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THE UNITED STATES, THE UNITED NATIONS, AND MICRONESIA: QUESTIONS OF PROCEDURE, SUBSTANCE, AND FAITH

*Harry G. Prince**

> In undertaking to place under trusteeship a territory of such strategic importance to the United States as these islands, the United States is expressing its faith in the United Nations.[1]

INTRODUCTION

On November 3, 1986, President Ronald Reagan proclaimed that the United States had satisfied its obligations under the trusteeship agreement for the Trust Territory of the Pacific Islands, or Micronesia.[2] The Proclamation verified that the Trust Territory had evolved into four new entities with new relationships to the United States: the Commonwealth of the Northern Mariana Islands under the sovereignty of the United States and the Federated States of Micronesia, and the Republic of the Marshall Islands and the Republic of Palau as states in free association with the United States.[3] While it is true that

* Professor of Law, Hastings College of Law. The author wishes to express appreciation to Professor Roger S. Clark for his insightful comments on an earlier draft, and to Rachel A. Van Cleave, Hastings Class of 1989, and Brad Kane, Hastings Class of 1990, for their invaluable research assistance. The author is also indebted to the staff of the Hastings Law Library for exceptional assistance in locating resource materials.

1. Statement of Warren Austin, United States Representative to the United Nations Security Council, upon presentation of draft Trusteeship Agreement for the Trust Territory of the Pacific Islands. 2 U.N. SCOR (113th mtg.) at 410 (1947) [hereinafter "Statement of Warren Austin"].

2. *See* Proclamation No. 5564 (Nov. 3, 1986), 51 Fed. Reg. 40,399-400 (1986) (relating to Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189). Micronesia includes more than 2000 islands in three groups, the Marshalls, the Carolines, and the Marianas. The Trust Territory includes all of Micronesia except Guam, Nauru and Kiribati. The islands are spread over three million square miles but have a combined land area of only 700 square miles. The population of the Trust Territory was estimated to be 164,304 in 1986. *1986 Report of the Government of the United States of America on the Administration of the Trust Territory of the Pacific Islands*, 54 U.N. TCOR, U.N. Doc. T/1909 (1987).

3. More specifically, the Trusteeship Agreement was declared to be no longer in effect with respect to the Northern Marinas, the Federated States, and the Marshall Islands. Because Palau had not completed its internal process for approving new relations with the United States, *see infra* notes 226-258 and accompanying text, the Trusteeship Agreement remained provisionally applicable solely to Palau. The four political communities are described in more detail below, *see infra* notes 141-144, and will be referred to in this article as "states" or "emerging states" without prejudice to the question of whether they qualify for statehood under international law.

the Trusteeship Council of the United Nations had previously concluded that the United States had satisfied its obligations under the Trusteeship Agreement,[4] the United States did not obtain the approval of the Security Council, the body which is generally viewed as holding ultimate responsibility under the United Nations Charter for ensuring that a strategic trust obligation has been properly fulfilled.[5]

This recent action by the United States Government has raised questions of both substance and procedure. Has the United States lived up to its obligations under the Trusteeship Agreement to foster the educational, social, political and economic development of the Trust Territory to a point where self-government and termination of the trust is appropriate? Are the proposed arrangements for post-trust relations between the emerging states and the United States consistent with United Nations principles of self-determination? Can the Trusteeship Agreement be validly terminated without the approval of the Security Council? Arguments can be made on both sides of all three questions. Substantively, the United States has built schools and hospitals, spurred the formation of constitutional governments, and provided large amounts of financial assistance. Still, the emerging states continue to be without much hope of future economic self-sufficiency, the infrastructure of roads and government facilities is often charged as being inadequate, and the traditional culture has given way to the advent of violent crimes, increasing suicide rates, and other social maladies generally attributed to Western influence on the territory. Most significantly, there are charges that nuclear weapons are being forced onto the territory of one state, and that there has been a lack of adequate compensation for injuries caused by nuclear testing in another state.

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4. T.C. Res. 2183 (LIII), 53 U.N. TCOR Supp. (No. 3) at 14-15, U.N. Doc. T/1901 (1986). For text of resolution see appendix B, *infra*. The resolution was adopted by a vote of three in favor (France, United Kingdom, and the United States) and one against (the Soviet Union). China, as had been its practice prior to 1989, did not take part in the proceedings. *See* 23 **U.N. Chronicle** 67 (1986). In 1987 and 1988 the Trusteeship Council, by similar votes of three to one, reaffirmed its position in the 1986 resolution that termination of the Trusteeship Agreement is appropriate. *See* 55 U.N. TCOR (1657th mtg.) at 18, U.N. Doc. T/PV. 1657 (1988), (adopting draft resolution found in U.N. Doc. T/S.1266 (1988); 54 U.N. TCOR (1640th mtg.) at 8, U.N. Doc. T/PV.1640 (1987) (adopting draft resolution found in U.N. Doc. T/L.1260 (1987)). China participated in Trusteeship Council proceedings for the first time in 1989. *See* 56 U.N. TCOR (1671st mtg.) at 26, U.N. Doc. T/PV.1661 (1989), and joined the majority in voting 4 to 1 essentially to reaffirm the 1986 resolution. *See* 56 U.N. TCOR (1671st mtg.) at 31, U.N. Doc. T/PV.1671 (1989) (adopting resolution found in U.N. Doc. T/L.1270 (1989)). Further Trusteeship Council acquiescence in the United States' unilateral efforts at termination is found in its dispatch of a visiting mission which visited only Palau, as the sole remaining portion of the Trust Territory. *See Report of the United Nations Visiting Mission to Palau, Trust Territory of the Pacific Islands, 1989*, 56 U.N. TCOR Supp. (No. 1), U.N. Doc. T/1935 (1989).

5. *See infra* notes 51-108 and accompanying text.

The proposed post-trust relations between the United States and the emerging states also are subject to mixed review. The new statuses seem certainly to reflect, as a general matter, the free choices of the majority of the people in the Trust Territory. But when measured against United Nations norms for self-determination, as defined by the Charter, General Assembly resolutions and past practice, the post-trust arrangements arguably concede too much to the United States for the new entities to be deemed to have achieved the proper level of self-government. Charges of neo-colonialism, in fact, have been made with regard to the commonwealth relationship with the Northern Mariana Islands.

Procedurally, the overwhelming weight of opinion is that Security Council approval is essential to the legal termination of the Trusteeship Agreement. Neither the Trusteeship Agreement nor the United Nations Charter, however, explicitly requires such a step. And quite notably, the United States Government is well on the path to terminating the Trusteeship Agreement, effectively and probably irreversibly, whether such action is procedurally correct or not.[6]

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6. While this article focuses on issues relating to *de jure* termination of the Trusteeship Agreement, the prospect of *de facto* termination of trusteeship status looms large in present considerations of the Federated States of Micronesia and the Republic of the Marshall Islands. These two emerging states present an increasingly plausible claim for statehood. Both the Marshall Islands and the Federated States can allege satisfaction of the four basic requirements for statehood: a permanent population, a defined territory, internal government, and the capacity to enter into relations with other states. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 74-75 (3d. ed 1979). The element most likely to be challenged is that of capacity to engage in foreign relations because the United States has substantial rights relating to security and defense of the emerging states. *See infra* notes 200-212 and accompanying text. The grant of a right to intervene in a state's territory for defense purposes, however, should not be deemed to spoil the otherwise independent nature of the grantor state. *See* I. BROWNLIE, *supra*, at 76-79.

The example of Syria and Lebanon offers some precedent for *de facto* termination, the mandate for those two states having been terminated without formal action by the League of Nations, which was in the process of dissolution, or United Nations but resting instead on gradual recognition and ultimately admission to the United Nations. *See* H.D. HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIP 265-66 (1948). Since the declaration by President Reagan of the termination of the trusteeship, the Marshall Islands and Federated States have been recognized by and established diplomatic relations with a number of states. The Federated States has been recognized not only by United States and the Marshall Islands, but also by Nauru, Japan, Australia, New Zealand, Fiji, Papua New Guinea, Israel, Kiribati, the Philippines, Tonga and China. *See* Memorandum: Federated States of Micronesia: Perceptions of Sovereignty and Statehood 6 (Aug. 22, 1989) (provided by courtesy of Stovall & Spradlin, Washington, D.C., legal counsel to the Federated States of Micronesia. Copy on file with *Michigan Journal of International Law*). The Marshall Islands has been similarly recognized, except that the Marshall Islands declined to establish full diplomatic relations with China because of concerns about human rights abuses. Telephone interview with Frank Solomon, Office of the Representative of the Republic of the Marshall Islands (Sept. 12, 1989); *see also Marshall Islands Defers Diplomatic Relations with China,* Reuters, Sept. 6, 1989 [Nexis].

The United States in recent months upgraded its diplomatic relations with the Federated States and the Marshall Islands to the ambassadorial level. *See* Act of July 26, 1989, Pub. L. 101-62, 103 Stat. 162. The primary reason for this move was to strengthen the claim to statehood and to encourage other states to recognize the Federated States and the Marshall Islands. *See* 135 CONG. REC. S7955 (daily ed. July 13, 1989) (statement of Sen. Johnston); 135 CONG.

The rather obvious reason for the United States circumvention of the Security Council in the termination process is the prospect that the Soviet Union or some other country might use that forum to take the United States to task over the competency of its forty year long administration of the Trust Territory.[7] Also, the Soviet Union might use its veto power to prevent Security Council approval of the proposed termination of the Trusteeship Agreement.[8] The threat that some coun-

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Rec. H3222 (daily ed. June 27, 1989) (letter of Janet G. Mullins, Assistant Secretary, Department of State to Rep. Jim Wright, dated May 23, 1989, stating that the establishment full diplomatic relations "will promote better international understanding of the sovereign and self-governing status of the Freely Associated States.")

If the United States succeeds in influencing other states to recognize the sovereignty of the emerging states by establishing diplomatic relations, then it becomes difficult to assert that the Federated States and the Marshall Islands are still subject to the general limitations on capacity that attach to non-self-governing trust territories. *Cf.* Marston, *Termination of Trusteeship*, 18 INT'L & COMP. L. Q. 1, 5-6 (1969) (asserting that attainment of independence necessarily means that trusteeship status has ended but that attainment of limited self-government might not have that effect). While the precise role of recognition in the criteria of statehood remains subject to debate, see J. DUGARD, RECOGNITION AND THE UNITED NATIONS 7-12 (1987), the fact of recognition affords the ability to act as a state in fact. The significant number of recognitions recorded to date would seem to preclude any possibility of prescriptive, collective non-recognition as has occurred with South African bantustans or "homeland-states." *See id.* at 99-107.

Despite the prospect of *de facto* termination of trusteeship status for the Marshall Islands and the Federated States, the United States would still be confronted with the continuation of trusteeship status for Palau and the Northern Mariana Islands as well as the lack of termination of the Trusteeship Agreement and any pertinent obligations thereunder. Palau might eventually follow the projected path of the Federated States and the Marshall Islands. The United States undoubtedly would argue that the termination in fact would also extend to the Northern Mariana Islands on the grounds that the Northern Mariana Islands has engaged in an act of self-determination by electing commonwealth status. Since the Northern Marianas will not be seeking the recognition as a sovereign state, the opportunity for external validation of the new status will not be presented. Thus, the Trusteeship Agreement and the residual United States obligations thereunder might linger indefinitely. Cf. Northern Cameroons (Cameroon v. U.N.), 1963 I.C.J. 15, 34 (Preliminary Objections: Dec. 2, 1963) (Noting that upon valid termination of trusteeship agreement the rights and duties of trustee cease to exist).

7. *See* Juda v. United States, 13 Cl. Ct. 667, 682 (1987) (U.S. attorneys asserting during trial that the executive branch has determined that the Soviet Union will frustrate post-trust agreements). Indeed, the Soviet Union has built a record of criticism of United States administration of the Trust Territory of the Pacific Islands through its record in the Trusteeship Council. *See, e.g.*, 55 U.N. TCOR (1658th mtg.) at 10-14, U.N. Doc. T/PV. 1658 (1988) (Soviet Representative accusing the United States of annexationist policy in the proposed termination of the Trusteeship Agreement); 54 U.N. TCOR, U.N. Doc. T/PV.1647 (1987) (Soviet Representative protesting the report of the mission sent to observe a plebiscite in Palau on grounds that the Trusteeship Council's goals were "to lend some legitimacy to the process of splitting up the United Trust Territory" and "covering up the annexationist actions" of the United States); *Trusteeship Council calls termination of Micronesia Agreement 'appropriate'*, 23 U.N. CHRONICLE 67 (1986) (Soviet Representative to the Trusteeship Council voting against approval of termination of the Trusteeship Agreement on grounds that the U.S. had not fulfilled its obligations under the Trusteeship Agreement, the United Nations Charter and the General Assembly Declaration on Decolonization); 53 U.N. TCOR U.N. Doc. T/1884 (1986) (Letter from the Soviet Union Representative accusing the United States of "neo-colonialist action in moving toward free association with Trust Territory states).

8. The presumption being taken is that the vote for approval of termination of the Trusteeship Agreement would be a substantive matter and therefore subject to veto by the permanent members of the Security Council under article 27(3) of the United Nations Charter. While the argument can be made that such a vote might be deemed procedural under article 27(2) and

tries might politicize the question, however, is not sufficient grounds to warrant a breach of the duty to follow proper procedure under the Charter of the United Nations. Avoiding the Security Council on this issue of trust termination is evidence of a demise of the faith in the United Nations system that lead to the creation of the Trust Territory some forty years ago. In a decade that has witnessed recurrent breaches of faith in the United Nations by the United States,[9] the argument can be made that the United Nations system should be tested anew with regard to Micronesia. If the United States and the newly emerging states of the Trust Territory can arrive at a genuine agreement for new arrangements that comport with United Nations Charter obligations, then the Security Council cannot properly withhold approval. The United States has a solid foundation for approval of trust termination based upon the free exercise of the right of self-determination by the peoples of the Trust Territory in deciding the forms of post-trust relations.[10] The United States, however, must continue with efforts to address remaining problems within the structures of those new relations, necessarily including the making of some concessions to the demands of the new states and to relevant United Nations principles. Legitimate termination of the trust must be predicated upon the proper provision for the well-being of the Micronesian peoples, not the protection of United States security interests.

If Security Council approval is improperly withheld, then resort should be made to the International Court of Justice for an advisory opinion.[11] Even if there is some concern that the matter might not be

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therefore not subject to permanent member veto, since the essence of the determination will be a decision on the proper exercise of the right of the people of Micronesia to self-determination and achievement of self-government, such an argument must be considered specious. *See* Macdonald, *Termination of the Strategic Trusteeship: Free Association, the United Nations and International Law*, 7 BROOKLYN J. INT'L L. 235, 263-66 (1981); Marston, *Termination of Trusteeship*, 18 INT'L & COMP. L.Q. 1, 13 (1969).

9. The United States' purported unilateral termination of the trust adds to other evidence of its lack of confidence in the United Nations system. Recent years have seen the United States attempt to close an accredited mission to the United Nations and deny entry into the United States of an official visitor to the United Nations in blatant disregard of obligations under the Headquarters Agreement. The United States has restricted payment of funds due to the United Nations in breach of article 17 of the Charter. In 1983, the Department of State gave notice of United States withdrawal from UNESCO as a result of a dispute over the agenda of the organization and its budget. Most significantly, the United States withdrew from the case Nicaragua brought against it before the International Court of Justice (I.C.J.) and subsequently rescinded its acceptance of compulsory jurisdiction of the I.C.J. under article 36 of the Statute of the I.C.J. because of alleged politicization of the court. The improper termination of the trusteeship agreement may be characterized as only the latest in a series of conduct which denigrates the United Nations.

10. *See infra* notes 136-47 and accompanying text.

11. While the ability to request an advisory opinion is limited by the Charter to certain organs of the United Nations, the United States would have three possible avenues. Article 96 (1) of the Charter provides that either the General Assembly or Security Council may request an

impartially considered in the I.C.J.,[12] the noble path for the United States to take would be to give the United Nations system a try rather than presuming that it will not work. Bearing in mind that its risks are limited because of its veto power in the Security Council, the United States Government should exercise some faith in the United Nations by giving it a chance to work for Micronesia.

This study first considers the procedural requirements for proper termination and concludes that Security Council approval is required. Second, this writing identifies the major issues that should be considered if the proposed termination of the Trusteeship Agreement for Micronesia is subjected to Security Council review. Two basic concerns should be the propriety of the division of the Trust Territory into four separate entities and the legitimacy of the agreements between the new governments and the United States for continuing relations as either commonwealth or freely associated states. The history of and practice under the trusteeship system indicate that the particular arrangements for commonwealth and free association statuses do not fit neatly into recognized categories of self-governance. Nonetheless, as a general matter, the arrangements are within the broader realm of acceptable relations because they reflect the free choices of the Micronesian peoples.

Other substantive issues which this paper discusses in evaluating whether the United States has satisfied its obligation under the Trusteeship System include: the need for clarification of the nature of the United States' relationship with the Northern Mariana Islands, the repeated attempts to get the Palauan people to countermand their new

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advisory opinion. Under the provisions of article 96 (2) of the Charter, the General Assembly also has authorized the Trusteeship Council to seek advisory opinions. *See* D. PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT 60-67 (1972). The International Court has previously found a basis for jurisdiction in cases involving trust, mandate, or non-self-governing territories. *See* Western Sahara, 1975 I.C.J. 12 (Advisory Opinion of Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Nambia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (Advisory Opinion of June 21); Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15 (Preliminary Objections: Dec. 2) (the court clearly acknowledged possible grounds for jurisdiction while declining to hear case on the merits on grounds that any judgment would be capable of effective application). From the perspective of the United States, the essential questions to be put before the International Court would be the proposition that upon the valid exercise of the right of self-determination through United Nations supervised plebiscites the emerging states are entitled to release from the restraints of trusteeship status through termination of the Trusteeship Agreement.

12. The I.C.J. has been accused of having become politicized due to the nature of its composition, which reflects the geo-political diversity of the General Assembly, the manner of selection of judges, and the bias perceived by some in certain decisions of the court. *See* Leigh & Ramsey, *Confidence in the Court: It Need Not be a "Hollow Chamber"*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 106-10 (L. Damrosch ed. 1987); T. FRANCK, JUDGING THE WORLD COURT 35-38 (1987). The allegations of bias have been answered with some contradictory data and analysis. *See* Damrosch, *supra*, at 123-33; T. FRANCK, *supra*, at 37-38.

constitution by permitting the United States to bring nuclear powered or capable vessels into their territory, the reparations made for injury resulting from nuclear testing in the Marshall Islands, the consequences of the United States' acquisition of land for missile testing done on the Kwajalein atoll, and the general economic development and social welfare of the Trust Territory. The United States' checkered record on these issues indicates that Security Council approval of the termination should be conditioned upon modification of post-trust arrangements to ensure that the Micronesian people are treated fairly.

PART I — THE PROPER PROCESS FOR TERMINATION

> In preparing this draft trusteeship agreement, the Government of the United States bore constantly in mind article 73 of the [United Nations] Charter: "Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants."[13]

A. *The Mandate System*

Although the Trusteeship System evolved directly from the mandate system of the League of Nations,[14] the history of the law of dependent territories and the Trusteeship System actually begins in the period of colonization prior to World War I. During the early period of competitive expansionism by the European powers, there was little doubt that colonies existed for the benefit of the colonizing states.[15] During the late nineteenth century, as the increasing importance of the colonies' natural wealth lead to a recognition of the need for international cooperation and accountability, attention was also drawn to the unfair treatment of the indigenous people.[16] The colonial powers took on limited obligations to promote the well being of the inhabitants of the territories, standing as "trustees of civilization."[17] This movement

13. Statement of Warren Austin, *supra* note 1, at 411-12.

14. *See* Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 AM. J. INT'L L. 263, 265 (1948) ("The trusteeship system of the United Nations is historically, though not legally, the successor of the mandates system of the League.")

15. *See* R. CHOWDHURI, INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS: A COMPARATIVE STUDY 15-16 (1955); Sayre, *supra* note 14, at 263.

16. *See* R. CHOWDHURI, *supra* note 15, at 20-22 (describing the Berlin Conference of 1884-1885 and the General Act of Brussels of 1890 as introducing rights of indigenous people of Central Africa); C. TOUSSAINT, THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS 4-5, 11-14 (Library of World Affairs No. 33, 1956).

