPSC Responses on Land 2 (May 29, 1974) (emphasis added).

Section 902 of the MPSC Draft provided that the commonwealth government, through a Public Land Corporation, would enter into leases with the United States Government for the various areas on the following terms: 1) 50 year term with option for 50 years; 2) reversion for failure of continuous use (5 years); 3) lease payments to be determined by an Ad Hoc Board; reassessing every 5 years; 4) maximum use of land and facilities by civilians; 5) joint community development; 6) relocation of displaced persons; 7) environmental protection; 8) local military procurement whenever possible; 9) joint grievance procedures; and, 10) adjudication of breaches.

The problem of the method of acquisition continued throughout the negotiations until mid-December 1974. On May 27, 1974 the MPSC stated its unequivocal position:

Even if the Members of the Commission were fully persuaded by the U.S. presentation, we could not agree to sell this land to the United States. It is our unanimous view that the status agreement we are now negotiating would *not* be approved by the people if it involved a sale of land to the United States. This is true, we believe, even though there could be a guaranty of reversion in the event the land is no longer needed for military purposes. This is true, we believe, even though the practical difference between a sale and a 50-year lease (with an option to renew for another 50 years) may be difficult for the United States officials to appreciate. For our people, however, this is a very important distinction which the Commission must respect. If this is made clear to Members of Congress, we are confident that they will agree to authorized [*sic*] the proposed military activity in the Marianas even though the land is leased, for there seems to be no significant advantage to a purchase insofar as the security interests of the United States are concerned.

Marianas Political Status Commission, Position Paper of May 27, 1974 at 2 (emphasis in original).

the land would be leased or sold to the United States,<sup>175</sup> or what the terms and conditions of any leases would be.<sup>176</sup> The MPSC favored the inclusion of a detailed statement of the lease terms in the Covenant, while the United States position, substantially that adopted in the Covenant, referred to a "technical agreement" which was to be signed by the parties.<sup>177</sup>

The question of the method of acquisition was finally settled at the fifth session of negotiations in December 1974. At the opening of the session, Edward Pangelinan, the chairman of the MPSC, reaffirmed the MPSC's opposition to the "permanent alienation" of the Marianas' scarce resource.<sup>178</sup> The MPSC once again proposed, and the United States accepted, a fifty year lease with a fifty year option in addition to a lump-sum payment.<sup>179</sup>

### C. Payment

The issue of the appropriate criterion for compensation was never resolved. The MPSC argued that no price for land on Tinian could be considered fair and just unless the valuation was determined after an exploration of all relevant factors, including the future growth potential of the Marianas and the relationship between the relative amounts of developed and undeveloped land. The MPSC suggested relating Marianas land values to those on Guam or Hawaii. The United States Delegation considered this approach unconventional, since it was standard United States practice to determine fair market value *in situ*. It did not believe that valuation would be difficult where an active market for private real estate existed and where current land rates in different localities were a matter of record and easily accessible. Nevertheless, it admitted that the large amount of public or military retention lands had no easily ascertainable market value. Thus the United States proposed negotiating a single lump sum figure for all land involved for its

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175. See Joint Draft, *supra* note 9, § 802.

176. See *id.* § 803.

177. Marianas Covenant, *supra* note 8, § 803(c); see Covenant Analysis, *supra* note 18, at 104.

178. Statement of Edward DLG Pangelinan, Chairman of MPSC (Dec. 5, 1974), reprinted in U.S. Office for Micronesian Status Negotiations, Marianas Political Status Negotiations, Report on 5th Session of Status Negotiations, 9, 19 (Dec. 5-19, 1974).

179. Marianas Covenant, *supra* note 8, § 803(a); see Covenant Analysis, *supra* note 18, at 100-01.

present requirements.<sup>180</sup> It emphasized that such a figure would not be arbitrary, but would be based upon an agreed average price per acre of land in different locations. The MPSC countered by emphasizing what it considered to be the central factor in determining fair market value, namely, "that price at which an owner would sell land to a buyer for whatever use the buyer believes would be most profitable."<sup>181</sup> It argued that the United States had ignored basic factors which determined land market conditions in the Marianas. For example, past and present land uses and land transactions had been determined by TTPI government policies which restricted land development and artificially depressed land prices. Standard land valuation indicators could not, therefore, be relied upon. Furthermore, the MPSC resisted any suggestion that distinctions be made between public and military retention land for purposes of land valuation. The United States Delegation agreed that agricultural land of equivalent quality in any location should be accorded the same value whether it was located on public or military retention land.<sup>182</sup> Nevertheless, it insisted on making a distinction between the two types of land by discounting the value of the military retention land to account for both pre-existing United States payments and early relinquishment of use and occupancy rights.

During the July 1974 meeting of the Joint Land Committee, the United States Delegation agreed to accept either a negotiated figure or an appraisal, as long as certain guidelines were included. The Delegation's view was that if the MPSC proposal for complete appraisal was followed, then a procedure comparable to that used by the Navy for acquiring land should be followed.<sup>183</sup>

Despite the fact that the MPSC commissioned an appraisal by a consultant, the final price was determined not by actual land

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180. See U.S. Delegation, Talking Points for Presentation to MPSC on Land Determination of Fair Market Values (May 24, 1974).

