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MEMORANDUM TO MR. COPAKEN

Legal Aspects of a Proposal to Amend the Compact of Free Association

I. Introduction

1. The Committee on Energy and Natural Resources of the United States Senate recently held preliminary hearings on the Compact of Free Association, which was initialled by the Governments of the Marshall Islands and the United States on January 14, 1980.

It is our understanding that at those hearings, the Chairman of the Committee, Senator Henry M. Jackson, and Senators J. Bennett Johnston and James A. McClure expressed their concern that, pursuant to section 354 of the Compact, the right of denial established by section 311(b)(2) would terminate on the 15th anniversary of the effective date of the Compact (or at the end of the extension provided for by section 231), unless prolonged by mutual agreement.

2. In subsequent conversations with Mr. James Bierne, the Committee's Legal Counsel, it was suggested that the concerns raised by Senators Jackson, Johnston and McClure, as well as certain preexisting concerns of the Government of the Marshall Islands, might be solved by means of an amendment to the Compact, embodying the following Four Points:

Point One: The Government of the Marshall Islands would undertake the obligation not to permit or tolerate that its territory, territorial waters or airspace be used or be made available for use by any third country for military purposes, without the express consent of the Government of the United States.

Point Two: The Government of the United States would undertake to guarantee the territorial integrity of the Marshall Islands, and guarantee that the territory, territorial waters or airspace of the Marshall Islands shall not be used by third countries, for military purposes, without the express consent of the Government of the Marshall Islands.

Point Three: The contemplated authorization of specified levels of economic assistance set forth in sections 211(a)(2), 213 and 217 of the initialled Compact of Free Association, dated January 14, 1980, will be backed up by explicit statutory language committing the full faith and credit of the Government of the United States, including the full panoply of rights to the judicial enforcement thereof.

Point Four: The explicit penalty for altering the political status from free association to independence would be eliminated from the initialled Compact of Free Association, by substituting the number "100" for the number "50" in section 453(b) so that levels of economic assistance specified in the initialled Compact would continue without diminution in the event the Marshall Islands should exercise its right of unilateral termination of the political status of free association and choose a political status of independence. Federal programs would not continue under such an eventuality.

It was understood that the obligations contained in Points One and Two should have no time limitation.

3. The present memorandum contains a preliminary discussion of the validity and legal effects of Points One and Two under international law (infra, Section II) and a proposal

for the implementation of those two Points through an amendment to the Compact (infra, Section III). The implementation proposals, as well as the Four Points in general, must still be submitted for the consideration of the Marshall Islands Government.

II. The Validity and Legal Effects of Points One and Two Under International Law

1. There is nothing in international law which would prevent the Governments of the Marshall Islands and the United States from undertaking the obligations set forth in Points One and Two. In other words, if Points One and Two are embodied in certain provisions of the Compact, there is no norm of international law which would render such provisions invalid solely by reason of their content. Indeed, treaties containing obligations similar to those envisioned in Points One and Two are common in international relations.[1/] For example, the Agreement Between the U.S.S.R. and Finland Concerning the Aaland Islands, signed at Moscow on October 11,

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1/ Treaty provisions analogous to Point One are those which provide for the demilitarization of a certain territory, or prohibit the building of fortifications. See, e.g., Article 42 of the Treaty of Versailles, done on June 28, 1919, U.S. Treaty, vol. III, p. 3351; Agreement Between the U.S.S.R. and Finland Concerning the Aaland Islands, signed at Moscow on October 11, 1940, Article 1, 67 U.N.T.S., No. 872, pp. 140-151. Treaty provisions similar to Point Two can be found in treaties of alliance. See, e.g., Convention Between the United States and Panama, done on November 18, 1903 33 Stat. 2234 (1903-1905), T.S. No. 431.

1940, and currently in force since 1948, provides in its Article 1:

> Finland undertakes to demilitarize the Aaland Islands, not to fortify them and not to make them available to the armed forces of any other State.
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> This provision shall be deemed to mean that neither Finland nor any other Power shall establish or maintain in the Aaland Islands region any military or naval establishment or operational base, any establishment or operational base for military aviation, or any other installation which might be used for military purposes. The existing gun-platforms shall be demolished.2/

The proposals embodied in Points One and Two are fully consistent with the United Nations Charter. The Charter not only prohibits the threat or use of force against the territorial integrity or political independence of any State (Art. 2(4)); it expressly recognizes the inherent right of individual or collective self-defense (Art. 51).

2. Given that the provisions implementing Points One and Two would be valid under international law, it remains to determine their legal effects. Of course, the legal regime created by those implementing provisions would be, primarily, that which they themselves establish.3/ The question is,

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2/ 67 U.N.T.S., No. 872, p. 146. This agreement came into force again as from March 13, 1948, pursuant to a notification given to Finland by the Soviet Union in accordance with Article 12 of the Treaty of Peace with Finland. Whiteman, Digest of International Law, vol. II, p. 1206.

3/ See Article 26 (pacta sunt servanda) of the Vienna Convention on The Law of Treaties, adopted on May 29, 1969, entered

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however, whether there is a body of rules of customary international law, which would attach the desired legal consequences to the implementing provisions, making specification unnecessary.

In our opinion, the legal relationship envisaged in Point One would be an international servitude. An international servitude is a permanent legal relationship whereby a State is entitled to exercise rights within part or the whole of the territory of another State, for a special purpose or interest relating to the territory in question, or whereby a State is obligated towards another State not to exercise certain of its rights within part or the whole of its territory, for a special purpose or interest relating to this territory.4/ A servitude is a ius in rem, of indeterminate duration, which is unaffected by changes of sovereignty in either State. The servitude contemplated in Point One is a paradygmatic case of a servitude in non faciendo, also called a negative servitude. The

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into force on January 27, 1980. U.N. Conference on the Law of Treaties Official Records, Documents of the Conference (U.N. Doc. A/CONF. 39/27), p. 289. The United States is not a party to the Convention, but the principle of Article 26 is also part of customary international law.