17. Some difference of opinion exists over the precise origin of the philosophical principles

included efforts to promote the abolition of the slave trade.[18]

During the First World War, diplomats and thinkers began to escalate the call for radical reform in colonial governments to make the welfare of the natives the paramount guide in their government.[19] At the Versailles Peace Conference of 1919, however, less noble factors were at play. These factors included an unwillingness to apply the principles of self-determination to colonies of the Allied Powers, and a number of secret treaties made between the Allied Powers or with outside parties. These treaties concerned the division of the "spoils of war," *i.e.*, the colonies of Germany and the Ottoman Empire.[20] Thus, the mandate system arose as a compromise and reflected the conditions established by the peace treaties for the administration of the former overseas possessions of Germany and Turkey.[21]

The mandate system was incorporated into the Covenant of the League of Nations under the provisions of article 22,[22] which set out the governing principles and the mechanics of the League's supervisory role. The mandate system included charter agreements for the mandated territories obligating each mandatory nation to apply the principles of article 22.[23] The charters all contained a clause requiring

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underlying the concept of the international sacred trust, with various writers attributing the concept to British, American, or Spanish politicians and thinkers. Undoubtedly the concept developed with the contribution of many sources. *See* R. CHOWDHURI, *supra* note 15, at 13-20.

18. *See* id. at 13-20; C. TOUSSAINT, *supra* note 16, at 8-9.

19. *See* R. CHOWDHURI, *supra* note 15, at 23-24; A. MARGALITH, THE INTERNATIONAL MANDATES 4 (1930). Margalith states:

> The most important spokesmen for the Allies were David Lloyd George, Prime Minister of England, and Woodrow Wilson, President of the United States of America. Through their utterances, such phrases as 'no annexation', 'self-determination', 'consent of the governed', were brought into use in all corners of the world and inspired the hope that the war would be the last war.

Id. at 8.

20. A. MARGALITH, *supra* note 19, at 10-13.

21. *See* H.D. HALL, *supra* note 6, at 30-35.

22. Article 22 provides in part:

> 1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.
>
> 2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.
>
> 3. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

23. For a collection of the mandate charters, see UNITED NATIONS, TERMS OF LEAGUE OF NATIONS MANDATES, U.N. Doc. A/70 (1946). For a listing of the mandates, see J. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 426-28 (1979).

the consent of the Council of the League of Nations for any modification of the terms of the mandate.[24] The Permanent Mandates Commission was established as an advisory body to assist the Council in supervising the application of the Mandate Principles.[25]

The essence of article 22 was that the mandatory system was a temporary matter aimed to ensure the well-being and development of the peoples inhabiting the subject territories. A "sacred trust" established for each mandated territory would end when that territory achieved independence. A League of Nations commentary describes the mandatory nations as being "like guardians in civil law" who "must exercise their authority in the interest of their wards . . . and must maintain an entirely disinterested attitude in their dealings with them."[26] This principle was consistent with the view that the mandatory nations held the trust for the world at large as well as the indigenous people, acted on behalf of the League, and were therefore accountable to the League for their administration.[27]

Thirteen charters were concluded under the mandate system.[28] The dissolution of the League of Nations during World War II created the possibility that the responsibility and obligations of the mandatory nations might have lapsed for those territories which had not yet gained independence. This possibility was precluded, however, by an agreement at Yalta in February, 1945 that the "Five-Powers" would consult on proposals for the United Nations Conference to deal with the mandated territories and other dependent area problems.[29] Subsequently, provisions were made in the United Nations Charter for a replacement system to be called the "Trusteeship System." These agreements reflected the presumption that the Trusteeship System would include existing mandated territories that had not achieved independence, territories of the defeated states in World War II, and any territories voluntarily placed under the system.[30] The territories that

24. *See* H.D. HALL, *supra* note 6, at 31.

25. *See generally id.* at 177-212.

26. LEAGUE OF NATIONS, THE MANDATES SYSTEM ORIGIN — PRINCIPLES — APPLICATION 23 (1945).

27. COVENANT OF THE LEAGUE OF NATIONS art. 22, para. 7. *See* S. DE SMITH, MICROSTATES AND MICRONESIA 20-21 (1970).

28. LEAGUE OF NATIONS, *supra* note 26. The "A" Mandates were Palestine, Transjordan, Syria and Lebanon. The "B" Mandates were British Cameroons, French Cameroons, British Togoland, French Togoland, Tanganyika, and Ruanda-Urundi. The "C" Mandates were Micronesia, Nauru, New Guinea, Western Samoa, and South West Africa. IRAQ was also classified as an "A" mandate although a formal charter was never executed. *Id.* at 21.

29. UNITED STATES DEP'T OF STATE, THE UNITED STATES AND NON-SELF-GOVERNING TERRITORIES 10 (1947).

30. *Id.* at 10.

were actually placed under the Trusteeship System were those which had been mandated territories, including Micronesia,[31] but excepting South West Africa and some of the former territories of Italy.[32]

B. *From Sacred to Strategic Trust*

The foregoing description of the origins of the Trusteeship System reveals that its roots lay solidly in the mandate system and the principles upon which that system was founded. The Trusteeship System, as might therefore be expected, embodied the essence of the mandate system's "sacred trust" and placed the trustee states in a temporary guardian relationship with the trust territories for the purpose of fostering the well-being and development of the territories into self-governing states.

The Trusteeship System is structured by the United Nations Charter provisions found in chapters XI, XII and XIII,[33] and supplemented by trusteeship agreements entered into by each administering authority for a trust territory.[34] Chapter XI is a declaration that applies to all areas of the world that are not fully self-governing, including trust territories. Article 73 of chapter XI provides in part that "the interests of the inhabitants of these territories are paramount."[35]

Chapter XII outlines the purposes and goals of the Trusteeship System, including the advancement of the territories and the furtherance of international peace and security. Article 76 establishes the

31. The recorded history of Micronesia is one of domination by foreign powers. *See generally* S. DE SMITH, *supra* note 27, at 122-28 (1970); C. HEINE, MICRONESIA AT THE CROSSROADS 10-17 (1974). Beginning with the advent of the Spanish explorers in the sixteenth century, portions of Micronesia have been continuously subjugated. Germany was the successor to Spain, largely because of an agreement to purchase from Spain its Pacific Ocean territories, including Micronesia. Japan took control of Micronesia in 1914 at the beginning of World War I and then received effective control of the islands when they became a mandated territory under the Treaty of Versailles at the end of the war. Japanese domination ended with the country's defeat in World War II, at which point the United States became the administering authority for the islands.

32. *See* J. CRAWFORD, *supra* note 23, at 426-28.

33. Chapters XI, XII and XIII are respectively titled: "Declaration Regarding Non-Self-Governing Territories," "International Trusteeship System," and "The Trusteeship Council."

34. For a sampling of trusteeship agreements, see H.D. HALL, *supra* note 6, at 340-70.

35. Because chapter XI is titled as a "Declaration," some have suggested that it is no more than a unilateral declaration and binding only in regard to the obligation of article 73(e) which is to "transmit regularly to the Secretary General . . . statistical and other information of a technical nature." Prevailing thought, however, has affirmed that because chapter XI is contained in a treaty, it cannot possess a character different from the treaty. *See* A. KAMANDA, A STUDY OF THE LEGAL STATUS OF PROTECTORATES IN PUBLIC INTERNATIONAL LAW 263-67 (1961) (citing 1 L. OPPENHEIM, INTERNATIONAL LAW 787-88 (7th ed. 1952)). Trust territories are exempted from the requirements of article 73(e) by express langauge, strongly supporting the conclusion that the rest of the article and Chapter XI does apply.

guiding objectives of the Trusteeship System[36] including the promotion of political, economic, social, and educational advancement of the inhabitants and echoes the article 73 directive that the territory be directed towards self-government or independence.[37]

The general responsibility for overseeing the Trusteeship System is placed in the General Assembly with the assistance of the Trusteeship Council created by chapter XIII. In addition to setting up this normal structure, however, chapter XIII goes further to provide that all or part of a territory may be designated as a "strategic area." The responsibility for supervising a strategic trust is placed in the Security Council by article 83(1).[38] Consequently, the Trusteeship Agreement for Micronesia, the only strategic trust created, was subject to Security Council approval and was so approved in 1947.[39] There was some resistance to the idea of including the strategic trust concept. The other states involved ultimately agreed to the idea, recognizing it as a matter of essential importance to the United States delegation.[40]

The concept of strategic areas or trusts stood in sharp contrast to the mandate system which provided for the demilitarization of man-

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36. Article 76 provides:

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present charter, shall be:

a. to further international peace and security;
b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

U.N. CHARTER art. 76.

37. The addition of the goal of progression toward self-government or independence was an addition beyond the goals of the mandate system. Sayre, *supra* note 14, at 279-81 (1948). The language of article 76 was the result of debate about the goals of the trusteeship system as outlined by Sayre. Although article 73 does not actually mention "independence," the drafting history reveals an understanding by the drafters that independence was one contemplated form of self-government. *See* W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 110-13 (1977).

38. "All functions of the United Nations relating to strategic areas . . . shall be exercised by the Security Council." U.N. CHARTER art. 83, para. 1.

39. S.C. Res. 21, U.N. Doc. S/318, *reprinted in Resolutions and Decisions of the Security Council 1947*, U.N. Doc. S/INF/2/Rev.1 (II) at 16 (1947). Those voting in favor of the resolution included the Soviet Union. *See* S. DE SMITH, *supra* note 27, at 129 (citing R. EMERSON, AMERICAN PACIFIC DEPENDENCIES 22 (1949)). Congress approved the Trusteeship Agreement by joint resolution on July 18, 1947, 61 Stat. 397.

40. *See* R. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 833-34 (1958).

dated territories.[41] Indeed, the strategic trust has been described as a "somewhat bastard and contradictory" concept.[42] The innovative notion of strategic areas was tailored by the United States specifically to fit the situation of Micronesia.[43] More particularly, the proposal of the strategic trust grew out of a dispute within the United States government between those who wanted to annex Micronesia outright because of security concerns,[44] and those who found the idea of annexation inconsistent with the non-annexation movement which the United States had supported.[45] Under the strategic trust concept, the United States was able "to have its cake and eat it too," avoiding outright annexation while retaining the utmost in control of the islands.[46] The fact that the Security Council has review powers is important because the United States is a permanent member with veto power over Security Council proposals.[47] While public statements of the United States have advocated the importance of the Pacific Islands' administration in a manner that contributes to the collective security of all the members of the United Nations,[48] the degree of U.S. control has led to

41. *See* Sayre, *supra* note 14, at 266-67; *see also* LEAGUE OF NATIONS COVENANT art. 22, para. 5.

42. TRUSTEESHIP IN THE PACIFIC 54 (A. McDonald ed. 1949).

43. Clark, *Self-Determination and Free Association: Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1, 3-5 (1980); Hills, *Compact of Free Association for Micronesia: Constitutional and International Law Issues*, 18 INT'L LAW. 583, 589-92 (1984). John Foster Dulles even warned the United Nations General Assembly that if it did not accept the American proposals regarding Micronesia, the United States would simply ignore that international body and continue its de *facto* occupation. J. WEBB, MICRONESIA AND U.S. PACIFIC STRATEGY 79 (1974).

44. Juda v. United States, 13 Cl. Ct. 667, 671 (1987); Adams, *American Involvement in Perspective*, in NATIONAL SECURITY AND INTERNATIONAL TRUSTEESHIP IN THE PACIFIC 86 (W. Louis ed. 1972). Adams states that Secretary of War Stimson viewed the Japanese mandated islands as essential to the United States' security and thought no trusteeship system should be devised until "the necessity of their [mandated islands] acquisition by the United States is established and recognized." Stimson also asserted:

> Acquisition of [the islands] by the United States does not represent an attempt at colonization or exploitation. Instead, it is merely the acquisition by the United States of the necessary bases for the defense of the Pacific for the future world. To serve such a purpose they must belong to the United States with absolute power.

Adams, *supra*, at 86-87 (citing U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCES AT MALTA AND YALTA 1945, 78-79 (1955)).

45. *See* Adams, *supra* note 44, at 83; H. NUFER, MICRONESIA UNDER RULE 26-28 (1978); R. GALE, THE AMERICANIZATION OF MICRONESIA 51-60 (1979); R. CHOWDHURI, *supra* note 15, at 41-43; C. HEINE, *supra* note 31, at 4; Hills, *supra* note 43, at 591-92.

46. *See* R. CHOWDHURI, *supra* note 15, at 120.

47. *See* U.N. CHARTER arts. 23, para. 1, and art. 27, para. 3 (designating permanent members of the Security Council and providing that non-procedural matters require the concurrence of all permanent members). Notably, the Security Council veto structure provided the United States with additional protection against changes in the Trusteeship Arrangement without United States approval but now works against United States' interests because of fear that other members possessing the veto power may use it against United States' interest in terminating the Trusteeship Agreement. *See* H. NUFER, *supra* note 45, at 28.

48. *See* 2 U.N. SCOR (113th mtg.) at 410 (1947) (statement of United States Ambassador

charges of *de facto* annexation.[49]

The Charter does not provide in detail what the differences between a strategic and non-strategic trust should be, but the provisions of the Trusteeship Agreement for Micronesia do establish some differences. Among some of the special provisions is article 5 which allows the United States to set up military facilities in the Trust Territory. Also, article 13 of the Agreement grants the United States the power to close off certain areas of the Trust Territory from even Security Council supervision.

Apart from the specialty provisions, the Trusteeship Agreement provides that the administering authority will foster self-government under the obligations imposed by article 76(b) of the Charter which allows for independence of the people if appropriate to the particular circumstances and in accordance with the expressed wishes of the people. The Agreement also obligates the United States to promote political, educational, social, and economic self-sufficiency for the inhabitants of the territory.[50] A fair reading of the Trusteeship Agreement in light of Charter obligations leads to the conclusion that despite the undeniable primacy accorded to its security concerns, the United States ultimately made a binding commitment to make the advancement of the Micronesian peoples the basic or paramount objective in the administration of the Trust Territory.

C. *Measures for Termination*

Determining the proper method for termination of the trusteeship for Micronesia becomes a matter of applying principles of treaty interpretation to the Trusteeship Agreement and relevant portions of the United Nations Charter. Not only are the Charter provisions relevant by virtue of their express and implicit incorporation into the Trusteeship Agreement, but also article 103 of the Charter gives its provisions priority over conflicting obligations under other international agreements. Under article 31 of the Vienna Convention on the Law of Treaties,[51] the meaning of a treaty should primarily be determined according to "the terms of the treat[ies] in their context." The "context" includes related agreements, subsequent practice under the treaties,

Warren Austin at presentation of draft Trusteeship Agreement for Micronesia); 1946-47 U.N.Y.B. 394, U.N. Sales No. 194.I. 18.

49. *See* D. MCHENRY, MICRONESIA: TRUST BETRAYED 2 (1975); S. DE SMITH, *supra* note 27, at 128.

50. Trusteeship Agreement for the Former Japanese Mandated Islands, *supra* note 2, art. 6.

51. Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969) *entered into force* Jan. 27, 1980.

and any relevant rules of international law. Article 32 of the Vienna Convention also allows for resort to the treaty's preparatory work and the circumstances of its conclusion as a supplement to interpreting the actual terms.

In addition to looking at the language of the Trusteeship Agreement and the relevant parts of the United Nations Charter, the drafting history of the Trusteeship Agreement and the history of the Trusteeship System should help define the requirements for termination of the trust. The past practices of individual states and the United Nations in bringing about the termination of other trusts is also revealing. Notably, the writers who have studied these factors relevant to the question of trust termination have concluded that approval of the Security Council is essential.[52]

The United Nations Charter provisions relating to trust territories in general require the approval of the General Assembly for "the terms of the trusteeship agreements and of their alteration or amendment."[53] The Charter also provides that approval of strategic trust agreement terms and any alteration or amendment to them should occur with the approval or assent of the Security Council.[54] The Charter provisions, however, do not specifically include the term "termination." This omission may be attributable in part to a similar gap in the League of Nations Covenant. During the drafting of article 22 of the Covenant, a proposal was made that the League of Nations have the right to redress or correct any breach of mandate obligations and replace a mandatory state.[55] This provision was excluded, however, on the grounds that the mandatory states would be reluctant to make investments in the mandated territories if the mandate could be brought to an end by the League of Nations at any time.[56]

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52. *See* D. MCHENRY, *supra* note 49, at 49; S. DE SMITH, *supra* note 27, at 185; C. TOUSSAINT, *supra* note 16, at 135; Clark, *Letter to the Editor in Chief*, 81 AM. J. INT'L L. 927, 930-33 (1987); Macdonald, *supra* note 8, at 256-62; Marston, *supra* note 6, at 36-37; *see also* Hirayasu, *The Process of Self-Determination and Micronesia's Future Political Status Under International Law*, 9 U. HAW. L. R. 487, 488 (1987) (presuming without detailed discussion that the termination would be submitted to Security Council); Sayre, *supra* note 14, at 289 (assuming without detailed discussion that Security Council approval would be required).

53. U.N. CHARTER art. 85 provides:

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

54. "All functions of the United Nations relating to strategic areas, including approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council." U.N. CHARTER art. 83, para. 1.

55. *See* R. CHOWDHURI, *supra* note 15, at 62.

56. *Id.*

The draft proposals for the Trusteeship System presented at San Francisco also failed to address the process for termination.[57] The Chinese delegation suggested within the Five Power Consultative Group[58] that there be a provision addressing action which could be taken by the General Assembly or Security Council in the event of a breach of a trust agreement. The proposal was opposed by those states which would hold trusts, and which therefore might be adversely affected by such a provision. The Chinese proposal did not make it into the drafts.[59] Other written comments suggesting terms for termination apparently went unheeded as well.[60] When the topic was later addressed in the general debate, a proposal was offered by Egypt that the General Assembly be given the power to terminate a trust arrangement.[61] The amendment was opposed for two stated reasons. First, some states argued that placing such power in the General Assembly was inconsistent with that part of the Trusteeship System which allowed for states to place territories voluntarily in the system.[62] Second, the General Assembly and Security Council could address specific problems existing with trustee states on a case by case basis, including the possibility of treating such a problem as a threat to the peace.[63] Yet another reason offered for the failure to include a specific termination provision is that states believed that termination provisions could be written into the separate Trusteeship Agreements, even though only two of the subsequent Agreements eventually addressed termination at all.[64]

The drafting history of the Trusteeship System, and collaterally the mandate system, is not extremely helpful in deciding the proper mode

57. *See* Marston, *supra* note 6, at 3.

58. The four sponsoring nations of the 1945 United Nations Conference of International Organization, the United States, Great Britain, China, and the Soviet Union, continued a prior practice of meeting as an informal consultative group. France was added as the "Fifth Power" because it would be a permanent member of the Security Council. *See* R. RUSSELL, *supra* note 40, at 641-42.

59. *See* R. RUSSELL, *supra* note 40, at 836-37.

60. *See* Marston, *supra* note 6, at 3-4. Ecuador and Venezuela made relevant suggestions concerning General Assembly power to terminate and the conditions necessary for independence.

61. *See* R. RUSSELL, *supra* note 40, at 837-38 (the proposal was made by Egypt in response to the lack of power that the League of Nations possessed to correct Japanese violations of its mandate); R. CHOWDHURI, *supra* note 15, at 62-63; C. TOUSSAINT, *supra* note 16, at 134.

62. *See* D. MCHENRY, *supra* note 49, at 46-47; R. CHOWDHURI, *supra* note 15, at 62-63; R. RUSSELL, *supra* note 40, at 833-34.

63. *See* R. RUSSELL, *supra* note 40, at 833-34; *see generally* R. CHOWDHURI, *supra* note 15, at 62-63.

64. *See* D. MCHENRY, *supra* note 49, at 46; Marston, *supra* note 6, at 11-12. In addition to the Trusteeship Agreement for Micronesia, the Somaliland agreement included a provision for termination. *See infra* note 70.

of termination, but it yields one important observation. The failure to include specific language seems to result largely from the desire of certain drafting parties to favor the mandatory or administering authorities by denying an express unilateral right of termination to the League, General Assembly, or Security Council. There is nothing in the language or drafting history, however, that specifically denies the League or United Nations the right to participate in termination of a trust in some manner other than unilateral termination. During the debate on the Trusteeship Agreement for Micronesia, there were several comments noting that the Charter did not provide for termination,[65] but there is other evidence that the drafters considered the right of the General Assembly or Security Council to participate in the process of termination to be subsumed in the right to approve alterations or amendments.[66] As stated by one scholar:

> There is no mention in the Charter of termination of an agreement; but in view of the inherently temporary nature of the trusteeship status, and considering the goal of each trust territory is "self-government or independence," it would be absurd to suppose that the drafters of the Charter did not intend the agreements to be terminated. It would be more reasonable to assume that they saw the problem in the wider context of alteration, and considered that the same rules would apply for termination.[67]

Consistent with the foregoing proposition is the observation that upon attainment of self-government or independence, the Trust Agreements must be terminated. Under the United Nations trusteeship system, the conclusion that a trust territory has achieved independent status is one that requires the participation of the Security Council or

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65. *See* 2 U.N. SCOR (124th mtg.) at 676-79 (1947).