181. Position Paper of Marianas Political Status Commission in Response to U.S. Presentation on Various Land Issues 4 (May 27, 1974).

182. U.S. Comments on MPSC Responses on Land 3 (May 29, 1974).

183. See Summary and Analysis of Initial Three Day Meeting of the Joint Land Committee 3-4 (July 15-17, 1974). A board would be appointed consisting of three other members and an appraiser, with the nomination of a chairman by the pertinent U.S. Commander. The board would develop guidelines under which the contract was to be performed, and identify the optimal use for the land in question based upon current and not speculative use, no more than approximately three years into the future.

value but by negotiation. Thus, in December 1974, in an attempt "to negotiate in the spirit of compromise and to expedite the reaching of . . . agreement,"<sup>184</sup> the MPSC retreated from its proposed estimate of \$34 million to a final figure of approximately \$29 million.<sup>185</sup>

The price to be paid for the lease was reached in the fifth session. Unfortunately, a series of budgetary problems caused the Department of Defense to decide to postpone indefinitely the construction of a base on Tinian. This news leaked during the fifth session. The MPSC had conceded considerable acreage on Tinian with great misgivings and had been told that the military activity there would have advantageous economic spinoffs. It responded in a Position Paper on December 13, 1974, and its tone was not pleasant.<sup>186</sup> In that same Position Paper, the MPSC expressly stated that it agreed to the concessions in reliance on United States representations concerning the economic spinoffs.<sup>187</sup> The United

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184. See Position of Land Values for Lands to be Acquired by the U.S. 5 (Dec. 16, 1974).

185. *Id.*

186. MPSC Position Paper on Land Issues 4 (Dec. 13, 1974):

It should be obvious to the U.S. Delegation that this recent announcement places the members of the Commission in a difficult political position. Time after time during the past eighteen months, we have joined with the U.S. Delegation in public meetings on Tinian and elsewhere concerning your immediate and pressing military requirements for two-thirds of Tinian. Time after time, we have accommodated your changes in plans and tried to explain them to our people. Finally, last spring, after the most difficult deliberation, the Commission tentatively agreed to make two-thirds of Tinian available to meet U.S. military requirements.

187. The MPSC stated:

As the history of these negotiations shows, the Commission was skeptical from the very beginning regarding the economic benefits expected to flow to the people of the Marianas from the planned base on Tinian. We continually emphasized only the resources available to the future Government from non-military sources. We framed our requests for Phase II support without regard to income which might be anticipated through increased economic activity resulting from Tinian base construction and operation or through rebates of Federal income taxes paid by U.S. military and civilian personnel permanently stationed at the Tinian facility. The U.S. Delegation, however, repeatedly criticized our economic analysis for ignoring these additional sources of income. Finally, the Commission deferred to your persistent and persuasive representations concerning the Tinian base and the income which the Marianas Government would certainly derive from it. On this basis, we reached agreement on the level of Phase II support reflected in the draft Covenant. In hindsight, we were mistaken in departing from our original position in reliance on your well-meaning representations.

*Id.*

States was embarrassed and quickly capitulated. The Joint Communique of that fifth session stated that, as a result of the decision not to proceed with construction of the Tinian base and in view of reduced revenues and employment levels, the United States Delegation had agreed to increase the levels of financial assistance for each of the seven years of the initial financial agreement by \$500,000: \$250,000 was to be provided for low-income home construction loans, and \$250,000 for retraining of workers, school curriculum development, and training of civil servants.<sup>188</sup>

#### D. *Eminent Domain Authority*

Considerable difficulties arose on the issue of the United States power of eminent domain. The terms of the MPSC Draft limited the United States to an interest no greater than a long-term lease, subject to reversion upon failure of substantial and frequent use of the land for the purpose for which it was originally acquired. Furthermore, in order to restrict land transfer to persons of Marianas descent, the United States could acquire interests in land only from the commonwealth government or its agent and not from private holders, except for interests of less than one year. In the case of non-military purposes or interests in Tanapag Harbor and Isley Field, approval from the Commonwealth Land Commission or the Commonwealth Legislature was also required. The United States also could not acquire any interest in land for military purposes by means of a judicial order. However, in the event of war or other military action by the United States, and upon a declaration by the President that a particular tract of land was needed, the United States Government would have the authority to exercise the power of eminent domain.<sup>189</sup>

In support of its position, the MPSC argued that its Draft provided a means for satisfying unanticipated land needs while assuring that scarce land resources would be conserved. The MPSC further indicated that except for the limitations on military acquisitions, the safeguards and limitations proposed were similar to those contained in the United States Commonwealth Proposal.<sup>190</sup> The

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188. Final Joint Communique, *supra* note 130, at 40-44.