4/ This is a slightly simplified version of the definition proposed by F. A. Vali, Servitudes of International Law, 2d edition (New York: Praeger, 1958), p. 309. For other definitions of international servitude, see Whiteman, op. cit., supra n. 2, vol. II, pp. 1173-1224.

history of treaty-making offers numerous examples of negative undertakings of this type.[5]

State practice clearly supports the existence of international rights *in rem* of the type just described.[6] This practice indicates, however, that in order to create such rights, the parties must do so expressly, by a clear expression of intent.[7] One way of expressing such intent is to indicate that a right *in rem* is being created, destined to survive changes of sovereignty over the territories in question.[8] As to the permanent character of the legal relationship to be created by implementation of Points One and Two, it would be enough to exclude it from the termination provisions of the

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5/ In addition to the Moscow Agreement between the U.S.S.R. and Finland, already cited, see, e.g., Treaty of Stettin of 1570, Rydberg, Sveriges Traktater, vol. IV, p. 391 (using the word "servitude"); Article III of the Treaty for delimitation of the frontier between the Sudan and Ethiopia, signed at Addis Adaba on May 14, 1902, Martens, N.R.G., 3rd Series, vol. 2, pp. 826-827; Treaty of Versailles, supra n.1, Articles 42 and 358; Article 12 of the Treaty of Lausanne of July 24, 1923, quoted in Whiteman, op. cit., vol. II, supra n.2, p. 1206; Article 7 of the Conciliation Treaty between the Holy See and Italy, of February 11, 1929, ibid., p. 1201; Peace Treaty with Italy of February 10, 1947, Articles 9 and Annex III, 49 U.N.T.S. 3.

6/ Vali, op. cit., supra n.4; D. P. O'Connell, "A Reconsideration of the Doctrine of International Servitude", in Canadian Bar Review, vol. 30, pp. 807-818 (1952); Helen D. Reid, International Servitudes in Law and Practice (1932), and bibliography there cited.

7/ See H. Lauterpacht, Private Law Sources and Analogies of International Law (repr. ed. 1970), pp. 122-123; Oppenheim-Lauterpacht, International Law (7th ed.), vol. I, p. 537; North Atlantic Coast Fisheries Arbitration (1910).

8/ Lauterpacht, Analogies, cit. supra n.7, p. 123.

Compact. Under international law, a treaty which does not provide for its termination, or for denunciation or withdrawal, is presumed not to be subject to denunciation or withdrawal.9/

4. Point Two refers to the obligation to guarantee the territorial integrity of the Marshall Islands and to guarantee against the use by third countries of Marshall Islands territory, for military purposes, without the express consent of the Marshall Islands Government. Consequently, the United States would not only have the right to veto any military use of Marshallese territory by a third country; it would have the duty to take the necessary action to prevent such use when such use has not been expressly authorized by the Government of the Marshall Islands.

III. Proposed Implementation of Points One and Two

The following amendments to the Compact of Free Association would adequately implement Points One and Two while keeping the modifications to a minimum:

A. Add the phrase "Except for the provisions of Title IV, which apply irrespective of the political status of Palau, the Marshall Islands or the Federated States of Micronesia" at the beginning of both section 442 and section 443 of the Compact of Free Association, initialled on January 14, 1980. The provisions would then read, in part:

9/ Vienna Convention on the Law of Treaties, supra n.3, Article 56.

"Section 442:

Except for the provisions of Title IV, which apply irrespective of the political status of Palau, the Marshall Islands or the Federated States of Micronesia, this Compact may be terminated, etc."

"Section 443:

Except for the provisions of Title IV, which apply irrespective of the political status of Palau, the Marshall Islands or the Federated States of Micronesia, this Compact shall be terminated, etc."

B. Renumber Title IV of the Compact of Free Association, initialled on January 14, 1980 so that it becomes Title V, and renumber sections 411 to 472 so that they become sections 511 to 572. Introduce corresponding changes throughout.

C. Add the following new text:

"TITLE IV

PERMANENT RELATIONS

Section 411:

(a) The Governments of Palau, the Marshall Islands and the Federated States of Micronesia undertake not to permit or tolerate that their respective territories, territorial waters or airspaces be used or be made available directly or indirectly for use by any third country for military purposes without the express consent of the Government of the United States.

(b) The Governments of Palau, the Marshall Islands, the Federated States of Micronesia and the United States agree that section 411(a) creates rights and obligations in rem, which shall remain unaffected by changes in sovereignty over the territory, territorial waters or airspace of Palau, the Marshall Islands or the Federated States of Micronesia, respectively.

Section 412:

The Government of the United States guarantees the territorial integrity of Palau, the Marshall Islands, and the Federated States of Micronesia, and guarantees that the territories, territorial waters or airspaces of Palau, the Marshall Islands and the Federated States of Micronesia shall not be used by any third country, for military purposes, without the express consent of the Government of Palau, the Marshall Islands, or the Federated States of Micronesia, respectively.

Section 413:

The Government of the United States shall determine, after consultation with the Government of Palau, the Marshall Islands or the Federated States of Micronesia, what uses of the territory, territorial waters or airspace of Palau, the Marshall Islands or the Federated States of Micronesia, respectively, shall be deemed encompassed by Sections 411(a) or 412."

Oscar M. Garibaldi