66. *See* R. RUSSELL, *supra* note 40, at 836-37:

> The Working Paper was also silent on the question of criteria or methods for terminating a trust or transferring it from one administering authority to another. The general provision that states directly concerned would have to agree, not only to the original trust arrangements, but also to "any alteration or amendment" in them, meant of course that neither termination nor transfer could occur without the consent of the original administering authority. This situation was not overlooked in the committee discussions, where questions were raised about amendment and termination procedures. The United States explained that the states originally concerned would have to agree to any subsequent changes, which would then be submitted for approval by the Organization as in the case of the earlier agreement. Termination of a trust or a change in the administrator would constitute "alterations" in this respect.

67. C. TOUSSAINT, *supra* note 16, at 134; *see* 2 U.N. SCOR (124th mtg.) at 678-79 (1947) (comment of Syrian representative that "Charter does include provisions for the termination of a mandate [sic]. The Charter does not provide for trusteeships being eternal. It says that trusteeships will be ended by self-government or independence. That means that when independence is granted, the termination of the trusteeship becomes quite evident."); Juda v. United States, 13 Cl. Ct. 667, 678-79 (1987); Clark, *Letter to the Editor in Chief*, *supra* note 52, at 930-31; Sayre, *supra* note 14, at 289.

General Assembly.[68] Because trusteeship agreements may be characterized as contracts between the trustee or administering authority and the United Nations for the benefit of the Trust Territory and its inhabitants, one party cannot unilaterally terminate without the presence of some special circumstances.[69]

The Trusteeship Agreement between the United States and the United Nations, like all the other trusteeship agreements,[70] does not expressly address the proper method of termination.[71] The most relevant part of the Trusteeship Agreement, article 15, as originally proposed and finally adopted, provides simply: "The terms of the present agreement shall not be altered, amended or terminated without the consent of the administering authority." During discussion of the Trusteeship Agreement before the Security Council, the Soviet representative proposed that article 15 be redrafted to provide the Security

68. *See* C. TOUSSAINT, *supra* note 16, at 135-36; Sayre, *supra* note 14, at 288-90. *But see* note 6, *supra* (possibility of recognition of statehood outside of United Nations).

69. Under the Vienna Convention on the Law of Treaties, *supra* note 51, Part V, a party may unilaterally terminate an agreement, inter alia: under the provisions of the treaty or upon mutual consent of the parties (article 54), based on an implicit unilateral right of denunciation with twelve months notice (article 56), upon conclusion of a later treaty by all parties involved (article 59), upon material breach by the other party (article 60), or upon a fundamental change of circumstances (article 62). While the United States could conceivably argue that there was an express or implicit right to terminate unilaterally, the representatives seem not to have formally phrased such an argument to date and such an argument would be susceptible to challenge. *See infra* notes 71-92 and accompanying text.

70. *See* C. TOUSSAINT, *supra* note 16, at 135. The Trusteeship Agreement for Somaliland did establish a time period for termination. Article 24 provided that Somaliland would receive its independence after ten years. The reason for the inclusion was the unique circumstances of the Trust Territory. Under the Peace Treaty of 1947, Italy renounced all claim and yielded to a determination to be made by the Allied Powers. The failure of those states to agree lead to the matter being resolved by the General Assembly, which placed a restrictive time limit to which an administering authority as primary drafter probably would not have consented. *See* Marston, *supra* note 6, at 9-10.

71. Interestingly, United Nations Charter article 79 provides that trusteeship agreements "shall be agreed upon by the states directly concerned." The meaning of the term "states directly concerned" was never ascertained during the establishment of the Trusteeship System. *See* C. TOUSSAINT, *supra* note 16, at 80-87. There was no trusteeship agreement adopted that had been concluded by the administering authority and "other states directly concerned." Marston, *supra* note 6, at 7-8.

One explanation of the "states directly concerned" provision is that it was intended to apply in those situations where more than one state had a claim to a non-self-governing territory and would require that the contending states reach an agreement before a trust could be established. *See* R. RUSSELL, *supra* note 40, at 833-34. Debate in the Security Council at the consideration of the Trusteeship Agreement for Micronesia reveals, however, a genuine lack of consensus on the meaning of the term "states directly concerned." *See* 2 U.N. SCOR (124th mtg.) at 677 (1947) (comment of Australian representative that the issue had "been argued on for fifteen months" and constituted an unhelpful "academic argument").

At least theoretically, any state that would qualify as a "state directly concerned" could assert a right to participate in the approval of the termination of the Trusteeship Agreement for Micronesia under the provisions of article 79 as a form of alteration or amendment. *See* C. TOUSSAINT, *supra* note 16, at 125-27, 137-40.

Council with the authority to terminate the Trusteeship Agreement.[72] The United States rejected the proposal on the grounds that such a term would be "inconsistent with the bilateral concept" of the trust arrangement because it would grant unilateral power to change the Trusteeship Agreement to the Security Council.[73] The United States representatives went on to state that such a grant of unilateral termination powers would be inconsistent with the United Nations Charter under which the Security Council could, at most, "approve or disapprove" a proposed termination but not originate any such action.[74]

Significantly, during the course of the debate, the United States proposed an alternative version of article 15 that provided for joint approval of termination by the United States and the Security Council.[75] While this proposal was later withdrawn,[76] it offers substantial evidence of the United States' acceptance of a role for the Security

72. *See* 2 U.N. SCOR (113th mtg.) at 414-15 (1947). The Soviet Union originally proposed that article 15 be re-drafted to read: "The terms of the present agreement may be altered, supplemented or terminated by decision of the Security Council." The Soviet proposal as later voted on read: "The terms of the present agreement may be altered and amended, or the term of its validity discontinued by the decision of the Security Council." *See* 2 U.N. SCOR (124th mtg) at 679 (1947).

The Polish representative also proposed that article 15 be amended to read: "The terms of the present agreement shall not be altered, amended or terminated, except as provided by the Charter." This proposal was defeated by a vote of four yeas, three nays, and four abstentions. *Id.*

73. 2 U.N. SCOR (116th mtg.) at 475-76 (1947). It does seem clear that the Soviet Union representative was of the view that the Security Council held the right to unilateral termination under the Charter. *See* 2 U.N. SCOR (124th mtg.) at 669 (1947).

74. Statement of Ambassador Austin:

> Now let us look at Article 83. You will notice that the idea of approval contained in Article 79 [with regard to the General Assembly] is expressed once more in Article 83, paragraph 1, which states that: "All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council."
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> In other words, obviously it is not the Security Council which originates the amendment; certainly it cannot authorize the termination; the most it can do, under the Charter, is approve or disapprove. Moreover, the Charter is the guide and the law regarding the powers of the Security Council; we cannot sit here and change them by an agreement between the United States and the Security Council. We cannot grant to the Security Council powers that the Charter does not grant. The only way in which the Security Council could be granted the power to alter, amend and terminate this contract would be by amending the Charter; no less authority than that would be necessary.

2 U.N. SCOR (116th mtg.) at 475 (1947).

75. *See* 2 U.N. SCOR (116th mtg) at 476-77 (1947) (The United States proposal was that article 15 read: "The terms of the present agreement shall not be altered, amended or terminated except by agreement of the administering authority and the Security Council").

76. After the other proposals for amendment of article 15 had been voted upon and had failed, Ambassador Austin withdrew his proposal for amending the article on the theory that it was offered as a compromise that had not been accepted by the other parties proposing amendments and therefore was not pending. Somewhat curiously, no other party tendered the United States' compromise proposal as an amendment. Instead, the original text of article 15 was quickly approved by a vote of eight in favor (Australia, Belgium, Brazil, China, Colombia, France, United Kingdom and United States) and three abstentions (Poland, Syria and Soviet Union). 2 U.N. SCOR (124th mtg.) at 679-80 (1947).

Council in the termination process. Moreover, United States Representative Warren Austin stated at that time that the Trusteeship Agreement was in the nature of a "bilateral contract between the United States, on the one hand, and the Security Council on the other" and therefore "no amendment or termination can take place without the approval of the Security Council" as well as the United States.[77] In light of this drafting history, it would be a distortion of article 15 to construe that it was intended to mean that the United States may unilaterally terminate the trusteeship or that the Security Council was barred from a role in the process.[78] Furthermore, the contents of Ambassador Austin's comments and his proposed alternative version of article 15 were before the Congress when the Trusteeship Agreement was considered and approved by joint resolution.[79]

Government officials in the United States have also acknowledged at different times during the administration of the Trust Territory that the approval of the Security Council would be required for termina-

77. *See* 2 U.N. SCOR (116th mtg.) at 476 (1947). For text of Ambassador Austin's comments, see Appendix A, *infra*.

78. *See* Clark, *Letter to the Editor in Chief*, *supra* note 52, at 932. *Cf.* Macdonald, *supra* note 8, at 258.

79. President Truman transmitted to the Congress along with his message recommending approval of the Trusteeship Agreement a memorandum which analyzed the terms of the proposed agreement. H.R. DOC. 378, 80th Cong., 1st Sess. 3-6 (1947). The memorandum included a somewhat detailed account of the Security Council debate on the Trusteeship Agreement, including the debate on article 15. The alternative phrasing of article 15 proposed by the United States and recognizing Security Council participation in termination is included in the memorandum. *Id.* at 6. The memorandum was referred to in discussion of the Trusteeship Agreement in both the House and Senate. *See* 93 CONG. REC. 8731-32 (1947) (statement of Rep. Fulton); H.R. REP. NO. 889, 80th Cong., 1st Sess. 3-4 (1947); *Trusteeship Agreement for the Territory of the Pacific Islands: Hearing on S.J. Res. 143 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 3-4 (1947) (statement of George C. Marshall, Secretary of State).

Note should also be taken that the phrasing of the approving congressional joint resolution made very specific mention of the prior consent of the Security Council and the need for consensual approval by the United States in order for the agreement to come into force. *See* 93 CONG. REC. 8731 (1947) (H.J. Res. 233); *Trusteeship Agreement for the Territory of the Pacific Islands: Hearing on S.J. Res. 143 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 1 (1947). The Resolution read in part:

> Whereas the Security Council on April 2, 1947, approved unanimously the trusteeship agreement with amendments acceptable to the United States; and
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> Whereas the said agreement, having been approved by the Security Council, will come into force upon approval by the Government of the United States after due constitutional process . . . .

The resolution is embodied in Pub. L. 204, 61 Stat. 397 (1947). Secretary of State Marshall verified before the Senate that the Trusteeship Agreement was in fact an agreement between the United States and the Security Council. *See Trusteeship Agreement for the Territory of the Pacific Islands: Hearing on S.J. Res. 143 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 8 (1947).

The Trusteeship Agreement was submitted to the Congress for approval by joint resolution rather than the treaty process because of the role that the House of Representatives would play in the future execution of the Trusteeship Agreement. H.R. DOC. NO. 378, 80th Cong., 1st Sess. 1-2 (1947) (transmittal letter of President Truman).

tion of the Trusteeship Agreement.[80] As recently as April 18, 1986, a State Department official testified that the United States, plans were to seek approval of the trust termination by first going to the Trusteeship Council and afterwards:

> to take up the question of Trusteeship termination with the Security Council of the United Nations. Our goal here will be to achieve a degree of support for Trusteeship termination that will assure international recognition of the sovereignty of the future freely associated states and will recognize the Northern Mariana Islands as a Commonwealth of the United States. Equally important in the Security Council is our goal of preventing any nation or bloc of nations from disrupting the termination of the Trusteeship Agreement and denying the peoples of the Trust Territory their freely chosen political status desires.[81]

Although in recent Trusteeship Council debates the United States representatives have been reluctant to take the position that Security Council approval is not required,[82] other members of the executive branch have taken a different tack. During the course of recent litigation over the claims of Marshall Islands residents based on the United States nuclear testing done in the 1940s and 1950s, the attorneys for the United States have attempted to discredit the comments of Ambassador Austin by suggesting that he misspoke, or was, in fact, in error about the role of the Security Council in trust termination.[83] While it may be possible that the representative of the United States Government may have made an inaccurate statement of his own or of the government's view of the law, or that he may have reached an inaccurate conclusion about the law, the relevant circumstances make the

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80. *See* Clark, *Letter to the Editor in Chief, supra* note 52, at 932 n.16; Juda v. United States, 13 Cl. Ct. 667, 679 (1987). Judge Harkins stated in *Juda,* "Representatives of the United States, since 1947 and until March 4, 1986, consistently have acknowledged an obligation to seek [Security Council] approval of termination of the Trusteeship Agreement." *Id.*

81. *Compact of Free Association: Hearings on The Proposed Compact of Free Association for Palau Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs,* 99th Cong., 2d Sess. 132-33 (1986) (statement of James R. Lilley, Deputy Asst. Secy. of State for East Asia and Pacific Affairs). The debate on termination has indeed reached the Congress. *Compare* 135 CONG. REC. S7955-56 (daily ed. July 13, 1989) (statement of Sen. McClure that trusteeship has terminated despite assertions to contrary); *and* 135 CONG. REC. E2486-90 (daily ed. July 12, 1989) (statement of Rep. Lagomarsino that trusteeship has terminated without Security Council approval; *with* 135 CONG. REC. H3223 (daily ed. June 27, 1989) (statement of Rep. Lugo that trusteeship termination requires Security Council approval).

82. *See* 54 U.N. TCOR (1630th Mtg.) at 12-46, U.N. Doc. T/PV.1630 (1987) (lengthy debate on United States' annual report to Trusteeship Council in which the United States refused to answer directly the Soviet Union representative's question of whether Security Council approval of termination is required).

83. *See* Brief for Plaintiffs at 18, Juda v. United States, 13 Cl. Ct. 667 (1987) (citing Defendant's Jan. 27, 1987 Memorandum, at 13); Clark, *Letter to the Editor in Chief, supra* note 52, at 932 (citing Justice Department argument in Nitol v. United States, 13 Cl. Ct. 690 (1987); 54 U.N. TCOR (1626th Mtg.) at 13 U.N. Doc. T/PV.1626 (1987) (statement of Jonathan Weisgall, attorney for plaintiffs in *Juda v. United States* before Trusteeship Council).

recent government attempt at disavowal quite disingenuous. First, acknowledging that Ambassador Austin undoubtedly was assisted by a very competent staff and acted upon instructions from the United States government,[84] the Soviet Union's proposal to amend article 15 was first presented on February 26, 1947, while Ambassador Austin's statements were not rendered until March 7, 1947.[85] The passage of time, as well as the context of the statements, suggests that they were deliberate. Ambassador Austin was making a clear, cogent argument that the Security Council had a right to approve the alteration, amendment, or termination of a strategic trust by virtue of the United Nations Charter provisions, but held no right to terminate unilaterally as suggested by the Soviet Union.[86] Ambassador Austin also stated that the purpose of the language in article 15 was to affirm that no changes could be made without the additional assent of United States as Administering Authority.[87]

During the 1947 Security Council debate, the representatives of Belgium, China, Australia, and Syria offered comments that concurred with the view of Ambassador Austin that both parties to an agreement would need to consent to termination,[88] providing a broader basis for establishing the intent of the drafters. Moreover, the failure to amend article 15 to provide explicitly for a Security Council role in termination should be considered in light of what appears to have been general deference to the United States on this matter in light of the "incomparably greater sacrifices" the United States had made in

84. Secretary of State George C. Marshall testified before the Senate that Ambassador Austin acted upon the instructions of the United States Government in responding to proposed amendments to the Trusteeship Agreement. *Trusteeship Agreement for the Territory of the Pacific Islands, 1947: Hearings on S.J. Res. 143 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 4 (1947). The weight to be accorded the statements of Ambassador Austin is evidenced by the fact that he is quoted liberally in the public records of the congressional debate on the Trusteeship Agreement. *See supra* note 79 and documents cited therein.

Moreover, the position of United States representative to the United Nations was an important one and Ambassador Austin was a man of some stature. He had been an active figure in Vermont politics and its United States Senator from 1931 to 1946 where in later years he built a reputation as an internationalist. He resigned from the Senate to become United States Representative to the United Nations. He served in this position until his retirement in 1953. *See generally* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989, at 555 (1989); G. MAZUZAN, WARREN AUSTIN AT THE U.N.: 1946-1953 (1977).

85. The Soviet proposals are initially found in the record of the 113th Meeting, 2 U.N. SCOR (113th mtg.) at 415 (1947), and the relevant statements of Ambassador Austin were made at the 116th Meeting, 2 U.N. SCOR (116th mtg.) at 475-77 (1947).

86. *See* 2 U.N. SCOR (124th mtg.) at 669 (1947) (remarks of Soviet representative Gromyko asserting the Security Council's right under the Charter to terminate unilaterally).

87. *See* 2 U.N. SCOR (116th mtg.) at 476-77 (1947), *reprinted in* appendix A, *infra*; *see also* 2 U.N. SCOR (124th mtg.) at 670 (1947); *see also* Clark, *Letter to the Editor in Chief*, *supra* note 52, at 932.

88. *See* 2 U.N. SCOR (124th mtg.) at 671-75 (1947).

the war with Japan and the struggle for the Pacific Islands.[89] The United States also threatened to withdraw the Trusteeship Agreement from Security Council consideration when undue criticism on this issue was perceived.[90]

Additional assistance in determining the proper means for ending the trusteeship is found in the past practice of states terminating other trust agreements and mandates. Although the other trusts did not fall within the strategic trust category, the manner of termination is useful because it is an aspect where there is almost no distinction between a strategic trust and a nonstrategic trust, except that Security Council approval is required for the strategic trust, while approval of the General Assembly was required for the nonstrategic trust. Likewise, the Mandate System, while failing to specify any particular termination terms, did grant general supervisory powers to the League Council.[91] While a consistent pattern of formal termination under the Mandate system cannot be identified, the limited practice that did occur reflects a trend of League Assembly or General Assembly acquiesence in termination or other disposition.[92] For past Trusteeship System terminations, approval of the United Nations through the General Assembly was always obtained.[93]

Additional arguments advanced on proper termination include the position that the decision of the International Court of Justice in the Advisory Opinion on the International Status of Southwest Africa[94] renders the unilateral termination of a trust agreement ineffective under international law.[95] The proposition has been considered that

89. *See* 2 U.N. SCOR (113th mtg.) at 414-15 (1947) (statement of Soviet Union Mr. Gromyko at presentation of draft Trusteeship Agreement for Micronesia); R. CHOWDHURI, *supra* note 15, at 16.

90. *See* 2 U.N. SCOR (124th mtg.) at 670 (1947): "As the United States is a party to the agreement, all I can do is to state, with all due deference, that an amendment in the nature of the one proposed by the representative of the Soviet Union would probably be unacceptable to the United States as a party to the agreement. It would clearly be in violation of the Charter. . . . Our position is that we shall have to refrain from voting on this issue, and the whole matter may result in the withdrawal of the principal party, the United States, from executing the trust."

91. *See* LEAGUE OF NATIONS COVENANT art. 22, paras. 7-9.

92. *See* J. CRAWFORD, *supra* note 23, at 337-41 and Appendix 2, at 426-28; Sayre, *supra* note 14, at 288-89; 1 WHITEMAN'S DIGEST OF INTERNATIONAL LAW 697-98 (1963).

93. *See* Clark, *Self-Determination and Free Association*, *supra* note 43, at 6; J. CRAWFORD, *supra* note 23, at 341, Appendix 2 at 426-28; Marston, *supra* note 8, at 12-13 and Appendix.

94. 1950 I.C.J. Reports 128, 141-43 (Advisory Opinion of July 11) (The Court unanimously held that "the Union of South Africa acting alone does not possess the competence to modify the international status of the territory of South West Africa, and the competence to determine and modify the international status of the territory rests with the Union of South Africa acting with the consent of the United Nations").