189. MPSC Draft, *supra* note 9, § 907.

190. MPSC Position Paper on Land Issues 10 (Dec. 16, 1974).

military acquisition provision was considered necessary to guarantee the terms of any military land agreements that might be set forth in the Commonwealth Agreement. The United States Draft, however, contained no such limitations on United States exercise of eminent domain.<sup>191</sup> Rather, it stated that the United States government could acquire land for public purposes under terms and conditions negotiated by the parties.<sup>192</sup> In the event that the United States was unable to acquire property by negotiation, it could as a last resort acquire property under its eminent domain power with compensation for the "current fair market value of the interest acquired, exclusive of any amount or amounts previously paid, gratuitously or otherwise, therefore."<sup>193</sup>

The MPSC opposed these provisions in the United States draft. It believed that if the United States had full power of eminent domain, the provisions with respect to leasing of limited amounts of land could be completely circumvented at any time. The response of the United States Delegation was that the power of eminent domain constituted a necessary attribute of sovereignty and that no legislature could restrain itself, or its successors, from exercising this power if public necessity demanded. It further noted that not only did federal statutes provide adequate protection for private interests, but also, other procedural safeguards could be considered. Moreover, preventing the United States government from exercising eminent domain to obtain title to land would undercut its sovereignty in the commonwealth. The Delegation added that Congress would not view favorably a procedure prohibiting private parties from directly negotiating the sale of their land to the United States government. Finally, the Delegation argued, if the United States could not freely exercise eminent domain to acquire necessary land for military purposes, then the Marianas was not prepared to undertake its appropriate obligations for the defense of the nation of which it was becoming a part.

The MPSC countered the arguments of the United States Delegation by reminding them that their proposal was based largely on the limitations which had been proposed in the United States Commonwealth Proposal and Draft Bill for an Unincorporated Ter-

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191. U.S. Draft, *supra* note 9, art. VII.

192. *Id.*

193. *Id.* § 703(b).

ritory for Micronesia.<sup>194</sup> The MPSC then emphasized what they considered to be a serious flaw in the Delegation's argument—the fact that the Marianas did not have political representation.<sup>195</sup> The MPSC was nevertheless encouraged by the suggestion that additional procedural safeguards against abuse of eminent domain may be possible. With this in mind, the MPSC suggested that the United States incorporate in the status agreement itself a formal statement to the effect that foreseeable United States needs for land for military purposes would be satisfied under the terms of the agreement.

The basic position of the United States Delegation continued to be that the power of eminent domain, as exercised in each state and in all the territories, must be available in the Marianas. As a compromise, the Delegation agreed to a provision requiring prior written notice to the commonwealth government as a prerequisite for taking land, whether it was acquired by voluntary or involuntary means.<sup>196</sup> It further agreed to make formal assurances: to acquire only the minimum amount of land necessary; to acquire only the minimum interest in land necessary; to acquire title only if a lesser interest would not be sufficient; and to acquire public land rather than private land whenever possible. The U.S. Delegation also agreed to include a formal statement in the agreement itself that the United States had no present intention or need to acquire

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194. See Position Paper of Marianas Political Status Commission in Response to U.S. Presentation on Various Land Issues 14-15 (May 27, 1974).

195. The U.S. may very well be asking the Marianas to undertake the same obligations with respect to eminent domain as the States and Territories, but *without* the same practical safeguards. One of the most important practical safeguards against the unwarranted and unnecessary exercise of the eminent domain power in the States, is the influence which the Senators and Congressmen can bring to bear on the executive branch—by the introduction of legislation, for example—to prevent a taking which a community opposes. Those three territories which have non-voting delegates have a similar, though not identical, recourse. The Commonwealth, however, may be in a different position, for the precise status of our potential non-voting delegate is not clear. We note that the draft covenant is wholly silent on this issue notwithstanding the June 1973 Joint communique's statement that "The United States delegation has agreed to support a request by the Marianas for its own non-voting delegate in Congress."

*Id.* at 15 (emphasis in original).

196. Marianas Covenant, *supra* note 8, § 806; see Covenant Analysis, *supra* note 18, at 118-20.

any additional property or any greater interest in property than that which is granted in the agreement.<sup>197</sup>

### E. *Land Alienation Restrictions*

Both the United States Delegation and the MPSC accepted the contention that restrictions on alienation based on native heritage were constitutionally justifiable. A dispute arose, however, over United States insistence that the status agreement *require* the commonwealth to impose such restrictions.<sup>198</sup> The strong federal interest in these restrictions was the result of United States involvement in the economic well being of the Marianas, whose economic strength was below that of the rest of the country. The Delegation argued that the interests of the United States required it to insure that the "original inhabitants retained their land holdings" so as not to become "the landless pawns of outside investors."<sup>199</sup>

In its Position Paper of May 27, 1974, the MPSC questioned the wisdom of making the imposition of land alienation restrictions mandatory in the status agreement itself. In the view of the MPSC, the issue was, in part, one involving the principle of self-government. Restraints on land alienation, the MPSC maintained, could not succeed unless the people involved understood and agreed to them. The MPSC considered it advisable to leave the option of land alienation restrictions to the people, as was done in the 1974 Draft. Furthermore, the MPSC was uncertain both as to how the United States intended to enforce the obligation to be imposed and whether the provision would be subject to mutual consent. Finally, the MPSC did not entirely accept the delegation's

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197. Joint Draft, *supra* note 9, § 806.