95. *See* S. DE SMITH, *supra* note 27, at 185. *But see* R. CHOWDHURI, *supra* note 15, at 170-72 (indicating that the decision of the International Court of Justice left substantial problems unanswered with regard to the South West Africa situation in particular).

the emerging states of Micronesia might have the capacity to agree to termination.[96] The argument is rather dubious because of the applicable principle that the original contracting parties must consent to alteration of an agreement and the new states were not parties to the Trusteeship Agreement.[97]

One final issue to be addressed in assessing the proper process for termination is the possibility that the approval of the Trusteeship Council[98] might be deemed to be adequate in lieu of Security Council approval. While it is true that the Security Council delegated some of its responsibilities to the Trusteeship Council under the provisions of Article 83(3) with respect to the monitoring of the United States administration of the trust for Micronesia, there is no reason to conclude that the delegation was a total abdication of Security Council responsibility and authority.[99] Indeed, the question of the proper roles of the Security Council and Trusteeship Council with relation to Micronesia was raised shortly after the execution of the Trusteeship Agreement. In response to a request from the Secretary General, the two councils conferred on the question and the Security Council ultimately adopted a resolution which provided that the Security Council retained ultimate responsibility for the strategic trust while delegating to the Trusteeship Council responsibility for all matters not involving issues of security.[100] The Trusteeship Council acceded to this arrangement.[101] This decision was consistent with the view that the provisions of Article 83(1) make it impermissible for the Security Council to surrender its ultimate responsibility for supervising strategic areas to the Trusteeship Council.[102] The resolution merely reflected a decision of the Security Council to avail itself of the assistance of the Trusteeship Council as provided for in Article 83(3) of the Charter.[103] For these

96. *See* Macdonald, *supra* note 8, at 249-53. (Accepting the idea that while not possessing full sovereignty, the emerging states hold sufficient personality to enter into valid agreements to end the trust relationship).

97. C. TOUSSAINT, *supra* note 16, at 125. *But see supra* note 6 (on possibility of emerging states achieving *de facto* termination of trusteeship status).

98. *See supra* note 4; *infra* appendix B.

99. *See generally* 1 WHITEMAN'S DIGEST OF INTERNATIONAL LAW 766-68 (1963).

100. *See* R. CHOWDHURI, *supra* note 15, at 164-67 (citing 4 U.N. SCOR (415th Meeting) at 9 (1949)); yearbook of the United Nations, 1948-49, pp. 140-41.

101. R. CHOWDHURI, *supra* note 15, at 167 (citing T.C. Res. 46 (IV), 4 U.N. TCOR Supp. (No. 1) at 1-2, U.N. Doc. T/328 (1949).

102. *See* Sayre, *supra* note 14, at 292. Sayre reads article 83 to require that the security council utilize the assistance of the trusteeship council but not surrender ultimate responsibility. This opinion is consistent with representations made by the United States representative to the Committee of Experts in 1948. *Id.* at 293 n.88; *see also* R. CHOWDHURI, *supra* note 15, at 166-67; C. TOUSSAINT, *supra* note 16, at 155-56; Macdonald, *supra* note 8, at 260-63 (concluding that Trusteeship Council approval of termination is insufficient).

103. *See* Juda v. United States, 13 Cl. Ct. 667, 680 (1987).

reasons, the approval of termination of the Trusteeship Agreement by the Trusteeship Council[104] will not substitute for the actual approval of the Security Council.[105]

Still, Trusteeship Council resolutions approving termination have lent credence to the United States efforts to terminate the trusteeship without Security Council participation.[106] Even before the presidential proclamation on the matter, the United States Government had informed the United Nations through the Secretary General that it had entered into new relationships with most of the Trust Territory with the approval of the Trusteeship Council.[107] Notwithstanding the practical effect and the language in its Resolution 2183 approving termination of the Trusteeship Agreement for Micronesia, recent statements by several members of the Trusteeship Council have seemed to acknowledge that the Security Council must play a role in termination and the records of the Trusteeship Council reveal that it has continued to entertain petitions relating to parts of the Trust Territory other than Palau[108]

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104. Macdonald also points out that the present constitution of the Trusteeship Council is not in literal compliance with article 86 which requires that the council consist of those states that are administering trusts, presently only the United States, the other members of the Security Council, and a sufficient number of other states to make equal the number of administering and non-administering states. *See* Macdonald, *supra* note 8, at 260-61.

105. While the Security Council has received the regular reports of the Trusteeship Council and published them as official documents, see 41 U.N. SCOR Spec. Supp. (No. 1), U.N. Doc. S/18238 (1986) (including T.C. Res. 2183), the Security Council appears never to have acted on the reports. *See e.g.,* Index to Proceedings of the Security Council, 41st year, 1986, pp. 41-42, U.N. Doc. ST/Lib.Ser.B/S.23 (1987) (reflecting lack of discussion in response to T.C. Res. 2183).

106. Note the reliance placed upon the Trusteeship Council Resolution No. 2183 and its other actions by the court in *Juda*, in reaching the conclusion that the Trusteeship Agreement has been terminated in effect, although not *de jure,* and that the Compact of Free Association between the United States and the Republic of the Marshall Islands has come into effect. Juda v. United States, 13 Cl. Ct. 667, 682-83 (1987).

107. *See* U.N. Doc. S/18424 (1986). At the time of the letter, and as now continues, the United States has entered into agreements with all of the Trust Territory except Palau. *See infra* notes 129-45 and accompanying text. The President's Proclamation was also included in the 1986 Annual Report of the United States to the United Nations on the Administration of the Trust Territory. *See* 54 U.N. TCOR at 275, U.N. Doc. T/1909 (1987). The annual report included a statement inside the cover of the 1986 report that it would be the final report of the United States to the Trusteeship Council. The United States, however, has continued to submit reports but has altered the format to treat Palau as the only remaining part of the Trust Territory. *See, e.g.,* 56 U.N. TCOR, U.N. Doc. T/1934 (1989).

108. *See, e.g.*, Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, February 1986, 53 U.N. TCOR Supp. (No. 1), at 39 U.N. Doc. T/1885 (1986) (statement of United Kingdom representative that "It simply is not true that there is any attempt to bypass the Security Council. The United Nations Mission has made it clear both to political leaders and at public meetings that the termination of the trusteeship will have to be decided by the Security Council."); U.N. Doc. T/1884 (1986) (letter of Soviet Union Permanent Representative asserting that "If we are to follow the Charter, the question of the Trust Territory must be resolved in the Security Council."); 50 U.N. TCOR (1595th Mtg.) at 47, U.N. Doc. T/PV.1595 (1985) (Statement of French Representative in Trusteeship Council proceedings that "Moreover, the process of self-determination in the Trust Territory of the Pa-

PART II — SUBSTANTIVE REVIEW OF THE U.S. ADMINISTRATION

> Our contribution to the culture here has been Coca-Cola, cigarettes and candy.[109]
>
> Nowhere in the Trusteeship Agreement is the United States called upon to create a Utopian welfare state in the Trust Territory.[110]

Assuming that the United States changes its course and seeks the approval of the Security Council for the proposed trust termination, the next task would be to determine the relevant subject matter for such a review. The Security Council might well begin with the break up of the Trust Territory into four political entities and whether the form of relations between each of those entities and the United States is consistent with the requirements of self-determination and self-government. Further, the Security Council should review the arrangements between each new state and the United States to ensure that the terms are fair and have been agreed upon freely. The Security Council should be concerned with provisions affecting the general social and economic conditions of Micronesia, particularly the area of economic development which has been described as the weakest aspect of the trust administration.[111] The United States' obligations should include a duty to make proper reparations for any breach of duty or advantage taken during the course of the trusteeship.

A. *Fragmentation of the Trust Territory*

A general consideration is the fragmentation of Micronesia during

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cific Islands began in 1969, under strict Trusteeship Council supervision, and that process will continue in the future under the ultimate supervision of the Security Council — which, surprisingly, certain people seem to forget").

109. Earnshaw, *Micronesia States Addicted to U.S. Funds Hope for Recognition*, The Reuter Business Report, Aug. 25, 1988 [Nexis] (quoting Salvation Army Major Benton Markham on Majuro, Marshall Islands). The "Coca-Cola" problem was first noted some time ago. Witness the exchange found in *Trusteeship Agreement for the Territory of the Pacific Islands: Hearing on S.J. Res. 143 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 10-11 (1947):

> Senator Hickenlooper. And within, say, 20 or 25 years the population of these islands is going to be a tremendous factor; and, personally, I think we are going to have to be prepared to meet it, and probably should be thinking about it now, because they are going around with health measures, which are perfectly fine, and we have found some new kind of diets. They do not like coconuts anymore. They like K rations and meat and a little something besides fish, and I think it is one of the practical problems we are going to have to meet, although not now. I hope we are thinking about meeting it eventually.
>
> Secretary Marshall. You are really outlining an Americanization of the Pacific. However, you do not mention baseball, but I suppose that it is included, and I suppose Coca-Cola has become a necessary drink down there, too.
>
> Senator Hickenlooper. The whole point of my question is, we look at the fine benefits which we get from security, but there are some human problems we are going to take on, and they will be sizable 20 years from now.

110. 56 U.N. TCOR (1617th mtg.) at 7, U.N. Doc. T/PV.1670 (1989) (statement of Patricia Byrne, U.S. Representative to Trusteeship Council).

111. *See* H. NUFER, *supra* note 45, at 229-31 (1978).

the United States' administration. Initially, one should not presuppose that the people of Micronesia would necessarily choose to remain as one political entity; Micronesians are not part of one identifiable ethnic or political group.[112] Rather, the islands have different groups of peoples with different languages, cultures, and values. At least nine different indigenous languages are spoken.[113] As some writers have observed:

> The current political situation of the Trust Territory is a classic case of ethnic pluralism created by colonial rule. From early Spanish rule to the present, successive colonial governments have imposed unified rule over the medley of peoples and cultures indigenous to the area.[114]

Much of the discussion about Micronesia treats the islands as one entity. This tendency of characterization has portrayed "Micronesia as far more integrated than the facts of anthropology, geography, or history will testify. The illusion of unity easily translates into the presumption of unity."[115]

While some have seemed to suggest that the United Nations principle favoring preservation of territorial integrity should have application in the case of Micronesia,[116] such application is not clearly warranted. The argument can certainly be made that preserving colonial boundaries has avoided problems of endless restructuring of territories, but prior United Nations practice has not always insisted on such preservation.[117] Moreover, the interest in preserving territorial integrity must be balanced against the equally important ideal of protecting the right of peoples to self-determination, including at least some limited right of choosing the territorial composition of the state. As stated quite perceptively by Judge Dillard in his separate opinion in the *Western Sahara* case, "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the

112. *See* Mason, *Unity and Disunity in Micronesia: Internal Problems and Future Status*, in D. HUGHES & S. LINGENFELTER, POLITICAL DEVELOPMENT IN MICRONESIA 203-62 (1974).

113. *See* A. RANNEY & H. PENNIMAN, DEMOCRACY IN THE ISLANDS 6 (1985); S. DE SMITH, *supra* note 27, at 120-22. Feelings of rivalry and regionalism have been perceived to run deep in the islands. *See* C. HEINE, *supra* note 31, at 110-17.

114. Mason, *supra* note 112, at 196.

115. *Id.* at 204.

116. *See* D. MCHENRY, *supra* note 49, at 42-45; 55 U.N. TCOR (1655th Mtg.) at 16, U.N. Doc. T/PV. 1655 (1988) (statement of the Soviet Representative to the Trusteeship Council that "the Trust Territory is to be viewed as a single, integral territory"). The basis for such assertions is the principle included in United Nations General Assembly Resolution 1514 that: "Any attempt aimed at the partial or total disruption of the national unity and the territory integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), U.N. GAOR Supp. No. 16 (1960), U.N. Doc. A/4684 at 66.

117. *See* M. POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 18-20 (1982) (citing examples of Rwanda and Burundi, the British Cameroons, and Gilbert and Ellice Islands).

people."[118]

While recognizing the diversity of peoples and cultures in the Trust Territory, the manner in which the partitioning of the Trust Territory occurred still gives rise to some concern. The Navy retained control over the islands of Saipan and Tinian in the Northern Marianas in part, at least to train Chinese Nationalists while the rest of the Trust Territory was turned over to Interior Department administration.[119] Perhaps due to these circumstances, the 1961 Visiting Mission to Micronesia found some indication that the United States Naval administrators had encouraged the idea of separatism on Saipan.[120] Although the Marshallese had previously proposed that each district be entitled to negotiate its own future with the United States,[121] the fragmentation of the Trust Territory is generally viewed as having begun with the initiation of separate post-trust talks between the United States representatives and the Northern Mariana Islands (NMI). As early as 1951, the Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands denoted a strong desire of the people of the Northern Mariana Islands to be incorporated into the United States.[122] When the United States introduced the possibility of commonwealth status as a third alternative to independence or free association during status negotiations in 1970, it met "profound" resistance from the Micronesian representatives. The commonwealth status would have included permanent control and sovereignty by the United States and the right to exercise eminent domain.[123] The

118. Western Sahara, 1975 I.C.J. 10, 122 (Advisory Opinion of Oct. 16); *see also* J. DUGARD, *supra* note 6, at 161-62 (the putative norm prohibiting fragmentation is limited by the right of the people to freely consent to partition).

119. H. NUFER, *supra* note 45, at 49-50; S. DE SMITH, *supra* note 27, at 135; *see also* R. GALE, *supra* note 45, at 101 (In the aftermath of the Bay of Pigs invasion, the CIA's training camp in Saipan was closed and security restrictions on Guam were also lifted).

120. *See* D. MCHENRY, *supra* note 49, at 13; Clark, *Self-Determination and Free Association*, *supra* note 43, at 78-83.

121. *See* Mason, *supra* note 112, at 248. While the Marshallese supported their proposal with the argument that each of the several distinct peoples of the Trust Territory should have its own sovereign right to decide its political future, it is likely that the motivation was a desire by the Marshallese to keep the proportionally larger tax revenues that their islands produced within the district.

122. *See* Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands, U.N. Doc. T/897 at 3-4 (1951); U.N. Doc. T/Pet.10/5, at 2 (1950)).

123. *See* D. MCHENRY, *supra* note 49, at 98-102. McHenry describes in some detail the exchange between the United States representatives and the Micronesian representatives who came to the meeting with an outline of their own four basic principles that should govern negotiations toward free association. Those four principles included the respect of Micronesian sovereignty; the right of Micronesian self-determination; the right of Micronesians to choose their own form of constitutional government; and the right to unilaterally revoke a status of free association by either party. *See also* Armstrong, *The Emergence of the Micronesians into the International Community: A Study of the Creation of a New International Entity*, 5 BROOKLYN J. INT'L L. 207, 214 (1979) [hereinafter Armstrong, *Emergence*]. The Micronesians recognized that integration

Northern Mariana Islands eventually became the only segment of the Trust Territory to respond positively.[124] The rest of the Trust Territory island groups continued to reject the permanent nature of the commonwealth status which would require surrendering to the United States ultimate authority over most areas of domestic and foreign affairs.[125]

For a number of possible reasons, the Northern Mariana Islands found the prospect of separation from the rest of the Trust Territory and the securing of a closer, commonwealth status with the United States quite appealing.[126] The distinct ethnic and cultural origin of the Marianas was a primary factor. The majority of its population is identified as being of Chamorro origin while the rest of Micronesia is principally of Carolinian origin.[127] The movement of the Northern Mariana Islands toward separation and commonwealth status was furthered by a very strongly worded resolution adopted by the Mariana Islands District Legislature in 1971,[128] and an overwhelming approval of the Covenant for a Commonwealth of the Northern Mariana Islands.[129]

Although the separate talks were criticized by the Visiting Mission of the Trusteeship Council in 1973,[130] the United States favorably re-

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would bring more financial support but disliked the idea that United States citizens might come to Micronesia and acquire land and take over businesses, and that government would be taken over by Americans.

124. *See* H. NUFER, *supra* note 45, at 86.

125. *See id.*

126. *See* D. MCHENRY, *supra* note 49, at 130 (citing, in addition to the separate administration, differences in culture, geographic separation from other districts, and relatively greater economic development.); S. DE SMITH, *supra* note 27, at 59-62; R. GALE, *supra* note 45, at 254-56. The desire to separate from the rest of Micronesia is seen as resulting in part from an early movement of many people in the Northern Mariana Islands to seek a union with Guam. The movement for union with Guam was seen as motivated by a shared ethnic backgrounds as well as a desire to share in the benefits that Guam enjoys because of its relatively close relationship with the United States as an unincorporated territory. While 60% of voters in the Northern Mariana Islands voted for reintegration with Guam in a 1969 plebiscite, the Guamanians voted in opposition to integration by a similar margin (58%) in a 1969 referendum. *See* H. NUFER, *supra* note 45, at 87. Although there was some support in Guam for reunification, the negative vote apparently resulted in part from a fear that the Guamanians would have to share their resources with the poorer people of the Marianas. R. GALE, *supra* note 45, at 255-56.

127. *See* Hirayasu, *supra* note 52, at 515.

128. *See* H. NUFER, *supra* note 45, at 89-90. The resolution was entitled "A Resolution Relative to Advising the Security Council and Trusteeship Council of the United Nations that the Mariana Islands District of the Trust Territory of the Pacific Islands Will Secede from the Trust Territory . . . by Force of Arms If Necessary, and with or without the Approval of the United Nations."

129. *See 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) at 33, U.N. Doc. T/1771 (1976) (93% of the registered voters in the Northern Mariana Islands voted in a special plebiscite and approved the Covenant by 78.8%).

130. *See* D. HUGHES & S. LINGENFELTER, *supra* note 112, at 247. As early as 1961 the

ceived the request for separate status negotiations. The United States response arose not simply out of a respect for the right of self-determination in the people of the Northern Mariana Islands but also because of its military interest in controlling the islands.[131] There is no doubt that the United States has always held an interest in keeping the islands of Micronesia in a permanent relationship and has schemed to bring that end about.[132] Nonetheless, if one is satisfied that the preference for incorporation into the United States is actually the freely expressed will of the people of the Northern Mariana Islands, then insistence upon independence would be at the expense of the basic right to choose a form of internal self-government.[133] Some questions have been raised with regard to fairness of the plebiscite in which the commonwealth status was approved. That criticism goes, in part, to the lack of alternatives reflected in the ballot that was used.[134] That ballot offered the choice of voting for commonwealth status or being thrust back into negotiations with the rest of the Trust Territory.[135] No specific mention was made of the options of free association or complete independence. Still, independence and free association were implicit in the alternative to commonwealth and that a large majority,

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Visiting Mission to Micronesia had called on the United States to discourage the desire for separation held by the Northern Mariana Islands. *See* D. MCHENRY, *supra* note 49, at 13. The Micronesian negotiating team appeared to acquiesce to the separate talks with the Marianas by virtue of failing to object. *Id.* at 132-33.

131. *See* R. GALE, *supra* note 45, at 260-66. The United States offered many reasons for consenting to the separate talks with the Marianas: the desire of the Marianas, the consent of other Micronesians, the lack of any united Micronesia, respect for the right of self-determination. "Separate negotiations resulted primarily from United States military considerations . . . . However, there is no evidence presently available that the Marianas broke away at the *explicit* urging of the Pentagon." D. MCHENRY, *supra* note 49, at 136-37.

132. *See* D. MCHENRY, *supra* note 49, at 16-20 (indicating that in the 1963 Solomon Report the United States clearly placed a priority on keeping Micronesia in a permanent relationship with the United States rather than seeking to fulfill its obligations to the islands under the Trusteeship Agreement).

133. *See* C. TOUSSAINT, *supra* note 16, at 58-59. Toussaint noted, with particular regard to the Northern Marianas, that "one assumption upon which the Trusteeship System is founded, namely that a self-government or independence is necessarily the wish of all non-self-governing peoples, has proved in this instance to be false."

134. *See* R. GALE, *supra* note 45, at 270-71; D. MCHENRY, *supra* note 49, at 166-67.

135. *See 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) at 24, U.N. Doc. T/1771 (1976). The ballot read:

> Yes — I vote for Commonwealth as set forth in the Covenant to Establish Commonwealth of the Northern Mariana Islands in Political Union with the United States of America.
>
> No — I vote against Commonwealth in political union with the United States as set forth in the Covenant recognizing that, if Commonwealth is rejected, the Northern Mariana Islands will remain as a district of the Trust Territory with the right to participate with the other districts in the determination of an alternative future political status.