198. The U.S. Delegation stressed that:

The need to protect the land holdings of the original population of an area thus is sufficiently strong to override the generally applicable constitutional requirements of equal protection and due process. This is indicative of the extraordinary importance of this need. This circumstance also indicates that this is not a matter solely of local interest, the enactment of which is within the discretion of the Northern Marianas. There is also a strong federal interest in legislation which will prevent the same thing that happened in Hawaii from taking place in the Northern Marianas. Our draft covenant therefore provides that the Northern Marianas *will*—not may—enact legislation to that effect.

U.S. Delegation, Talking Points on Land Alienation 3 (May 25, 1974) (emphasis in original).

199. *Id.*

assertion that there was a "strong federal interest" in restraints on land alienation.<sup>200</sup>

The Joint Draft, dealing with land alienation, reflected two disagreements: the first was whether the Marianas should be empowered or required to regulate the alienation of real property; and the second was whether the status agreement should require the Marianas to "regulate the extent to which land now classified as public land can be held by individuals."<sup>201</sup> Congress feared that if no such restrictions were imposed, the Marianas people might sell off their land and then turn to the federal government for continued financial assistance.

Although the MPSC did not dispute the appropriateness of land alienation restrictions, it considered the issue to be the consistency of requiring, in the status agreement, that such restrictions be imposed indefinitely with the principle of local self-government. The MPSC took the position that the decision to impose alienation restrictions should be made by the local government. The compromise reached provided for alienation restrictions for a certain number of years, after which time the people will be free to make their own decisions on the matter.<sup>202</sup>

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200. Still, the Delegation remained firm:

The United States has at present no particular ideas about the method of enforcing this obligation. We had assumed that the Commonwealth would faithfully carry out the commitments undertaken by it in the Status Agreement. We did not anticipate the need to pass federal legislation in this field. On the other hand, failure to carry out that obligation may be deemed to constitute a refusal of the Commonwealth to contribute its fair share to its own development and may be taken into consideration in determining the amount of U.S. assistance after the expiration of the first seven-year period. This would be particularly true if as the result of the failure to enact or to enforce such limitation on land alienation a large portion of the population of the Northern Marianas had lost its land, and the average citizen of the Commonwealth consequently failed to benefit from the U.S. assistance while those aliens who acquired the land absorbed the benefits of U.S. assistance.

We are somewhat puzzled by the suggestion that our proposal involved an issue of self-government and that any provision of the status agreement which is not popular risks being evaded or sabotaged. The status agreement will necessarily contain some unpopular undertakings by the Commonwealth. But we assume their endorsement by the people in a plebiscite would constitute their affirmative vote in favor of such restrictive legislation.

Comments on MPSC Responses on Land 10-11 (May 29, 1974).

201. Joint Draft, *supra* note 9, § 805.

202. Marianas Covenant, *supra* note 8, § 805(b); *see* Covenant Analysis, *supra* note 18, at 116-17.

#### IV. TRANSITION TO COMMONWEALTH

The Covenant detailed the process by which the Marianas would approve it. First, the Covenant would be submitted to the Mariana Islands District Legislature, and then to the people of the Northern Mariana Islands for approval. Popular approval of the Covenant required a majority vote of at least fifty-five percent in a plebiscite administered by the United States as administering authority under the Trusteeship.<sup>203</sup> United States agreement to the Covenant was to be secured "in accordance with its constitutional processes,"<sup>204</sup> such approval was given through a joint resolution of Congress approved by the president.

Upon approval of the Covenant, the President would issue a proclamation announcing the termination date for the Trusteeship Agreement and the establishment of the commonwealth.<sup>205</sup> Such a determination by the President was to be final, and not subject to review by any authority of the TTPI, the Northern Mariana Islands, or of the United States.<sup>206</sup> The parties envisioned the implementation of the provisions of the Covenant in three stages: *i.e.*, upon approval of the Covenant,<sup>207</sup> upon a date within six months

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203. Marianas Covenant, *supra* note 8, § 1001(a); *See* Covenant Analysis, *supra* note 18, at 127-28.

204. Marianas Covenant, *supra* note 8, § 1001(b); *see* Covenant Analysis, *supra* note 18, at 128-29.

205. Marianas Covenant, *supra* note 8, § 1002; *see* Covenant Analysis, *supra* note 18, at 130.

206. Marianas Covenant, *supra* note 8, § 1002; *see* Covenant Analysis, *supra* note 18, at 130. It is questionable whether such an agreement is enforceable, precluding a judicial determination in case of unreasonable government action.