78.8 percent of those voting, favored commonwealth status.[136] The Trusteeship Council, with the exception of the Soviet Union delegate, was satisfied that the breakaway of the Marianas was inevitable.[137]

After the Northern Mariana Islands broke away from the rest of the Trust Territory, further fragmentation occurred. By 1977, both Palau[138] and the Marshalls had requested negotiations for separate status.[139] In 1978, a referendum on the creation of an all-Micronesia federation was held in all of the Trust Territory except the Northern Mariana Islands, but failed to receive the necessary approval of Palau and the Marshall Islands.[140] The referendum resulted in the creation of three separate political entities. In addition to the Northern Mariana Islands,[141] the other three entities are the Republic of Palau,[142] the Republic of the Marshall Islands,[143] and the Federated States of Micronesia, consisting of the remaining districts of the Trust Territory.[144]

After the failure of the All-Micronesia referendum, the United States proceeded to negotiate agreements for free association with the latter three entities. The negotiations ended in 1982 with the signing of Compacts of Free Association with each of the new governments.[145]

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136. *See id.* at 33.

137. *See* R. GALE, *supra* note 45, at 267.

138. In 1976, the Palauans voted 88.5% in favor of seeking separate status from the rest of the Trust Territory. *See* A. RANNEY & H. PENNIMAN, *supra* note 113, at 25. The United States initially rejected the request of Palau for separate negotiations. D. MCHENRY, *supra* note 49, at 134.

139. Dating from 1972, the Marshall Islands legislature and delegations made it clear that separate negotiations were a preferred option. *See* Mason, *supra* note 112, at 248-49; D. MCHENRY, *supra* note 49, at 134.

140. *See Report of the United Nations Visiting Mission to Observe the Referendum in the Trust Territory of the Pacific Islands*, 1978, 46 U.N. TCOR Supp. (No. 2) at 57, U.N. Doc. T/1795 (1979). The vote tallies were: Kosrae - 1118 yes and 704 no; Ponape - 5970 yes and 2020 no; Marshall Islands - 3888 yes and 6217 no; Truk - 9762 yes and 4239 no; Yap - 3359 yes and 186 no; and Palau - 2720 yes and 3339 no.

141. The Northern Mariana Islands consists of fourteen islands with a population of about 20,800. U.S. DEPT. OF INTERIOR, COMMONWEALTH OF NORTHERN MARIANA ISLANDS, FACT SHEET 2 (1989).

142. Palau consists of about 200 islands with an estimated population of about 14,000 inhabiting about eight of the islands. U.S. DEPT. OF INTERIOR, REPUBLIC OF PALAU, FACT SHEET 2 (1989). Palau is also known as "Belau," particularly within the islands. *See* A. BOSS, R. CLARK, E. HAMMERICH, S. ROFF & D. WRIGHT, REPORT OF THE INTERNATIONAL OBSERVER MISSION — PALAU REFERENDUM — DECEMBER, 1986, at 1 (1987) [hereinafter A. BOSS, REPORT OF INTERNATIONAL OBSERVER MISSION].

143. The Republic of the Marshall Islands consists of about 31 atolls with a population of about 45,000. U.S. DEPT. OF INTERIOR, REPUBLIC OF THE MARSHALL ISLANDS, FACT SHEET 3 (1989).

144. The Federated States of Micronesia consists of four districts (Kosrae, Ponape, Truk, and Yap) with a population of about 100,000. U.S. DEPT. OF INTERIOR, FEDERATED STATES OF MICRONESIA, FACT SHEET 2-3 (1989).

145. The Compact of Free Association was signed by the United States and the Federated States of Micronesia on October 1, 1982, and by the United States and the Republic of the Marshall Islands on June 25, 1983. *See* Compact of Free Association Act of 1985, Pub. L. No.

Each Compact of Free Association was subject to approval within the states by processes which included popular approval through plebiscites. The Compacts have been approved in the Republic of the Marshall Islands and the Federated States of Micronesia,[146] but one has yet to receive approval in Palau.[147]

Despite hopes that there might be a unified Micronesia, the partisan interests of the various island groups precluded any opportunity for unification. Given the context of disparate peoples brought together by external forces, it seems fundamentally inconsistent with the principle of self-determination to force some semblance of unity upon the islands in the Trust Territory. A forced unity would also seem to invite internal problems that would threaten the continued existence of the state. One need not look very far to find secessionist struggles that have been waged by minority groups who found themselves involuntarily included in conglomerate states.[148] It would be inconsistent with the doctrine of self-determination and acutely shortsighted not to recognize the right of Micronesian people to form several states based on the desires of the people. The United States may well take credit for allowing the division of the Trust Territory as a reflection of its commitment to democracy, thus allowing the Micronesians a large voice in deciding their future political status.[149]

99-239, 99 Stat. 1770 (codified as amended at 48 U.S.C. § 1681 (1986)) [hereinafter Compact for Micronesia and Marshall Islands]. The Republic of Palau initially signed the compact in 1982 but approval by popular vote was not obtained for reasons set out below. *See infra* notes 226-262 and accompanying text. Consequently, the Compact of Free Association between the United States and Palau has undergone revisions and still is pending final approval. The most recent version can be found at Pub. L. No. 99-658, 100 Stat. 3672 (codified at 48 U.S.C. § 1681 (1986)) [hereinafter Compact for Palau]. The most recent proposal for implementation of the Compact for Palau can be found in H.J. Res. 175, 101st Cong., 1st Sess. (1989). The Compacts [when cited together, hereinafter Compacts of Free Association] all contain similar terms but do have some differences. *See infra* notes 200-212.

146. The Marshall Islands approved the compact in a plebiscite conducted in September, 1983 by a vote of 58% in favor. *See Report of the United Nations Visiting Mission to Observe the Plebiscite in the Marshall Islands Trust Territory of the Pacific Islands*, September 1983, 51 U.N. TCOR Supp. (No. 2), U.N. Doc. T/1865 (1984). The FSM approved of the compact in a plebiscite conducted in June, 1983, by a vote of 79% in favor. *See Report of the United Nations Visiting Mission to Observe the Plebiscite in the Federated States of Micronesia, Trust Territory of the Pacific Islands, June 1983*, 51 U.N. TCOR Supp. (No. 1), U.N. Doc. T/1860 (1984).

147. *See infra* notes 226-262 and accompanying text.

148. One example recently discussed is the armed struggle of the Eritrean people against Ethiopia. *See* Comment, *Self-Determination: Its Evolution and Practice by the United Nations and Its Application to the Case of Eritrea*, 6 WIS. J. INT'L L. 75 (1987); *see also* A. JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY 78-83 (1986) (discussing examples of secessionist struggles found in Bangladesh, Eritrea, and Biafra).

149. *See* 56 U.N. TCOR (1669th mtg.) at 8, U.N. Doc. T/PV.1669 (1989) (statement of United Kingdom Representative J. Stephen Smith in the Trusteeship Council).

B. *Achievement of Self-Government or Independence*

As a result of negotiations that officially began in 1969,[150] the Northern Mariana Islands are assuming the status of Commonwealth to the United States. Palau, the Marshall Islands and the Federated States of Micronesia have all ostensibly agreed to a relationship of free association with the United States.[151] A critically important issue in any Security Council review of the proposed termination will be whether these forms of government satisfy the United Nations Charter article 76(b) requirement that trust territories be advanced "towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned."

The legitimacy of the forms of post-trust government, as specifically structured by the agreements with the United States, have received differing evaluations in studies by several scholars.[152] The difference of opinions seems to rest in large part on whether emphasis is placed on the right of Micronesian peoples to choose almost any form of government, provided the choice reflects the "freely expressed wishes" of the peoples, or alternatively, whether emphasis is placed on the degree to which the chosen forms of government fit into one of the three categories of self-government — independence, free association or integration — as defined by the United Nations General Assembly resolutions concerning self-determination set out below.

Any Security Council review of the Micronesian Compacts of Free Association would undoubtedly take into account the General Assembly resolutions concerning decolonization and self-determination. The General Assembly pronouncements include Resolution 1514, the "Declaration on the Granting of Independence to Colonial Countries and Peoples."[153] Resolution 1514 makes several references to the

150. For a description of the negotiations, see Armstrong, *Emergence*, *supra* note 123, at 213-27.

151. The people of Palau have yet to approve the Compact by the required super-majority in a plebiscite, but it appears inevitable that the Compact negotiated between the two governments will be approved. *See infra* notes 243-257 and accompanying text.

152. *See, e.g.*, Hirayasu, *supra* note 52 (approving the post-trust relations); Rodriguez-Orellana, *In Contemplation of Micronesia: The Prospects for Decolonization of Puerto Rico Under International Law*, 18 U. MIAMI INTER-AM. L. REV. 457 (1987) (critical of Compacts of Free Association); Hills, *supra* note 43 (writing in favor of the free association arrangements); Clark, *Self-Determination and Free Association*, *supra* note 43 (writing critically of the proposed arrangements); Armstrong, *Emergence*, *supra* note 123 (writing favorably on the post-trust relations).

153. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960). Pomerance asserts that Resolution 1514 is the most frequently cited resolution in United Nations history. *See* M. POMERANCE, *supra* note 117, at 1.

right of peoples to "independence" *per se* and is often interpreted as requiring full independence as the appropriate form of self-government for an emerging state.[154] One day after the adoption of Resolution 1514, the General Assembly also adopted Resolution 1541,[155] concerning the obligation of states to transmit information on dependent territories under United Nations Charter article 73. Principle VI of the Annex to Resolution 1541 states that:

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

(a) Emergence as a sovereign independent State;

(b) Free association with an independent State; or

(c) Integration with an independent State.

Resolution 1541 also includes factors to be considered in deciding whether free association is sufficient to establish self-government, including the requirements that the free association involve "a free and voluntary choice . . . through informed and democratic processes," that there be self-government in internal matters, and that the people have the right to modify the status of the territory through democratic means.[156]

Resolution 1541 also allows for the possibility of integration as a form of self-government within certain limits. Principle VIII provides that integration should include complete equality between the people of the non-self-governing territory and the state into which it is being integrated, including equal rights of citizenship and of participation in all levels of government. Principle IX states that a decision to integrate must reflect the freely expressed wishes of the people, and should come only after the territory has attained a sufficiently advanced stage of self-government to allow for a responsible, knowledgeable choice through an informed, democratic process.

The difference between Resolution 1514's emphasis on independence and Resolution 1541's allowance for alternative forms of gov-

154. *See* M. POMERANCE, *supra* note 117, at 24-25. The preamble of Resolution 1514 states, in part, that the General Assembly recognizes the yearning of dependent peoples for freedom and their movement toward "independence." Paragraphs 3, 4, and 5 of the resolution all mention independence to the exclusion of any other forms of government.

155. G.A. Res. 1541, U.N. Doc. A/4684 (1960).

156. G.A. Res. 1541, Annex Principle VII. Resolution 1541 has been interpreted to require two additional elements in light of prior practice: the terms of the free association should be clearly set down in a binding agreement, and the power of the associate state to intervene in internal affairs should not involve great discretion. J. CRAWFORD, *supra* note 23, at 375-76. *But cf.* Clark, *Free Association: Critical View* 2, in UNIV. OF VIRGIN ISLANDS, PROCEEDINGS: CONFERENCE ON THE FUTURE POLITICAL STATUS OF THE UNITED STATES VIRGIN ISLANDS, Feb. 26-27, 1988 (1989) (noting that the free association arrangements between New Zealand, the Cook Islands and Niue are almost totally lacking any written agreement).

ernment has been noted and discussed more fully in other writings.[157] To the extent that a contradiction is perceived,[158] Resolution 1541 should carry more weight because it reflects more of an attempt to interpret United Nations Charter provisions, specifically article 73, rather than an attempt to add substance to the Charter, as Resolution 1514 has been interpreted to do.[159] Another answer to the possible inconsistency between Resolutions 1541 and 1514 is the view that independence is presumed to be the proper mode of self-government, but that the presumption against free association or integration, based on the fact that those relationships contain more opportunities for exploitation, can be overcome.[160] In any event, Resolution 1541 is consistent with United Nations practice which has not always required independence for a non-self-governing territory.[161]

The more flexible approach to acceptable forms of self-government is buttressed by General Assembly Resolution 2625, the Declaration Concerning Friendly Relations Among States.[162] Resolution 2625 reads, in part, "[t]he establishment of a sovereign and independent

157. *See* M. POMERANCE, *supra* note 117, at 9-13; W. OFUATEY-KODJOE, *supra* note 37, at 119-25; Clark, *Free Association and Self-Determination*, *supra* note 43, at 49-53.

158. *See* M. POMERANCE, *supra* note 117, at 10. The difference may be attributable to the fact that Resolution 1514 came from the plenary session of the General Assembly while Resolution 1541 was drafted by a committee in which states administering non-self-governing territories held significant numbers. *See* Clark, *Self-Determination and Free Association*, *supra* note 43, at 49-51; Armstrong, *Emergence*, *supra* note 123, at 236-37.

159. *See* M. POMERANCE, *supra* note 117, at 10-12. *See also* W. OFUATEY-KODJOE, *supra* note 37, at 112-25. Ofuatey-Kodjoe makes four points in favoring Resolution 1541 over Resolution 1514: article 73 of the Charter allows for self-government without complete independence; Resolution 1541 operates on the basis of continued acceptance of article 73; Resolution 1514 is inconsistent with concepts embodied in article 73 and the trusteeship system, and practice of the United Nations is more consistent with Resolution 1541.

160. *See* Macdonald, *supra* note 8, at 242-44.

161. *See* J. CRAWFORD, *supra* note 23, at 367-77; W. OFUATEY-KODJOE, *supra* note 37, at 121-22; Macdonald, *supra* note 8, at 241-43.

162. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States In Accordance With the Charter of the United Nations*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

Another General Assembly pronouncement, Resolution 742, also addressed similar topics to those found in Resolutions 1514, 1541 and 2625. *See* G.A Res. 742, 8 U.N. GAOR Supp. (No. 17) at 21-23, U.N. Doc. A/2630 (1953). Resolution 742 addressed the question of when a territory had become self-governing and therefore beyond the scope of U.N. Charter, Chapter XI on Non-Self-Governing Territories. In reference to the present debate on the adequacy of commonwealth status or free association for the new states, Resolution 742 can be taken to offer support to both sides. On the one hand, Resolution 742 emphasizes the need for peoples to reach a decision that is "freely expressed by informed and democratic processes," allows for association with an existing state, and states that each case should be judged by the particular circumstances. More stringently, however, Resolution 742 dictates that association should be "on the basis of absolute equality," and that limitations on sovereignty should be subject to modification at any time by the former territory. The importance of Resolution 742 in the present debate is lessened by the overall awkwardness of its provisions. *See* Clark, *Self-Determination and Free Association*, *supra* note 43, at 42-49, and its succession by more definitive Resolution 1541; *see also* M. POMERANCE, *supra* note 117, at 25-26.

State, the free association or integration with an independent State or *emergence into any other political status freely determined by a people* constitute modes of implementing the right of self-determination by that people." It is difficult to maintain the position that the option of independence must always be chosen by a non-self-governing territory when all relevant United Nations General Assembly resolutions and prior practice are considered.[163] The stronger position is that the "essence of self-determination is method, not result."[164]

C. *The Covenant to Establish a Commonwealth*

The establishment of a commonwealth relationship between the United States and the Northern Mariana Islands is perhaps a *fait accompli*. On February 15, 1975, representatives of the Northern Mariana Islands and the United States completed negotiations and executed the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States.[165] The Covenant was subsequently approved by the United States Congress[166] and the people of the Marianas.[167] It was largely given effect in 1978 by presidential proclamation[168] and fully given effect at the time of President Reagan's proclamation of the termination of the Trusteeship Agreement in 1986.[169]

The commonwealth relationship, as structured by the Covenant, calls for the Northern Mariana Islands to join "in political union with

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163. *See* Western Sahara, 1975 I.C.J. 10, 123 (Advisory Opinion of Oct. 16) (separate opinion of Judge Dillard):

> At one point Spain asserted, principally in its written statement, that in the free exercise of the population's right to self-determination allowance *must* be made for the *independence of the territory as a legal possibility*. She drew this conclusion from an analysis of resolution 1541 (XV) and the broader options designated in resolution 2625 (XXV). She also intimated that the General Assembly had committed itself to holding a referendum. I can find nothing in these resolutions, however, or in the legal aspects of the "right" itself which compels such conclusions. On the contrary it may be suggested that self-determination is satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it.

164. M. POMERANCE, *supra* note 117, at 24-25. *See* Western Sahara, 1975 I.C.J. 10, 33 (Advisory Opinion of Oct. 16) (defining the principle of self-determination as "the need to pay regard to the freely expressed will of peoples"); *id.* at 81 (Declaration of Judge Singh) (ascertaining the freely expressed will of the people is "the very *sine qua non* of all decolonization").

165. Pub. L. 94-241, 90 Stat. 263 (1976) (codified at 48 U.S.C. § 1681 (1982)).

166. H.J. Res. 549, 94th Cong., 1st Sess. (1975); S.J. Res. 107, 94th Cong., 1st Sess. (1975).

167. *See Report of the United Nations Visiting Mission to Observe the Plebiscite in the Mariana Island District, Trust Territory of the Pacific Islands, June 1975*, 43 U.N. TCOR Supp. (No. 2), U.N. Doc. T/1771 (1976).

168. Proclamation No. 4534, Oct. 24, 1977, 42 Fed. Reg. 56,593, *reprinted in* 48 U.S.C. § 1681 (1982).

169. *Supra* note 2.

and under the sovereignty of the United States"[170] with the islands having the right of internal self-government[171] and the United States being granted the responsibility for external affairs.[172] The right of internal self-government is potentially limited by Covenant provisions which make the existing laws and Constitution of the United States partially applicable to the Northern Mariana Islands[173] and grant the United States a limited ability to enact future laws that will be applicable to the Northern Mariana Islands.[174] While United States laws are thereby made applicable to the islands, the territory has received no opportunity for representation in the United States Congress nor participation in the election of the President. Instead, article IX grants the right to have a "Resident Representative" with official recognition by all departments and agencies of the United States government[175] and calls for regular consultation between the two governments.[176]

While the division of responsibility between internal and foreign affairs might seem rather straightforward, the Covenant has already spawned a dispute as to the degree of internal autonomy to be accorded the Northern Mariana Islands. While the dispute between the United States and the Northern Marianas government is discussed more fully below,[177] but it essentially is a dispute over the residual powers of internal or local government for the islands. The construction advocated by the Northern Marianas government would provide

170. COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA art. I, § 101 [hereinafter COVENANT].

171. COVENANT, *supra* note 170, art. I, § 103 provides that: "[t]he 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."

172. COVENANT, *supra* note 170, art. I, § 104 provides that: "[t]he United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands."

173. COVENANT, *supra* note 170, art. I, § 102 provides: "The relations between the Northern Mariana Islands and the United States will be governed by this Covenant which, together with those provisions of the Constitution, treaties and the laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands."

Article V of the Covenant goes on to state more specifically which parts of the United States Constitution and federal laws apply to the Northern Mariana Islands and calls for the appointment of a presidential commission to make recommendations as to the extent and manner that other United States laws should be made applicable to the Northern Mariana Islands. *Id.* art. V.

174. COVENANT, *supra* note 170, art. I, § 105. This section provides in part that "[t]he United States may enact legislation in accordance with its constitutional processes which will be applicable to 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 . . . may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands."

175. COVENANT, *supra* note 170, art. IX, § 901.

176. COVENANT, *supra* note 170, art. IX, § 902.

177. *See infra* notes 188-199 and accompanying text.

for a large degree of internal self-government, conceding to the United States government the areas of defense, security and foreign affairs. Under the construction presented by the United States government, the Northern Marianas are ultimately a mere territory, largely subject to laws enacted in the United States Congress without the benefit of representation in Congress. The legitimacy of the commonwealth status, as measured against United Nations precepts, may well depend on the particular construction given to the Covenant. The construction of the Covenant offered by the United States government is extremely susceptible to criticism, not only because of the lack of a voice in the Congress, but also because it raises a fundamental question of whether the people of the Northern Mariana Islands have freely consented to this form of commonwealth status. Moreover, even the more palatable construction of the Northern Marianas Government raises some questions of legitimacy.

In his important 1980 writing on Micronesia, Professor Roger Clark asserted that the commonwealth arrangement between the United States and the Northern Mariana Islands does not fulfill all of the requirements of Resolution 1541 for self-government by either free association or integration for several reasons. He argued: (1) that the people of the Marianas were probably not presented with a clear choice of independence as a form of government during the 1975 plebiscite; (2) that the Marianas are not free to modify their relationship with the United States if they should so wish; (3) that the Marianas are not entirely free to determine their internal constitution; and (4) that the Marianas are not fully integrated into the United States' system of federal government.[178] In a subsequent writing, Professor Clark has suggested that the Northern Mariana Islands "appear to be consigned to permanent colonial status."[179]

Professor Clark is certainly correct insofar as the Covenant structure does not fit into any of the three categories of self-government established by Resolution 1541. The Northern Marianas Government has reached the same conclusion:

> The Northern Marianas Islands by this standard [Resolution 1541] does not reach a full measure of self-government on termination of the trusteeship. It certainly does not become a sovereign independent state. It does not become freely associated with the United States because it does not have the power under the Covenant to disassociate itself from

178. Clark, *Self-Determination and Free Association*, *supra* note 43, at 75-78. In his 1986 statement before the Trusteeship Council, Professor Clark stated that nothing had happened since 1976 to change this assessment of the Commonwealth arrangement. 53 U.N. TCOR (1604th mtg.) at 36, U.N. Doc. T/PV.1604 (1986).

179. Clark, *Letter to the Editor in Chief*, *supra* note 52, at 934.

> the sovereignty of the United States. See Principle VII of the [Resolution 1541] Annex.
>
> Integration with an independent state, the United States, also is not achieved, because such integration requires complete equality between the peoples of the Northern Mariana Islands and the United States, including "equal rights and opportunities for representation and participation at all levels in the executive, legislative and judicial organs of government." See Principle VIII of the [Resolution 1541] Annex.[180]

Nonetheless, an argument for the validity of the commonwealth relationship can be made. Reviewing the proposed arrangements in light of the General Assembly resolutions, the emphasis should be on whether a valid act of self-determination has occurred.[181] As set out above, the people of the Northern Mariana Islands continually lobbied for a close relationship with the United States for many years.[182] While some questions have been raised about the phrasing of the plebiscite ballot and the timing of the referendum, it is difficult not to conclude that commonwealth status was the free choice of the people of the Northern Mariana Islands.[183] Even during the recent dispute over the issue of internal governance, the government has voiced a continued strong preference for commonwealth status.[184]

Still, some might question whether commonwealth status is valid even if one assumes that it accurately reflects the free choice of the people of the Northern Marianas. Integration through commonwealth status should be deemed within the realm of permissible forms of self-government provided that the government is structured in such a manner as to satisfy the requirements of article 76 of the United Nations Charter that (1) the arrangement is appropriate to the particular circumstances of the territory and its peoples, and (2) the status reflects the freely expressed wishes of the people concerned. The people of the Northern Mariana Islands seem quite willing to accept a

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180. *Special Representatives of the Governor of the Commonwealth of the Northern Marianas Islands for the Section 902 Consultations, Position Paper on Self-Government* 25 (Nov. 21, 1986) [hereinafter *Nov. 21 Position Paper*] (Courtesy of MacMeekin & Woodworth, Washington, D.C., Counsel to the Special Representatives. Copy on file with *Michigan Journal of International Law*).

181. *See* Hirayasu, *supra* note 52, at 515-17; *see also* D. MCHENRY, *supra* note 49, at 41 ("Despite a clear preference for independence, United Nations members, even some of the most avid proponents of independence, have suggested that a status short of independence is best for Micronesia, particularly if that is their free choice. There has seemed to be an emphasis, however, on *complete* self-government and on the right of Micronesians to decide — a right even to make the "wrong" choice").

182. *See supra* notes 126-137 and accompanying text.

183. *See Report of the United Nations Visiting Mission to Observe Plebiscite in the Marianas Island District*, 43 U.N. TCOR Supp. (No. 2) at 36-42, U.N. Doc. T/1771 (1976). The Visiting Mission concluded that the plebiscite was conducted without improper interference by the United States and the poll was well-organized and well-attended.

184. *See infra* notes 194-199 and accompanying text.

hybrid status that does not fit neatly into either free association or integration as defined by Resolution 1541 as long as there is a substantial degree of internal self-government. The Northern Marianas Government has explained its willingness to accept the partial integration arrangement despite the failure to fit into any of the Resolution 1541 categories of self-government:

> The Commonwealth, of course, has long recognized that the status achieved under the Covenant did not comport with the standards for self-government set out under General Assembly Resolution 1541 (XV). Given its isolated location, small population, and desire for a permanent association with the United States, it nonetheless decided to proceed with the Covenant arrangement with the United States . . . . the Commonwealth considered that its interests are protected, even though the citizens of the Northern Mariana Islands do not fully participate in the political processes of the United States, because of the mutually binding nature of the Covenant.[185]

The commonwealth status appears to be consistent with the circumstances and reflect the wishes of the people. Therefore, the status, at least as construed by the Northern Marianas Government, is almost certainly consistent with article 76.

The emphasis in Resolution 2625 on flexibility supports the view that partial integration through the commonwealth status is permissible.[186] Further, the lack of clear United Nations precedents in the area of self-determination refutes the notion that such an arrangement is prohibited or that independence is always required.[187]

Assuming that the Northern Marianas Islands and the United States may legitimately decide to enter into a relationship of partial integration, there remains the indispensible requirement that the people of the Marianas freely consent to that form of government. In recent years, the Northern Marianas Government has accused the United States of imposing a form of partial integration to which it had not agreed. More specifically, governmental officials of the Northern Mariana Islands have presented petitions to the Trusteeship Council to draw attention to concerns that the United States will not properly respect the right of that government under the Covenant to control its

185. *Nov. 21 Position Paper, supra* note 180.

186. *See supra* note 162 and accompanying text.

187. *See* D. MCHENRY, *supra* note 49, at 35-42. McHenry examines the United Nations Charter requirements in light of subsequent General Assembly resolutions and concludes that "[f]rom the above discussion, it is possible to conclude that, although the world community has indicated a preference for independence, it has not held that independence is the sole legitimate expression of self-determination by a dependent territory. Such a conclusion would seem especially warranted with respect to Micronesia. *Id.* at 41; *see also* M. POMERANCE, *supra* note 117, at 73-74 (concluding that flexibility is required in pursuing the right of self-determination).

own internal affairs.[188] Statements by officials during the course of inter-governmental consultations reflect a distinct rift as to whether the Northern Marianas government is supreme in internal matters or if United States law is supreme because the Commonwealth is a territory of the United States. The Northern Marianas Government first raised concerns about encroachment on its right of internal self-government in response to a number of actions by the Congress, the President and the Interior Department that were perceived to subject the Northern Marianas to oversight by the Interior Department.[189] These acts convinced the Northern Marianas Government that it was still being treated as a mere territory without a right of self-government, whereas it held the view that it should have the right of internal self-government "at least equal to that of a state of the United States."[190] The United States responded by taking the position that the Commonwealth is indeed subject to the territorial clause of the Constitution, article IV, section 3, clause 2, and therefore its "right to self-government does not extend to the same level as the several states."[191] The

188. *See* 56 U.N. TCOR (1663d mtg.) at 12-26, U.N. Doc. T/PV.1663 (1989) (representatives included members of the legislative branch of the government.); 55 U.N. TCOR (1649th mtg.) at 19-38, U.N. Doc. T/PV.1649 (1988) (representatives included the Lieutenant Governor, the President of the Senate, the Speaker and a fellow member of the House, and the elected Northern Marianas Islands representative to the United States).

189. *See Nov. 21 Position Paper, supra* note 180. The Representatives noted that the Covenant resulted in the Commonwealth being removed from Interior Department oversight as a mere territory but that sections 203(a) and (b) of Public Law 97-357, 48 U.S.C. § 1692 (1982) had reconferred on the Interior Department the right to receive an annual financial report from the Governor of the islands and conferred on the Inspector General the right to audit all accounts and expenditures of the Government. *Id.* at 15-16. The Northern Marianas Government was also concerned by the issuance of Executive Order 12572 (Nov. 3, 1986) which was perceived to treat the Commonwealth as a mere territory and the issuance of a notice by the Interior Department, citing 50 Fed. Reg. 51,455, 51,456 (Dec. 17, 1985), assigning to an assistant secretary responsibility for promoting development in the Commonwealth. *Id.* at 18-19.

190. *See id.* at 4, 11-12. The Northern Marianas' most recent statement on the issue has proposed that the Covenant be construed to grant the Commonwealth absolute autonomy in internal and local affairs, restricting the Congress' ability to legislate to those areas specifically listed in the Covenant or subsequent agreements. *See Special Representatives of the Governor of the Commonwealth of the Northern Mariana Islands for the Section 902 Consultations, Supplemental Position Paper on Self-Government* 6-17 (May 1989), *reprinted in*, COMPILATION OF DOCUMENTS FROM THE SEVENTH ROUND OF THE COVENANT SECTION 902 CONSULTATIONS 27, 33-44 (MacMeekin & Woodworth, May 24, 1989) (Copy on file with *Michigan Journal of International Law*).

191. *See Department of Interior, Memorandum — Nature of United States Obligations of Financial Assistance to the Commonwealth of the Northern Mariana Islands* 12 (Jan. 6, 1989), *reprinted in*, COMPILATION OF DOCUMENTS FROM THE SIXTH ROUND OF THE COVENANT SECTION 902 CONSULTATIONS 22, 33 (MacMeekin & Woodworth, Jan. 10-11, 1989) (Copy on file with *Michigan Journal of International Law*). The Memorandum went on to state that Congress could enact any law affecting the Northern Mariana Islands, at least with regard to limitations on funding, as long as there was a rational basis. *Id.* at 13 (citing Harris v. Rosario, 446 U.S. 651 (1980)).

The Interior Department had asserted in an earlier paper that, while the United States was granted unlimited rights with regard to foreign affairs and defense powers under section 104 of the Covenant, the right to local self-government for the Commonwealth under section 103 was

dispute strikes at the very heart of both the Covenant and the quintessential self-determination concern of self-government. For the people of the Northern Marianas to be subject ultimately to government by a process in which they have no representation, as the United States would construe the Covenant, indeed smacks of colonialism, as Professor Clark has suggested. Such an arrangement is antithetical to prevailing principles of self-determination.

Section 902 of the covenant calls for regular consultation "on all matters affecting the relationship," and for special representatives of the two governments to meet at the request of either party to engage in good faith consideration of designated issues and to make a report and recommendations with respect thereto. Since the consultation mechanism was first invoked in 1985, it has been beset with delays caused by failures to appoint United States Representatives and with charges that the United States has refused to discuss important issues.[192]

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not similarly unlimited. Rather, the Interior Department took the position that the United States Government could enact any law unless it was specifically limited by the Covenant. The residual or plenary legislative power was viewed as being placed in the United States Government. *See Special Representatives of the President of the United States for the Section 902 Consultations, Position Paper on The Relationship Between the United States and the Commonwealth of the Northern Mariana Islands* 9-10 (Mar. 28, 1987), *reprinted in*, COMPILATION OF DOCUMENTS FROM THE THIRD ROUND OF THE COVENANT SECTION 902 CONSULTATIONS 74, 83-84 (MacMeekin, Cutler & Woodworth, Apr. 1, 1987) (Copy on file with *Michigan Journal of International Law*).

192. The Northern Marianas first requested consultations in May, 1985. The United States did not respond with the designation of a special representative until May, 1986 when an official of the Interior Department was so designated. Three rounds of consultations took place, without many accomplishments, before the resignation of the Special Representative, Richard Montoya, in July, 1987. The process remained stalled for another year until a second representative was named. The consultations resumed from August, 1988 to May, 1989 when the second representative, Becky Norton Dunlop, resigned. *See Transcript of the Covenant Section 902 Consultations: Hearing Before the Subcomm. on Insular and International Affairs of the House Comm. on Interior and Insular Affairs*, 101st Cong., 1st Sess. (1989) (summary of section 902 consultations contained in statement of Pedro A. Tenorio, Lieutenant Governor); McAllister, *Interior Official Resigns Under Fire*, Wash. Post, May 27, 1989, at A7, col. 1 (reflecting Dunlop's resignation). The recent statement of Special Representative Dunlop before a House Subcommittee cited several successes of the section 902 talks: the resolution of a dispute between the IRS and the Northern Marianas about the tax status of housing bonds sold by a governmental authority; an understanding concerning the recommendations of a presidential commission on the applicability of U.S. laws to the Northern Marianas under section 504 of the Covenant; the agreement to provide air service to some islands in the Northern Marianas; and an understanding concerning the provision of non-governmental, third country assistance to the Northern Marianas. *See Transcript of the Covenant Section 902 Consultations.*

The representatives of the Northern Marianas government have not been so positive in describing the success of the consultations. Senate President Benjamin Manglona has asserted that "not one single substantive agreement has come out of these discussions. The self-government issue is as far from resolution as it has ever been; 902 discussons have proven to be all form and no substance." *See* 56 U.N. TCOR (1663d mtg.) at 25, U.N. Doc. T/PV.1663 (1989). Senator Manglona has pointed out in a House Subcommittee hearing that even the housing bond issue was resolved by a presidential dictate on the particular actions that refused to acknowledge the non-taxability of Northern Marianas government bonds. *See Transcript of the Covenant Section 902 Consultations.* House Speaker Pedro Guerrero identified a pattern of circumvention of the 902 process and the failure to reply to designated issues in a timely manner, if at all. Such

While the desire for full internal self-government remains the "central issue" for the Northern Marianas,[193] the lack of substantial progress through the consultation arrangements provided in section 902 has become a sore point as well. The combination of the dispute over the meaning of the Covenant and the ineffectiveness of the dispute resolution process has lead the people of the Northern Marianas to reconsider the commonwealth relationship.

During the testimony before the Trusteeship Council in 1988, the Marianas representatives identified these issues and a number of other concerns, described as "large and crucial," related to the Covenant's division of matters for internal governance.[194] To underscore the depth of the concern, the representatives presented an initiative that had been voted upon and approved by more than 75% of voters on November 7, 1987.[195] The initiative was described as "reaffirm[ing] our people's right to govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption."[196] The initiative included a provision that if negotiations left their concerns relating to self-government or financial assistance unresolved as of July 1, 1989, the people of the Northern Marianas shall have the right to reaffirm, reject, or renegotiate the Covenant.[197]

The Marianas Government representatives have continued to request that the Trusteeship Agreement be terminated, but only with the

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conduct has raised doubts about the United States' commitment to abide by the Covenant in good faith and lead to consideration of terminating the commonwealth status. *See Transcript of the Covenant Section 902 Consultations.*

193. *See* 56 U.N. TCOR (1663d mtg.) at 21, U.N. Doc. T/PV.1663 (1989) (statement of Benjamin T. Manglona, President of the Senate of the Northern Marianas legislature).

194. For a recent statement of particular NMI concerns, see 56 U.N. TCOR (1663d mtg.) at 16-26, U.N. Doc. T/PV.1663 (1989) (statement of Benjamin T. Manglona, President of the Senate). Among the concerns were the movement of the United States Government to apply laws affecting internal affairs on the basis of the territorial clause of the U.S. Constitution (article IV, § 3), the failure of the United States to engage in negotiations over disputes under § 902 of the Covenant, a perceived bias in U.S federal courts towards the positions of the U.S. Government, unilateral amendments of the Covenant by the U.S. Congress, the failure of the United States government to consult with the Northern Marianas Government before entering into international agreements that affect the NMI in areas of trade, immigration policy and international aviation, the control of fisheries and seaside resources in adjacent waters, and the appointment and authority of members of the executive branch of the U.S. Government who have responsibilities in the Northern Mariana islands.

195. The initiative is included in U.N. Doc. T/PET.10/702 (1988). For text of initiative see *infra* Appendix C.

196. *See* 55 U.N. TCOR (1649th mtg.) at 21, U.N. Doc. T/PV.1649 (1988) (statement of Lieutenant-Governor Pedro Tenorio). Other legislation was reported to have been introduced in the Northern Mariana Islands to terminate the Covenant. *Id.* at 36.

197. *See* Commonwealth-Wide Initiative No. 1, § 2, *infra* Appendix C. Although the problems remain largely unresolved, no referendum on the Covenant is presently scheduled. Interview with MacMeekin and Woodworth, Washington, D.C., Legal Counsel to Special Representatives of the Northern Mariana Islands for section 902 consultations (Nov. 2, 1989).

understanding and guarantee of the right to internal self-government in accordance with the United Nations Charter and the Trusteeship Agreement.[198] Charges of bad faith raised by the Northern Marianas and the disagreement between the two governments over the proper interpretation of the Covenant underscore the positive role that could be played by the Security Council in reviewing the proposed termination of the Trusteeship Agreement. The Security Council, if its members largely resist any temptation to politicize the issues, could review the Covenant not only to assure that it satisfies United Nations standards for self-determination through the free choice of the people, but also to aid the parties in construing the agreement to achieve a truly consensual agreement.[199] If a structure of partial integration can be mutually agreed upon by the Northern Marianas and the United States, then the Security Council should be reluctant to withhold its approval. But as long as the Northern Marianas continue to protest on the basis of a lack of internal self-government, the United States will be hard-put to defend the Commonwealth status as being consistent with self-determination standards.

D. *Compacts of Free Association*

Under very similar Compacts of Free Association for Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands,[200] each state is accorded a broad right of self-governance in both domestic matters and foreign affairs,[201] and is made responsible for its foreign undertakings.[202] The United States, however, is allowed a right of consultation in matters of foreign affairs[203] and receives "full

198. *See* 55 U.N. TCOR (1649th mtg.) at 21-22, U.N. Doc. T/PV.1649 (1988) (statement of Lieutenant-Governor Pedro Tenorio). The charge has been made that the United States waited until the Trusteeship Agreement was apparently terminated before stripping the Northern Marianas of self-government. *See* 55 U.N. TCOR (1649th mtg.), U.N. Doc. T/PV.1649 (1988) (statement of Pedro M. Atalig, Chairman of NMI Committee on Trusteeship Termination).

199. Unfortunately, the response of the Trusteeship Council has simply been to refer the Marianas to the dispute resolution provisions found in section 902 of the Covenant. *See* Trusteeship Council Resolutions, U.N. Doc. T/L.1270 (1989); U.N. Doc. T/L.1266 (1988), ("The Council considers that any difficulties over the interpretation of the new status agreements should be resolved bilaterally by the parties concerned in accordance with the procedures mutually agreed upon and laid down in the relevant new status agreements").

200. *See supra* note 145.

201. Compacts of Free Association, *supra* note 145, §§ 111, 121. Section 111 provides that "[t]he peoples of the [three states], acting through the Governments established under their respective Constitutions, are self-governing;" and section 121 provides that the three states have the capacity to conduct foreign affairs in their own names and rights.

202. Compact for Micronesia and Marshall Islands, *supra* note 145, §§ 124, 125; Compact for Palau, *supra* note 145, §§ 126, 127.

203. Compacts of Free Association, *supra* note 145, § 123.

authority and responsibility for security and defense matters."[204] The right of "strategic denial" is also granted to the United States by provisions which permit the United States to close the islands to the military forces of any other nation.[205]

Under Title Two of the Compacts, the United States also takes on the obligation of providing the freely associated states with substantial monetary and program assistance during the term of the Compacts. The Compacts are supplemented by a number of separate agreements such as those relating to the establishment and use of defense sites or facilities.[206]

The provisions on termination found in Title Four are an important aspect of the Compacts when considered against the General Assembly standards for self-determination because those provisions ultimately limit the ability of the freely associated states to terminate portions of the Compacts. The Compacts allow for termination both by mutual agreement and by unilateral act.[207] The continuation of financial assistance largely depends upon how termination comes about,[208] but the defense and security provisions are designed to continue for a minimum of fifteen years for the Federated States of Micronesia and the Republic of the Marshall Islands.[209] For Palau, the defense and security provisions will continue for a minimum of fifty years.[210] The right of "strategic denial" of use of the territories by the military forces of any third states granted by section 311 of the Com-

204. Compact for Micronesia and Marshall Islands, *supra* note 145, § 311; Compact for Palau, *supra* note 145, § 312.

205. Compact for Micronesia and Marshall Islands, *supra* note 145, § 311(b)(2); Compact for Palau, *supra* note 145, § 311. The prohibition of other military forces is even more absolute in the Palauan Compact.

206. *See* Compacts of Free Association, *supra* note 145, § 321. The initial separate agreements for the Republic of the Marshall Islands and the Federated States of Micronesia can be found at H.R. Doc. No. 192, 98th Cong., 2d Sess. 115-391 (1984). The initial separate agreements for Palau can be found at H.R. Doc. No. 193, 99th Cong., 2d Sess. 154-405 (1986).