207. Upon approval of the Covenant those sections which establish federal government authority and the skeleton of Northern Marianas government authority, and which separate the Northern Marianas from the rest of the Trust Territory come into effect: (1) the "mutual consent" limitation upon federal legislative authority in the Marianas in matters affecting fundamental provisions of the Covenant (§ 105); (2) the authorization for formulation and approval of the Constitution for the Northern Mariana Islands (§§ 201-203); (3) the inapplicability of United States laws presently inapplicable to the TTPI, unless Congress specifically acts to the contrary (§ 503); (4) the Commission on Federal Laws to study and make recommendations on the applicability of federal laws to the Marianas (§ 504); (5) the establishment of a Marianas Social Security fund separate from the Trust Territory fund (§ 606); (6) the transfer of title of TTPI property within the Marianas to the government of the Northern Marianas (§ 801); (7) the determination of cases and controversies arising under the Covenant by the United States courts (§ 903); (8) and the provisions for approval of the Covenant, effective dates and definition of terms (Art. X).

of the approval of the Covenant and new local constitution,<sup>208</sup> and upon the termination of the Trusteeship Agreement.<sup>209</sup>

A major focus of the negotiations concerned the timing of the establishment of the commonwealth. The MPSC Draft provided that the Mariana Islands District of the TTPI would become a self-governing commonwealth upon the effective date of the agreement but that implementation of the commonwealth status would not take place until the Trusteeship Agreement was terminated.<sup>210</sup> The

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208. Provisions necessary for the exercise of self-government consistent with the probable continuation of separate administration of the Trusteeship are implemented at this time: (1) the guarantee that the U.S./Commonwealth political relationship will be governed by the Covenant, and that the right of local self-government will be upheld (§§ 102 and 103); (2) the oath to support the Covenant, U.S. Constitution, applicable treaties and laws, and Marianas Constitution to be taken by Commonwealth officers and employees (§ 204); (3) the guarantee of privileges and immunities of citizens of the several States to the Marianas citizens (§ 304); (4) the establishment of Marianas judicial authority (Art. IV); (5) the applicability of the U.S. Constitution and federal laws, and the continuance of TTPI and Marianas District and local laws presently applicable in the Marianas (§§ 501, 502, and 505); (6) authorizing with limitations similar to other territories local financing and taxation (§§ 601-605, 607); (7) provision of U.S. financial assistance (Art. VII); (8) the leasing of land by the U.S. on Tinian, Saipan, and Farallon de Medinilla (§§ 802-805); and (9) the limited powers of the Marianas Resident Representative and the requirement of consultation between the federal government and the Commonwealth (§§ 901-902). Marianas Covenant, *supra* note 8, § 1003(b); *see* Covenant Analysis, *supra* note 18, at 132-33.

This date is also the effective date of the Marianas Constitution. Section 1004(b) of the Covenant contains the proviso that if the President finds that the effectiveness of any provision of the Marianas Constitution prior to termination of the Trusteeship Agreement would be inconsistent with it, the provision could be declared ineffective until termination of the Trusteeship Agreement. No such declaration was made. Marianas Covenant, *supra* note 8, § 1002; *see* Covenant Analysis, *supra* note 18, at 130.

209. Provisions reaffirming the United States' power over foreign affairs and defense and the establishment of the Commonwealth are activated: (1) establishment of the Commonwealth (§ 101); (2) U.S. authority over foreign affairs and defense including power to acquire land in future (§§ 104 & 904); and (3) U.S. citizenship and nationality of the Marianas people (§§ 301-303). Furthermore, those sections of the Immigration and Nationality Act, that would relate to §§ 301-303 of the Covenant, would be applicable to the Marianas. Marianas Covenant, *supra* note 8, § 506; *see* Covenant Analysis, *supra* note 18, at 62.

210. MPSC Draft, *supra* note 9, § 202: "The Marianas Islands District shall become a self-governing commonwealth, to be known as 'The Commonwealth of the Mariana Islands.'" *See also id.* § 1203, which provided that "within 30 days of the Presidential certification that the Constitution of the Commonwealth of the Mariana Islands, as approved by the people, is consistent with the Commonwealth Agreement, the President of the United States shall issue a proclamation announcing that the Commonwealth of the Mariana Islands shall be established 180 days after the date of the proclamation."

MPSC was obviously concerned that parallel negotiations taking place with the other districts in the Trust Territory might delay the termination of the Trusteeship Agreement. In light of this concern, the MPSC maintained that the Trusteeship Agreement was not a bar to the establishment of self-government for the Marianas and that implementation of self-government would be entirely consistent with the duties of the United States under the Trusteeship Agreement. Nevertheless, the MPSC Draft provided that the political union would not be affected, and United States sovereignty would not be extended,<sup>211</sup> until termination of the Trusteeship Agreement because the exercise of sovereignty by the administering authority would not be consistent with its obligations under the applicable trusteeship agreement.