207. Compacts of Free Association, *supra* note 145, §§ 441-43.

208. In the event of mutual termination the economic assistance provided by the United States will continue only on the basis of mutually agreed terms. Compacts of Free Association, *supra* note 145, § 451. In the event of unilateral termination by the United States with respect to the Federated States of Micronesia or the Republic of the Marshall Islands, the economic assistance provisions would continue until the fifteenth anniversary of the Compact. Compact for Micronesia and Marshall Islands, *supra* note 145, § 452. In the event of unilateral termination by the Republic of the Marshall Islands or the Federated States of Micronesia, the general economic assistance provisions would continue only as determined by the United States. *Id.* § 453.

With regard to Palau, the most recent version of the Compact of Free Association provides that in the event of unilateral termination by either the United States or Palau, the economic assistance and defense provisions would both continue for a minimum of fifty years. Compact for Palau, *supra* note 145, art. V, § 452. It should be noted, however, that the economic assistance provisions under Title Two provide funding only for a fifteen-year period.

209. Compact for Micronesia and Marshall Islands, *supra* note 145, §§ 452, 453.

210. Compact for Palau, *supra* note 145, § 452.

pacts is structured to run in perpetuity by the most recent Palauan Compact[211] and subsidiary agreements to the Federated States of Micronesia and the Republic of the Marshall Islands Compacts.[212]

Several writers have observed that any proposal for a continuing close relationship between a trust territory and the former administering state is likely to be regarded with "great suspicion."[213] Moreover, Professor Roger Clark has suggested in recent testimony before the Trusteeship Council that the arrangements are not satisfactory because of the perpetual right of strategic denial granted to the United States and the concomitant lack of ability by the associated states to terminate unilaterally the entire Compact package at any time.[214] In his 1986 statement before the Trusteeship Council representing the International League for Human Rights, Professor Clark stated:

> We have concluded that the combined effect of the various 15, 30-and 50-year provisions coupled with permanent denial is to place too great a fetter on the power of the three entities to opt out unilaterally. It will be virtually impossible for one or more of the entities to escape from the burdens of the military arrangements. Accordingly we do not believe that the arrangements satisfy the United Nations' norms for a proper exercise of self-determination.[215]

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211. *Id.* § 453 ("Notwithstanding any other provision of this Compact: (a) The provisions of Section 311, even if Title Three should terminate, are binding and shall remain in effect for a period of 50 years and thereafter until terminated or otherwise amended by mutual consent . . .").

212. *See* H.R. DOC. NO. 192, 98th Cong., 2d Sess. 348-51 (Marshall Islands), 382-87 (Federated States of Micronesia) (1984). The two agreements provide that the United States has "the authority and responsibility to foreclose" military access by any third state, and that the terms of the agreements will continue "in full force and effect until terminated or otherwise amended by mutual agreement." The phrasing of these provisions may seem susceptible to an interpretation that unilateral termination is possible but the congressional legislative history indicates that the intent was for the arrangement of "strategic denial" to continue in perpetuity. *See* H.R. DOC. NO. 188, 99th Cong., 1st Sess. 6, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2746, 2751.

213. *See* Clark, *Self-Determination and Free Association*, *supra* note 43, at 67-68; M. POMERANCE, *supra* note 117, at 25; Armstrong, *Emergence*, *supra* note 123, at 207.

214. *See* 53 U.N. TCOR (1604th mtg.) at 39-42, U.N. Doc. T/PV.1604 (1986). The drafting history of the Compacts reveals that the ability of the associated states to unilaterally terminate the security and defense provisions steadily declined in succeeding versions of the Compacts from 1980 forward. For this reason, Professor Clark moved from his initial position of somewhat reluctantly concluding that the early Compacts would satisfy United Nation Standards to ultimately concluding that the final versions would not. *See* Clark, *Free Association: Critical View*, *supra* note 156, at 2-3.

215. 53 U.N. TCOR (1604th mtg.) at 42, U.N. Doc. T/PV.1604 (1986). The 30-year reference is to the ability of the United States to lease facilities on Kwajalein Atoll for that period of time under the subsidiary agreement with the Marshall Islands. *See* H.R. DOC. NO. 192, 98th Cong., 2d Sess. 307, 319 (1984).

Professor Clark went on to state that the Compacts might also be viewed as void either on the basis of conflict with a peremptory norm of general international law under article 53 of the Vienna Convention on the Law of Treaties, that peremptory norm being the principle of self-determination, or on the basis of the widely accepted rule in domestic systems that an agreement is invalid because it is unconscionable or contrary to well-established public policy. 53 U.N.

But not all writers have shared Professor Clark's disregard for the Compacts. Reviewing the proposed arrangements in light of the General Assembly resolutions, these writers have emphasized the large degree of governmental autonomy attained by the new states as well as the free expression of choice in deciding upon status as associated states.[216] The peoples of the Federated States of Micronesia, the Republic of the Marshall Islands, and even Palau, notwithstanding the failure of the Compact to get the required super-majority in the latter state,[217] have clearly spoken in favor of free association with the United States. Both United Nations observers and independent parties have concluded that the plebiscites were fairly conducted.[218] The associated states have consciously rejected the option of integration, as well as independence, based upon their revulsion to the idea of being subject to complete United States authority, on the one hand, but yet recognizing a need for continued financial relations with the United States government.[219] While some specific provisions under the Compacts do raise questions,[220] these decisions by the emerging states are

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TCOR (1604th mtg.) at 42, U.N. Doc. T/PV.1604 (1986). *But see* M. POMERANCE, *supra* note 117, at 63-71 (concluding that the argument that self-determination is a peremptory norm is unsound); I. BROWNLIE, *supra* note 6, at 612-13 (questioning principle of unequal treaties between powerful and dependant states as grounds for invalidity).

216. *See* Hirayasu, *supra* note 52, at 515; Hills, *supra* note 43, at 603.

217. *See infra* notes 226-262 and accompanying text.

218. *See Report of the United Nations Visiting Mission to Observe the Plebiscite in the Marshall Islands, September 1983*, 51 U.N. TCOR Supp. (No. 2) at 37, U.N. Doc. T/1865 (1984); *Report of the United Nations Visiting Mission to Observe the Plebiscite in the Federated States of Micronesia, Trust Territory of the Pacific Islands, June 1983*, 51 U.N. TCOR Supp. (No. 1) at 19, U.N. Doc. T/1860 (1983); *Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, February 1983*, 50 U.N. TCOR Supp. (No. 3) at 37, U.N. Doc. T/1851 (1983); A. RANNEY & H. PENNIMAN, *supra* note 113, at 106-17 ("Accordingly we conclude that the Micronesian plebiscites satisfied the standards of fair voting and full popular eligibility and participation as well as most Western democracies and better than those that have made the heaviest use of referendums"); *see also* Hirayasu, *supra* note 152, at 507-11.

219. The position of the United Kingdom on the question of free expression was recently stated by J. Stephen Smith, the Representative of the Trusteeship Council:

> It is often claimed that the people of Micronesia have not been allowed to make a free choice as to their political status. It seems to us that such claims are simply untrue. The new status arrangements are the product of lengthy negotiations over the last 20 years. During that time, the people of Micronesia could have chosen whatever status they wished — be it independence, integration with the United States, or a relationship with some other state. Yet of all the options open, they have chosen arrangements which strike a balance between their wish to govern their own affairs and their desire for the assistance and protection of a major power in areas such as security and defence, where they are ill-equipped to provide for themselves. We should support their free choice, not seek to interfere with its fulfillment.

56 U.N. TCOR (1669th mtg.) at 7-8, U.N. Doc. T/PV.1669 (1989).

220. Particular concerns with substantive Compact provisions relating to Palau and the Marshall Islands are discussed below. *See infra* notes 246-332 and accompanying text.

A primary distinction between the Federated States of Micronesia and the other states of Palau and the Marshall Islands is that the United States' primary military interest is in "denial" or the prevention of other states from having a presence in the area. *See* A. RANNEY & H.

quite rational.

The practical circumstances of Micronesia cannot be ignored in considering the propriety of its post-trust relationship with the United States. Even one of the most incisive critics of the United States' administration has noted that:

> Notwithstanding [United Nations General Assembly] resolution 1514, there is a case to be made against independence for Micronesia. One must keep in mind the environment and surrounding circumstances. The islands are widely dispersed; inter-island transportation is extremely difficult; and, indeed in a very real sense, Micronesia is not yet a country, only what one Micronesian has called "a potential country." The lack of a common language, culture, or history for all of Micronesia makes development, and even more basically, communications, very difficult. Finally, except for its strategic location, Micronesia is without known and reliable economic resources.[221]

The free association arrangements should be acceptable provided, first and foremost, that there indeed has been a free, informed choice by the electorate. The free association relationship should also include respect for internal self-government with only minimal interference

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PENNIMAN, *supra* note 113, at 53; Adams, *supra* note 44, at 94. Additionally, while article XIII, section 2 of the the Federated States Constitution restricts the entry of nuclear material into the territory, as does the Palauan Constitution, the Federated States Constitution grants the national government the power to permit exceptions. Thus the Federated States did not encounter the problems in approving the Compact experienced in Palau. *See infra* notes 226-245 and accompanying text. Also, the particularly acute problems in the Marshall Islands (*see infra* notes 263-315 and accompanying text) are not duplicated in the Federated States because the United States did not test nuclear weapons and does not have military bases in the Federated States except for a Coast Guard facility. *See Compact of Free Association: Hearing on the Proposed Compact of Free Association: The Federated States of Micronesia Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 16-17 (1985) (statement of Bailey Olter, Vice-President of the Federated States of Micronesia). Consequently, the approval of the Compact of Free Association in the Federated States of Micronesia was not very controversial. *Id.* at 53-54. 63.2% of the registered voters cast ballots and approved the Compact of Free Association by a 79% majority despite the fact that the state of Ponape voted 51.1% against approval. *See Report of the United Nations Visiting Mission to Observe the Plebiscite in the Federated States of Micronesia, Trust Territory of the Pacific Islands, June 1983*, 51 U.N. TCOR Supp. (No. 1) at 14-15, U.N. Doc. T/1860 (1984). The negative vote in Ponape has been attributed to several factors, including concerns about the future financial welfare of the Federation, feared military plans of the United States, hopes for full independence, and separatist sentiments. *See* A. RANNEY & H. PENNIMAN, *supra* note 113, at 65-67. The Compact of Free Association was subsequently approved by the required number of Federated States of Micronesia state legislatures and members of Congress. *Id.* at 76-77.

The concerns with regard to the post-trust status of the Federated States of Micronesia would be the same general concerns stated below. Namely, the Security Council should be satisfied that approval was freely arrived at and that the United States made proper arrangements in the Compact of Free Association to address any shortcomings of its administration, particularly the need to promote post-trust economic, educational, and medical care development. Recent reports give rise to substantial concerns that the Federated States are woefully lacking in some of these areas. *See* Dolan, *Micronesia Suffers From Its 40 Years of U.S. Welfare*, Wall St. J., Jan. 3, 1989, at 1 (describing economic shortcomings); Ambrose, *Picture of Health Improving on Yap*, Honolulu Star-Bulletin & Advisor, June 26, 1988, at F1, col. 5.

221. D. MCHENRY, *supra* note 49, at 49.

based on the international security concerns. The argument that there should be a meaningful right afforded the associated states to modify, if not to terminate, the relationship unilaterally has a sound basis in Resolution 1541. Nevertheless, one must recall that article 76, as the most directly applicable United Nations Charter provision, supports the view that flexibility is permitted as long as internal self-government exists in a form freely chosen by the peoples concerned. Resolution 2625 and the lack of clear United Nations precedent also support a flexible view with regard to the structuring of a free association relationship.

Moreover, the long term or perpetual right of denial is not without precedent. As Arthur Armstrong pointed out in his discussion of the Compacts of Free Association, while such agreements are justifiably controversial, the ability to enter into such an agreement has been recognized.[222] Any review of the Compacts should certainly include a review of these provisions to ensure that the terms have been agreed upon freely. The Federated States has taken the position that the making of the Mutual Security Agreement is a proper exercise of its sovereign rights to delegate authority with regard to its territory. This position emphasizes that the Mutual Security Agreement not only grants rights to the United States but also assigns a duty to prevent the sort of unfriendly military occupation that has occurred in the past, a task that the archipelagic states would find difficult to accomplish.[223] The refusal to recognize the ability of the new states to enter into such a treaty arrangement by a free and informed decision might be considered overly paternalistic, even in the Trusteeship System context.

To the extent that the Security Council might find that the present Compacts fall short of the applicable standards, the most effective res-

222. Armstrong, *Strategic Underpinnings of the Legal Regime of Free Association: The Negotiations for the Future Political Status of Micronesia*, 7 BROOKLYN J. INT'L L. 179, 226 n.104 (1981), *see also* I. BROWNLIE, *supra* note 6, at 116-17, 372-75 (recognizing as a general matter that perpetual rights may be granted with residual sovereignty resting in the grantor state); Isenberg, *Reconciling Independence and Security: The Long Term Status of the Trust Territory of the Pacific Islands*, 4 UCLA PAC. BASIN L.J. 210, 230-35 (1985) (citing other examples of long-term or perpetual treaties and concluding that such agreements do not preclude independence). *But cf.* Clark, *Free Association: Critical View*, *supra* note 156, at 3 (responding to Isenberg with observation that precedents cited provide limited guidance because the treaties were either terminable on notice or were questionable in origin or vitality and all pre-dated the 1960 General Assembly declarations relating to self-determination).

223. *See Compact of Free Association: Hearing on the Proposed Compact of Free Association: The Federated States of Micronesia Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 16-17 (1985) (statement of Bailey Olter, Vice-President of the Federated States of Micronesia); *see also* Memorandum: Federated States of Micronesia - Perceptions of Sovereignty, *supra* note 6, at 4 ("In its self-governing capacity the FSM chose, through the medium of the compact, to delegate certain authority in the United States on agreed terms. It is well settled in international law that nations can make such delegations without impact on their sovereignty or statehood").

olution is not likely to be the total rejection of the free association arrangements. Rather, the Security Council should call for adjustments to be agreed upon by the United States and the new states in light of any identified flaws.[224] The solution might be found in greater availability of a unilateral right to modify or terminate the right of denial, if the acquisition of a unilaterally perpetual right of denial was deemed inconsistent with article 76. More specifically, this most troublesome part of the Compact might be changed into simply a long-term arrangement, subject to mutual renewal.[225]

The nature of the issues surrounding the proposed forms of post-trust governments and relations make a strong case for Security Council review of the proposed termination. The United States took on the trust as an agreement with the United Nations through the Security Council. The Security Council should have the opportunity to participate in the resolution of the unique issues raised by the post-trust arrangements.

E. *Palauan Plebiscites and Nuclear Weapons*

The principal question raised by the impending emergence of a state of Palau is the legitimacy of the plebiscites, under international law as well as the internal law of Palau, that may ultimately result in approval of the Compact of Free Association. Approval of the Compact would grant the United States permission to bring nuclear-powered or nuclear-capable vessels into Palau despite a provision in its constitution that nuclear warfare materials should not be brought into the territory without the special consent of the Palauan people. Debate in the Palauan plebiscite campaign also focused on the possibility that the United States would build military bases on the island of Babeldaop and on the question of the adequacy of the United States' financial assistance to Palau under the Compact of Free Association.[226] The United States is generally perceived as viewing Palau as a remote, contingent military base in the event that it might someday lose its military bases in the Philippines,[227] as well as a likely site for

224. Complete rejection of the proposed arrangements would almost certainly result in the sort of withdrawal from Security Council review that was witnessed when the United Kingdom refused to continue before the United Nations after its proposal for free association for the West Indies states was rejected by the General Assembly. *See* Clark, *Self-Determination and Free Association*, *supra* note 43, at 60-64; J. CRAWFORD, *supra* note 23, at 374-75.

225. Such an agreement would place an obligation on the United States to negotiate for renewal on an intermittent basis, perhaps every twenty-five years. While the financial leverage of the United States makes it likely that renewal would occur, the opportunity to reconsider the arrangement would offer more respect for the sovereignty of the new states.

226. *See* A. RANNEY & H. PENNIMAN, *supra* note 113, at 36-37.

227. *See Compact of Free Association, 1988: Hearings on S.J. Res. 231 Before the Senate*

military training or supply facilities.[228] The most significant debate, however, arose because of Palau's constitutional restrictions on the importation of nuclear and other hazardous materials into its territory. The Constitution of Palau provides in article II, section 3:

> Major governmental powers including but not limited to defense, security, or foreign affairs may be delegated by treaty, compact or other agreement between the sovereign Republic of Palau and another sovereign nation or international organization, provided such treaty, compact or agreement shall be approved by not less than two/thirds (2/3) of the members of each house of the *Olbiil Era Kelulau* and by a majority of the votes cast in a nationwide referendum conducted for such purpose, provided that any such agreement which authorizes use, testing, storage or disposal of nuclear, toxic chemical, gas or biological weapons intended for use in warfare shall require approval of not less than three fourths (3/4) of the votes cast in such referendum.

Another provision of the Palauan constitution contains a more general prohibition against the use, testing, storage or disposal of the prohibited materials within the territory.[229] These two constitutional provisions reflect a well-established view by Palauans opposing the presence of military armaments and nuclear materials in their territory.[230] The first nuclear control provision appears quite prominently in the second article of the Constitution along with two provisions reaffirming the Constitution as the supreme law of the land.[231] The restrictions on

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Comm. on Energy and Natural Resources, 100th Cong., 1st Sess. 71 (1988) (Statement of James D. Berg, Director of Office of Freely Associated State Affairs, Department of State: "if . . . we were to leave the Philippines and to move to another area, those areas undoubtedly would be Guam or the Northern Mariana Islands, which are north of Guam and which are U.S. soil. Palau would play at best, from what I understand, a very tertiary role in any kind of fallback from the Philippines"); Comment, *The Compact of Free Association: An End to the Trust Territory of the Pacific Islands*, 5 B.U. INT'L L.J. 213, 220 (1987).

228. *See* 55 U.N. TCOR (1655th mtg.) at 8, U.N. Doc. T/PV.1655 (1988) (Statement of U.S. Representative Patricia Byrne before Trusteeship Council).

229. PALAU CONST. art. 13, § 6:

> Harmful substances such as nuclear, chemical, gas or biological weapons intended for use in warfare, nuclear power plants, and waste materials therefrom, shall not be used, tested, stored, or disposed of within the territorial jurisdiction of Palau without the express approval of not less than three-fourths (¾) of the votes cast in a referendum submitted on this specific question.

Professor Clark has ascertained that art. 13, § 6 was drafted first as a general limit on the proscribed activities by either Palauan authorities or the United States. Apparently, fears that the section might be bypassed with regard to the United States through the approval of the Compact by a simple majority vote lead to the more detailed provisions in art. 2, § 3. *See* 50 U.N. TCOR (1590th mtg.) at 11, U.N. Doc. T/PV. 1590 (1986) (statement of Roger S. Clark).

230. *See* Gibbons v. Salii, Civ. Action No. 101-86, 1 Rep. of Palau Intrm. 333, 339-45 (App. Div. Sept. 1986); *Compact of Free Association, 1988: Hearings on S.J. Res. 231 Before the Senate Comm. on Energy and Natural Resources*, 100th Cong., 1st Sess. 9-10 (1988) (statement of Gabriela Ngirmang attributing attacks on Palau during world War II to the military presence of Japanese); *see also* J. WEBB, *supra* note 43, at ch. 9 (the principal goal of the people of Palau appears to be the prevention of the use of their lands by warring nations as occurred during World War II).

231. PALAU CONST. art. II, § 1: "This Constitution is the supreme law of the land; § 2: Any

nuclear materials are consistent with a later constitutional provision in article VI which lists "conservation of a beautiful, healthful and resourceful natural environment" as the first among several responsibilities of the national government. The drafting history of the Constitution reveals that the clauses prohibiting the harmful substances were adopted in part because the environment was viewed as a "public trust of which all citizens, living and yet unborn, are beneficiaries."[232]

Attempts were made during the constitutional adoption process to convince the people of Palau to alter the nuclear control provisions because of the limitations thereby imposed on the United States' military presence. A draft of the constitution which provided the government of Palau with the power to authorize entry of United States nuclear-capable or nuclear-powered vessels into the territory suffered a large defeat, while two versions with the more restrictive nuclear control provisions received substantial majority approval.[233] The chairman of the Palauan commission, then negotiating the Compact of Free Association with the United States, noted that, "[b]y rejecting the revised Constitution, the people have spoken clearly in expressing their support of a Constitution which prohibits transit of American warships through Palauan waters and use of Palauan land by American military units."[234]

The Compact of Free Association originally contained provisions which allowed the United States to bring nuclear weapons within Palauan territory and to store other nuclear materials within Palau as long as the storage did not endanger public health or safety.[235] As a

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law, act of government, or agreement to which a government of Palau is a party, shall not conflict with this Constitution and shall be invalid to the extent of such conflict."