After the required two thirds vote of the MPSC<sup>212</sup> on February 20, 1975, the Marianas District Legislature approved the Covenant unanimously<sup>213</sup> and eight days later formally requested the United States government to set a date for a plebiscite on the Covenant. The approval of the Covenant by the Commission was achieved as a result of certain last minute changes in the Reserved Draft.<sup>214</sup>

Secretary of the Interior H. Rogers Morton issued Order No. 2973 on April 11, 1975, setting June 17, 1975 as the date for the plebiscite.<sup>215</sup> On June 22, 1975, the plebiscite commissioner re-

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211. *Id.* § 203 stated: "Upon termination of the Trusteeship Agreement, the Commonwealth of the Mariana Islands shall achieve political union with the United States and the United States shall have sovereignty in the Commonwealth in accordance with the terms of the Commonwealth Agreement."

212. 13 ayes, one abstention and one nay.

213. Res. 76-1975, Fourth Mariana Islands District Legislature, 5th Sess. (Feb. 20, 1975), reprinted in *Hearing Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 609-10 (1975).

214. *E.g.*, the Marianas must be specifically named if territorial clause powers were used, the Constitution would be deemed approved if there has been no action six months after submission to the President, and U.S. assistance under the Covenant would be used as local revenue matching funds. Res. No. 126-1975, Fourth Mariana Islands District Legislature, 5th Sess. (Feb. 28, 1975).

A further change, at the insistence of the chartered municipalities of Rota and Tinian, provided for equal representation in one house of the Marianas bicameral legislature from the three leading Mariana Islands. See *Hearing Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 93 (1975) (statement of Ambassador Haydn Williams) [hereinafter cited as Williams Statement].

215. See *Hearing Before the Subcomm. on Territorial and Insular Affairs of*

ported officially to the Secretary of the Interior that of the 5,005 qualified and registered voters, 95% of the total, who cast ballots, 3,945, 78.8%, voted in favor of the Covenant and 1,060 voted against.<sup>216</sup>

On July 1, 1975, President Ford transmitted the Covenant to Congress.<sup>217</sup> The Presidential message transmitting the Covenant has suggested approval in the form of a Joint Resolution, containing only introductory language followed by the text of the Covenant.<sup>218</sup> The major concern during the hearings in the House of Representatives were the apportionment of the local legislature,<sup>219</sup> war claims,<sup>220</sup> immigration restrictions, political representation and

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*the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 409-10 (1975). The secretarial order set forth the procedure for the plebiscite and provided for a plebiscite commissioner to supervise the plebiscite, a political education program and permitted visitation by United Nations observers. *Id.* See also *Marianas Plebiscite*, N.Y. Times, Aug. 25, 1975, at 25, col 5.

216. Plebiscite Report, *supra* note 7, at 34. See also *Hearing Before the Subcommittee on Interior and Insular Affairs of the House Committee on Territorial and Insular Affairs*, 94th Cong., 1st Sess. 410 (1975). For a more detailed account of the policies and methods used in encouraging voters, see letter from Erwin D. Canham to the President (June 19, 1975), reprinted in S. REP. NO. 433, 94th Cong., 1st Sess. 413-14 (1975).

217. See H.R. DOC. NO. 207, 94th Cong., 1st Sess. (1975), reprinted in S. REP. NO. 433, 94th Cong., 1st Sess. 100 (1975).

218. *Id.*

219. The provisions of the Covenant, see note 49 *supra* and accompanying text, which stated that each of the chartered municipalities, *i.e.*, Saipan, Rota and Tinian, would have equal representation in one house of the bicameral legislature received considerable attention in the hearing on April 14, 1975. See Williams Statement, *supra* note 213, at 93-94. Significantly, Representative Benitez, the Resident Commissioner of Puerto Rico, saw that the peculiar geography of the Northern Marianas justified this proposed arrangement. *Id.* at 124.

220. The House of Representatives changed the Administration's version of the Joint Resolution to provide for full payment of war claims. *Id.* at 125. Mr. Emmett Rice, Acting Director of the Office of Territorial Affairs indicated that the War Claims Commission was then paying sixteen cents on the dollar for each claim, and that, in all likelihood, less than forty percent of the value of the claims would ultimately be paid. It was estimated that total World War II claims would amount to \$33,000,000. The fund for payment was somewhat in excess of \$10,000,000 due to changed exchange rates, but the fund appeared to be \$22,000,000 short of full payment. Initial payments under the Micronesian Claims Act had been up to \$1,000 on any death claims and 16% of remaining claims. The Commission also estimated that total post-war awards would approximate \$30,000,000. The Micronesian Claims Act authorized an appropriation of \$20,000,000 for payment of these claims, so that full payment would require a further authorization of approximately \$10,000,000. FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, ANNUAL REPORT TO THE CONGRESS FOR 1975, at 76-78 (1975). Moreover, total awards issued would

land issues.<sup>221</sup> After a single day of hearings, and a favorable report by the House Interior and Insular Affairs Committee,<sup>222</sup> H.J. Res. 549 passed by a voice vote on July 21, 1975.<sup>223</sup> The Senate's consideration of H.J. Res. 549, and the Senate version, S.J. Res. 107, which did not include the provisions of Sections 2 and 3 of the House resolution was considerably longer than that of the House.<sup>224</sup>

The Senate Committee on Interior & Insular Affairs ordered without dissent H.J. Res. 549, amended to conform to the Senate version, reported on October 3, 1975.<sup>225</sup> Subsequently, H.J. Res.

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be a bare minimum approximation of wartime losses since the Commission used values from the 1942-45 period in assessing losses and added no interest in computing its awards. Such treatment compares unfavorably with the treatment afforded Guam, where the Commission paid 100% of the losses within five years of the end of the Second World War. *Id.*

221. Herman Guerrero, Congressman from the Marianas District to the Congress of Micronesia, expressed some concern on the effectiveness of the control of immigration into the Marianas under the covenant. Williams statement, *supra* note 213, at 130. The House hearings also affirmed the U.S. Delegation's earlier resistance to MPSC proposals for representation in the Congress. *Id.* at 110-11. The Congress also voiced its preference for mandatory land alienation restrictions. *Id.*

222. H.R. REP. NO. 364, 94th Cong., 1st Sess. (1975).

223. 121 CONG. REC. 23662, 23677 (1975).

224. *Hearing Before the Senate Comm. On Interior and Insular Affairs*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Senate Hearing*]. Sen. Johnston questioned the impact of the "mutual consent" provision on the traditional territorial powers of the Congress. *Id.* at 213. In response, Ambassador Williams noted that neither § 103 nor § 105 were designed to prevent Congress from legislating on matters of local government. *Id.* The Senate questioned even more fundamentally the desirability of the new acquisition regardless of the nature of the agreement. Sen. Hart supported by Donald McHenry, questioned whether there were significant political and economic advantages in establishing military facilities in the Marianas over foreign-based facilities. *Id.* at 336-340. The Administration responded by citing the strategic proximity of the Marianas to shipping lanes used for Mideast crude oil shipments to Japan. Sen. Pell of the Foreign Relations Committee expressed strong opposition to the Covenant on the basis of the mandate under the Trusteeship to lead the people of the TTPI to self-government, *i.e.*, independence. *Id.* at 235.

On the other hand, Mr. Edward Pangelinan, chairman of the MPSC, stressed the importance of the provisions of the House version concerning the Micronesian Claims Act and the extension of federal programs. *Id.* at 273-274. These sections had not been included in the Senate version, and the exchange between Mr. Pangelinan and Sen. Johnston indicated with clarity the contending positions. *Id.*

225. S. REP. NO. 433, 94th Cong., 1st Sess. 15 (1975). Significantly, on the question of the character of the relationship to be created by the Covenant, the Committee's Report stated:

Although described as a commonwealth, the relationship is territorial in nature with full sovereignty vested in the United States, and plenary legisla-

549 was referred jointly to the Senate Armed Services and Foreign Relations Committees.<sup>226</sup> At the end of the debate in the Foreign Relations Committee, Senator Jacob Javits asked that a sense of

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tive authority vested in the United States Congress. The authority of the latter is limited in a few areas through US federal restraint, i.e., by approval of the Covenant, the US government will agree not to exercise its authority in certain areas. The essential difference between the covenant and the usual territorial relationship (e.g. that with Guam) is the provision in the Covenant that the Marianas constitution and governmental structure will be a product of a Marianas constitutional convention, which follows the pattern of Puerto Rico, and not an organic act of the US Congress. Of particular significance, the Marianas commonwealth relationship, unlike the governmental structure of Guam or the Virgin Islands cannot be amended or terminated unilaterally by the US Congress. The Marianas commonwealth relationship will be significantly closer to the Guam territorial relationship than to the Puerto Rican commonwealth arrangement. The Marianas constitution must be consistent with applicable provisions of the US Constitution, and with US treaties and laws applicable to the Marianas.

*Id.* at 15 (Footnote omitted).

226. The Foreign Relations Committee held hearings on November 5. *See*, S. REP. NO. 596, 94th Cong., 2d Sess. 7 (1976). Administration spokesmen emphasized that approval would fulfill United States international obligations under the Trusteeship; and that it would strengthen United States national security in the Western Pacific. *Id.* at 8. A delegation, led by Bethwell Henry, Speaker of the House of Representatives of the Congress of Micronesia, did not oppose, in principle, the desire of the Marianas to separate from Micronesia. *Id.* at 9. It argued, however, that separation should preserve the ability of the other districts to exercise their right of self-determination. *Id.* Furthermore, in its view, the resolution left unsettled several major problems implicit in the separation of the Mariana Islands from the Trust Territory, such as the status of the present TTPI capital, Marianas taxing and regulatory authority over the personnel or property of the TTPI government until the relocation of the capital, and the financial provisions of the two separate governments and their competing spheres of governmental authority and administration. *Id.* There was also a discussion analyzing the costs and benefits of the Covenant in which Sen. Hart categorized the Covenant as "an open-ended seven-year authorization bill which [did] not even allow for congressional oversight or for the return of unspent monies to the Treasury." *Id.*

The Foreign Relations Committee was concerned with the separation of the Marianas from the rest of the Trust Territory. On November 20, 1975, the Committee considered two amendments introduced by Senators Pell and Percy. The Pell Amendment was intended to declare the sense of the Congress that the obligation of the United States to promote the development of the peoples of the TTPI towards self-government or independence could best be accomplished by the submission of an agreement or agreements resolving the political status of all of the TTPI to the Congress, for its consideration. *Id.* at 11. The Percy Amendment would have approved the Covenant, but postponed implementation until agreements covering the entire TTPI were presented for congressional consideration. *Id.* *See also Group in Senate Opposes Ford on Commonwealth in Marianas*, N.Y. Times, Dec. 9, 1975, at 10, col. 4.

Congress resolution be added to the end of the H.J. Res. 549.<sup>227</sup> On January 20, 1976, the Committee by a seven to four vote, recommended that the Senate adopt H.J. Res. 549 as amended.<sup>228</sup>

The General Legislation Subcommittee of the Armed Services Committee held open hearings on November 17, 1975, to deliberate on H.J. Res. 549.<sup>229</sup> On January 20, 1976, the Subcommittee voted by five to two with one abstention, to report favorably an amendment proposed by Senator Harry F. Byrd, Jr., disapproving the Covenant.<sup>230</sup> On January 27, 1976, the full committee met in open session and, by a margin of nine to six, voted to report H.J. Res. 549 favorably without further amendment.<sup>231</sup> When the resolution reached the House of Representatives, Representative Phillip Burton then requested unanimous consent<sup>232</sup> for concurrence with the Senate amendment.<sup>233</sup> There was no objection to Mr. Burton's request.<sup>234</sup> And on March 24, 1976, President Gerald

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227. It is the sense of the Congress that pursuant to section 902 of the foregoing Covenant, and in any case within 10 years from the date of the enactment of this resolution, the President of the United States should request on behalf of the United States the designation of special representatives to meet and to consider in good faith such issues affecting the relationship between the Northern Mariana Islands and the United States as may be designated by either Government and to make a report and recommendations with respect thereto.

S. REP. NO. 596, 94th Cong., 2d Sess. 14 (1976).

228. *Id.*

229. *Id.* at 177.

230. The substituted amendment read: That the Congress hereby recognizes and sympathizes with the desires of the people of the Northern Mariana Islands to have and exercise the right of self-determination. The Congress also recognizes its obligation to promote the development of the peoples of the entire Trust Territory of the Pacific Islands toward self-government or independence and believes that such obligation can best be accomplished by a consideration of a plan or agreement resolving the political status of all of the Trust Territory of the Pacific Islands rather than by consideration of plans for agreements for one or more islands or groups of islands on a separate and individual basis.

*Id.* at 15. This was similar to the amendment proposed by Senator Pell. See note 226 *supra*.

231. *Id.*

232. 122 CONG. REC. 6105, 6147 (1976). The Congressman explained: "the Senate felt that the two add-on sections in this period of budgetary constraint were not well advised. Although I personally disagree with that position, I am reluctantly accepting it and therefore, am urging my colleagues to yield to the Senate in those two respects." *Id.* at 6147.

233. See note 230 *supra* and accompanying text.

234. 122 CONG. REC. 6105, 6149 (1976).

Ford signed H.J. Res. 549 Approving a Covenant Establishing Commonwealth Status for the Islands.<sup>235</sup>

### CONCLUSION

The Marianas Covenant negotiations are significant because of their approach to the problems of the Northern Marianas as well as their result. The basic bargaining positions were clear, as were the disparate power positions.

The United States conducted the negotiations in an adversary manner rather than in one required by the Trust relationship.<sup>236</sup> This approach was unfortunate and it accounted, in part, for the difficulty in resolving the negotiations with the remaining districts of the Trust Territory.<sup>237</sup>

The result of the negotiations, though, was even more important. The Covenant clearly articulates the need for Northern Marianas approval prior to federal action. This was the first time in the history of United States territorial affairs that the federal government agreed to an unambiguous limitation on its power. The open question at this point, is whether this will affect the rest of the Trust Territory, or the Commonwealth of Puerto Rico for that matter.

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235. 12 WEEKLY COMP. OF PRES. DOC. NO. 13,482 (1976).

236. See generally Comment, *International Law and Dependent Territories: The Case of Micronesia*, 50 TEMPLE L.Q. 58 (1976). "Once an area has been recognized as a dependent territory, it is accorded a special place in the international community. The relationship between the administering nation and the dependent territory is recognized as a fiduciary one, and the interests of the inhabitants of the territory become paramount." *Id.* at 60.

237. On Oct. 31, 1980 the Marshall Islands and the Federated States of Micronesia initialed accords with the United States concerning their political status. On Nov. 19, 1980 the Palau Islands signed a similar agreement which will make them independent except in military affairs, which will remain under the control of the United States. See N.Y. Times, Nov. 20, 1980, at A10, col. 1.