232. Gibbons v. Salii, Civ. Action No. 101-86, 1 Rep. of Palau Intrm. 333, 340 (App. Div. Sept. 1986) (quoting Standing Committee Report No. 29, at 1-2 of the Palauan Constitutional Convention (1979)); *see also* A. Boss, *supra* note 142, at 8-9.

233. *Id.* at 340-44. The first draft of the constitution with the more restrictive nuclear provisions was approved by 92% of the voters but the plebiscite was rendered null by a prior act of the Palauan legislature that withstood challenge in the courts. The second draft with the less restrictive nuclear prohibitions was defeated by receipt of only 31% approval. In the third plebiscite, the original nuclear control provisions were reinstated and the constitution was approved by 78% of the voters on July 9, 1980.

234. *Id.* at 344 (quoting telex message of Roman Tmetuchl, Chairman of the Palau Political Status Commission to United States Ambassador Peter Rosenblatt).

235. The original terms of the Compact were in the form of a multilateral agreement between the United States and the Republic of the Marshall Islands, the Federated States of Micronesia, and Palau. The provision of sections 311, 312 and 314, along with a subsidiary agreement concerning harmful substances, effectively granted the United States a right to bring nuclear weapons and materials into Palau. *See* Compact for Micronesia and Marshall Islands, *supra* note 145; Gibbons v. Remeliik, Civ. No. 67-83, 1 Rep. of Palau Intrm. 80, 81-83 (Palau Sup. Ct. Trial Div. 1983).

consequence of the interaction of the Compact and the Constitutional nuclear control provisions, the ballot in the February 1983 Palauan plebiscite contained a question seeking a three-fourths' majority approval of section 314. Over 88% of the registered Palauans voted in this first plebiscite[236] with 61.4% of the voters approving the Compact of Free Association but only 51.3% approving the section 314 grant of permission to the United States to bring nuclear weapons into Palau.[237] The Palauan Supreme Court subsequently ruled that since section 314 had not received the necessary approval, the Compact as a whole had failed.[238]

After the failure to approve the Compact in a second plebiscite on September 4, 1984,[239] the Compact was renegotiated and changed to read in section 324:

> In the exercise in Palau of its authority and responsibility under this Title, the Government of the United States shall not use, test, store or dispose of nuclear, toxic chemical, gas or biological weapons intended for use in warfare and the Government of Palau assures the Government of the United States that in carrying out its security and defense responsibilities under this Title, the Government of United States has the right to operate nuclear capable or nuclear propelled vessels and aircraft within the jurisdiction of Palau without either confirming or denying the presence or absence of such weapons within the jurisdiction of Palau.

The intent of the revised language was to draw a distinction between the prohibitions on "using, testing, storage or disposal" and the "operation" of nuclear capable or powered vessels.[240] The revised Compact received approval by 72% of voters in a plebiscite on February 21,

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236. The observation has been made that the controversy over section 314 may have lead to the very high voter turnout in Palau. A. RANNEY & H. PENNIMAN, *supra* note 113, at 48.

237. *See Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, February 1983,* 50 U.N. TCOR Supp. (No. 3) at 38, U.N. Doc. T/1851 (1983).

238. Gibbons v. Remeliik, Civ. No. 67-83, 1 Rep. of Palau Intrm. 80, 83 (Palau Sup. Ct. Trial Div. 1983). *See* A. RANNEY & H. PENNIMAN, *supra* note 113, at 43.

239. After the failure of the Compact to receive approval in February of 1983, the United States and Palau negotiated a bilateral agreement to eliminate section 314 and its reference to nuclear weapons. The agreement was signed on May 23, 1984. *See* STAFF OF HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 99TH CONG., 1ST SESS., COMPACT OF FREE ASSOCIATION WITH PALAU (AS SIGNED MAY 23, 1984) (Comm. Print 1985). The United States took the position that as a consequence of the general defense and security provisions in the Compact, it would have the authority to bring nuclear materials into Palau so that the general approval of the Compact would still require three-fourths approval. Only 66.9% of the voters approved the Compact. *See* A. RANNEY & H. PENNIMAN, *supra* note 113, at 49-50.

240. *See Compact of Free Association: Hearings on the Proposed Compact of Free Association for Palau Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs,* 99th Cong., 2d Sess. 128-30 (1986) (Statement of James R. Lilley, Deputy Asst. Secy. of State for East Asia and Pacific Affairs).

1986.[241] Although the Palauan president certified that the Compact had been approved based on the distinction in language, subsequent litigation lead to a decision that since "operation" fell within the range of restricted activity, 75% approval was still required, and the Compact had therefore failed again.[242]

To date, three additional plebiscites, for a total of six, have been held in Palau in the effort to get the Palauans to grant the United States permission to bring nuclear propelled and armed vessels into the area.[243] These additional plebiscites have taken place amid steadily escalating controversy, including the violent deaths of two Palauan presidents,[244] and a wave of violence aimed at those persons who opposed the Compact.[245] While a majority of Palauans have voted to approve the Compact of Free Association in each case, the margin has

241. *See Report of Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, February 1986*, 53 U.N. TCOR Supp. (No. 2), U.N. Doc. T/1885 (1986).

242. Gibbons v. Salii, Civ. App. No. 101-86, 1 Rep. of Palau Intrm. 333, 347-49 (App. Div. 1986).

243. In December 1986 the vote was 66% yes and 34% no. *See Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, December 1986*, 54 U.N. TCOR Supp. (No. 1), U.N. Doc. T/1906 (1987). In June 1987 the vote was 67.6% yes and 32.4% no. *See Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, June 1987*, 54 U.N. TCOR Supp. (No. 2), U.N. Doc. T/1919 (1987). The August 1987 plebiscite resulted in an affirmative vote of 73% and a negative vote of 27%. *See Report of United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, August 1987*, 54 U.N. TCOR Supp. (No. 3) at 8, U.N. Doc. T/1920 (1987).

244. *See* Williams, *Troubles Beset Palau*, S.F. Examiner, Oct. 6, 1988, at A28, col. 1. The first president, Hauo Remeliik, was murdered in his home, and the ensuing criminal prosecutions were dubious in nature. The second president, Lazarus Salii, who played a leading role during negotiations on the future of Micronesia, is reported, at least officially, to have committed suicide. *See* Wypijewski, *Broken Trust*, THE NATION, Sept. 26, 1988, at 224. In the wake of the slaying of President Remeliik, an investigation was conducted by American prosecutors and the Federal Bureau of Investigation (FBI) that resulted in the conviction of three young Palauans. The convictions were ultimately overturned by the Palauan appellate court on the basis that the prosecution witnesses were "inherently incredible," and amid allegations that the defendants had been framed. *See* Shenon, *Convictions Reversed in Island Slaying*, N.Y. Times, July 21, 1987, at A16, col. 1; Malcomson, *Stranger Than Paradise*, 14 MOTHER JONES 19, 51-52 (1989).

245. *See Compact of Free Association, 1988: Hearings on S.J. Res. 231 Before the Senate Comm. on Energy and Natural Resources*, 100th Cong., 2d Sess. 10-11 (1988) (statement of Gabriela Ngirmang relating attacks in the form of murder of Mr. Bedor Bins, shots fired into a home, firebombing and other intimidation); 55 U.N. TCOR (1649th mtg.) at 12-17, U.N. Doc. T/PV.1649 (1988) (testimony of Sue Rabbitt Roff before Trusteeship Council). The incidents of violence were verified in a report by the International Commission of Jurists which sent a mission to Palau. The report was forwarded to the Trusteeship Council and is reprinted in U.N. Doc. T/COM./L.396 (1988).

The accounts of violence are also summarized in a wide ranging United States General Accounting Office report and its supplement that focus on Palau. *See* NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION, UNITED STATES GENERAL ACCOUNTING OFFICE, U.S. TRUST TERRITORY: ISSUES ASSOCIATED WITH PALAU'S TRANSITION TO SELF-GOVERNMENT 67-70 (Report 89-182, 1989) [hereinafter GAO REPORT]; NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION, UNITED STATES GENERAL ACCOUNTING OFFICE, U.S. TRUST TERRITORY: ISSUES ASSOCIATED WITH PALAU'S TRANSITION TO SELF-GOVERNMENT 54-57 (Supplemental Report 89-1825, 1989) [hereinater GAO SUPPLEMENTAL REPORT].

never reached the 75% majority required by the Palauan Constitution.[246] The most recent effort of those parties favoring the Compact of Free Association has been an attempt to amend the Palauan Constitution to allow approval of the Compact, with its grant of permission for the United States to operate nuclear capable or powered vessels, by a simple majority rather than 75% of those voting. The proposed constitutional amendment provided that the two constitutional nuclear control provisions would not apply to the Compact, but would continue in full force for all other purposes.[247] On August 4, 1987, the constitutional amendment received a majority approval from the Palauan voters thus leading to the sixth referendum on the Compact on August 21, 1987. The voting in that referendum produced a 73% majority in favor of adoption.[248]

The August, 1987 constitutional amendment and compact referenda, however, were challenged in lawsuits by anti-Compact groups.[249] The first lawsuit was settled by agreement of the parties[250] and the second was dismissed through a combination of a motion to dismiss by some plaintiffs and a lack of action by the other plaintiffs.[251] Those plaintiffs who filed the motion to dismiss later charged that they were pressured into withdrawing the lawsuit.[252] The plaintiffs later reinstated the second suit and it proceeded to a decision on the merits.[253] The Supreme Court of Palau at the trial level ruled that the August, 1987 constitutional amendment and compact referendum were invalid for two reasons.[254] First, the amendment was conducted under special transition provisions on the grounds that there was an inconsistency between the Palauan Constitution and the Compact of Free Association, and the court decided that no inconsistency existed. Without the inconsistency and the availability of the special transition provisions of the constitution, amendment could occur only during a

246. *See supra* notes 237-243 and accompanying text.

247. *See Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, August 1987*, 54 U.N. TCOR Supp. (No. 3) at 13-21, U.N. Doc. T/1920, (1987) (ballot included); GAO SUPPLEMENTAL REPORT, *supra* note 245, at 52-53.

248. *Report of United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, August 1987*, 54 U.N. TCOR Supp. (No. 3) at 27, U.N. Doc. T/1920 (1987); GAO SUPPLEMENTAL REPORT, *supra* note 245, at 53-59.

249. Merep v. Salii, Civ. Action No. 139-87, (Palau Sup. Ct. Trial Div. 1987); Ngirmang v. Salii, Civ. Action No. 139-87 (1987).

250. *See* GAO SUPPLEMENTAL REPORT, *supra* note 245, at 58.

251. *See* GAO SUPPLEMENTAL REPORT, *supra* note 245, at 59-60.

252. *See* GAO SUPPLEMENTAL REPORT, *supra* note 245, at 60.

253. Fritz v. Salii, Civ. Action No. 161-87 (Palau Sup. Ct. Trial Div. 1988), *aff'd in part, rev'd in part*, Civ. App. No. 8-88 (Palau Sup. Ct. App. Div. 1988). The lawsuit was recaptioned because of a change in some plaintiffs.

254. *Id.* at 24-25, 27-28.

regularly scheduled general election. The second basis for invalidation was the fact that the amendment did not receive a three-fourths' approval in the *Olbiil Era Kelulau* (Palauan National Congress) as required by the constitution. On appeal before the Appellate Division of the Supreme Court of Palau, the decision was affirmed in part and reversed in part. The Appellate Division decided that the amendment was null and void because of the failure to get the three-fourths' vote in the *Olbiil Era Kelulau* but that there was indeed a conflict or inconsistency between the constitution and the Compact.[255]

The net result of the high court's decision is that the constitution can be amended at any time under its transitional provisions, provided that the *Olbiil Era Kelulau* follows the required procedure of approving by three-fourths' vote and that the amendment receives a simple majority of popular vote, including approval in three-fourths of the 16 states.[256] Since the Compact has always received more than 50% approval, one might expect that the pro-Compact forces would have proceeded to amend the constitution by proper procedural means and then approved the Compact with a simple majority vote. The *Olbiil Era Kelulau*, however, enacted a law on August 4, 1989 which reaffirmed the constitutional restrictions on the introduction of nuclear materials into the territory, provided that another referendum on the Compact shall be held between January 1 and June 30 of 1990, and confirmed that the Compact must receive at least 75% approval to become effective.[257]

The recent referendum law reflects a resolve of the Palauan people to respect their consitution and its commitment to protecting natural resources. Yet the unquestioned dependency on United States economic assistance presents the possibility that eventually the will of the Palauan people may reluctantly, rather than freely, yield to United States security interests. The executive and legislative branches of the United States have continued to seek approval of the Compact, with little indication of willingness to seek further accommodation of Palauan constitutional dictates.[258]

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255. *Id.* at 14, 26.

256. *Id.* at 26.

257. *Third Olbiil Era Kelulau*, House Bill No. 3-56-3 (1989) (copy on file with Michigan Journal of International Law).

258. The compact was essentially pre-approved by the United States Congress in Public Law 99-658 of November 4, 1986, *supra* note 145, subject to Approval by Palau in accordance with its constitution and enactment of a joint resolution by the Congress. *Id.* at tit. 1, § 101 (d). In light of the continued uncertainty arising of the multiple plebiscites, the House and Senate have continued to conduct hearings and consider legislation relating to the compact. The most recent versions have added provisions that address a number of problems in Palau including the allegations of improper practices in government expenditures and drug trafficking. *See* H.J. Res. 175,

Regardless of how one weighs the arguments contesting the validity of the August, 1987 referenda on the constitutional amendment and Compact of Free Association, it must be conceded that the process leading to the nearly inevitable Palauan approval of the post-trust relations with the United States is an item that the Security Council should investigate while considering the termination of the Trusteeship Agreement.[259] Particularly relevant to such an inquiry is the fact that the failure to approve the Compact of Free Association has resulted in the United States withholding the large initial financial assistance that would be due under the Compact.[260] The financial circumstances are further complicated by the debt undertaken by the Palauan Government in order to finance the construction of an electric power plant that has been plagued with allegations of corrupt handling.[261] The default on the loan, which might have been avoided if United States Compact funds were available, lead to litigation in United States' courts in which Palau was held liable.[262]

The possibility of economic duress should be a prime matter of Security Council consideration in reviewing the proposed termination of the trust. Article 52 of the Vienna Convention on the Law of Treaties expressly prohibits the threat of force in procurement of a treaty; it should follow that the improper use of economic leverage likewise would invalidate a treaty. The issue in the case of Palauan approval of the Compact would be whether the United States stepped across the line from fair but hard bargaining to the use of economic coercion.

101st Cong., 1st Sess. (1989). The House approved the Resolution on June 27, 1989. *See* 135 CONG. REC. H3195, 3220 (daily ed. June 27, 1989).

259. The last compact referendum was deemed to have been fairly conducted by United Nations observers but the General Accounting Office reported a number of challenges to its validity, including the furloughing of workers just before the vote and the unequal allocation of funding for voter education, as well as the charges of violence. *See* GAO SUPPLEMENTAL REPORT, *supra* note 245, at 62-69. Previously, an independent observer mission concluded that the pro-Compact administration had "overreached" in the December, 1986 referendum by commingling of educational and propaganda efforts, uneven allocation of funds, and intimidation of some voters. *See* A. BOSS, *supra* note 142, at 100-01.

260. Upon entry into force of the Compact, Palau will receive in the first year an estimated $148 million and a total of $478 million over the first fifteen years. In 1987, Palau received $16.7 million and in 1988 it received $27.4 million. *See* GAO REPORT, *supra* note 245, at 13, 45.

261. *See* GAO REPORT, *supra* note 245, Appendices I & II, at 74-105.

262. Morgan Guaranty Trust Co. v. Republic of Palau, 693 F.Supp. 1479 (S.D.N.Y. 1988). Through this decision and two prior opinions, the federal district court decided that the Compact of Free Association effectively terminated the Trusteeship Agreement and rendered Palau a *de facto* sovereign state despite the lack of United Nations approval, 639 F.Supp. 706, 716 (S.D.N.Y. 1986), that Palau was entitled to sovereign immunity as a basic matter but not in this case because of waiver and the commercial activity exception, 657 F.Supp. 1475, 1477-80 (S.D.N.Y. 1987), and that although there was fraudulent misrepresentation in the transaction the president of Palau did not rely upon the misrepresentation in proceeding with the contract. 693 F.Supp. at 1497-98.

The question can only be resolved through a carefully conducted factual investigation.

F. *Marshall Islands: Kwajalein and Nuclear Reparations*

The review of the proposed termination with regard to the Republic of the Marshall Islands should focus principally on the settlement of claims for loss of property and personal injury against the United States government due to the nuclear tests conducted in the Marshall Islands from 1946 to 1958. Careful consideration should also be given to claims related to the living conditions and compensation of Marshallese people displaced by the United States' acquisition of land for the military missile testing range in the Kwajalein Atoll. The attempts to resolve these problems in the Compact of Free Association raise a number of concerns, including whether the United States has committed fundamental breaches of the Trusteeship Agreement through the effective alienation of native land, whether there has been adequate redress for any such breach, and whether the central government of the emergent Marshall Islands state is in a position to espouse and settle these claims.

Nuclear Tests

After the initial use of the atom bomb against Japan in the Second World War, the United States was extremely interested in conducting further tests to determine the potential uses for nuclear weapons. To conduct the tests, the United States desired areas under its control with small populations that could be relocated with some ease. The Bikini Atoll in the Marshall Islands was determined to fit the needs of the United States.[263] Resisting challenges in the United Nations Trusteeship Council,[264] and asserting the propriety of using the Trust Territory on the basis of Trusteeship Agreement provisions permitting the closing of areas for security reasons,[265] the United States government embarked on a program of nuclear tests in the Marshall Islands from

263. Weisgall, *The Nuclear Nomads of Bikini*, 39 FOREIGN POL'Y 74, 75-76 (1980).

264. *See* Adams, *supra* note 44, at 94 ("The Soviet Union and India, in particular, raised the nuclear issue each year in the Trusteeship Council, but the United States defended its testing on the grounds of military necessity.").

265. *See* 4 U.N. REV. (Sept. 1957), at 33-35 (United States at 1956 Trusteeship Council asserting the right to test based on the Trusteeship Agreement while noting that tests had already been conducted before execution of the agreement and that notice had been given to and accepted by the Security Council on several occasions. The representatives of Syria, Burma, and the Soviet Union all raised questions about the propriety of the tests. "Ivan I. Lobanov, of the USSR, recalled his delegation's repeated warnings that nuclear tests were inadmissible in a trust territory. The warnings had gone unheeded, the tests had continued and had created many difficulties for the island and adversely affected the health of the population. The USSR had consistently maintained that a trustee must not use the possessions of his wards for his own

1946-1958.[266] The consent of the Marshallese people was at least nominally given, but recent studies of the Bikinian problems have raised tremendous doubt, if not certainty, that the Marshallese people were unaware of what was happening to them.[267]

Nevertheless, the Marshallese people of Bikini began a forty year sojourn as "nuclear nomads" whose homes even today are uninhabitable.[268] The people of Bikini were eventually relocated to the island of Kili after suffering near starvation on Rongerik.[269] Kili lacks the natural resources to support the people who were placed there since it has no lagoon and its violent waves prevent the fishing opportunities that were bountiful on Bikini.[270] As a result, there were periods of starvation and complete dependency on supplies of foodstuff coming from the United States' military authorities. Recent portraits of life on Kili describe a people virtually imprisoned on an island that is incompatible with their traditional life style and also offers little support for a more modern life style.[271] Some Bikinians were returned to their island beginning in 1969, after assurances from the United States government that the islands were safe, only to be evacuated again in 1978 after medical testing determined that the returnees "may have ingested the largest amount of radiation of any known population."[272]

A fate similar to that of the Bikinians befell the people of Enewetak who were moved to the island of Ujelang because of the nuclear testing program. Ujelang has a land area of less than a mile.[273] The nuclear testing program affected yet another group of Marshallese when radioactive fallout from the Bravo test fell onto the islands of Rongelap and Utirik on March 1, 1954.[274] The inhabitants

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purposes, since trusteeship is based upon the idea of unselfish aid,. . . . Furthermore, no monetary compensation could justify the alienation of land within a trust territory").

266. *See generally* Weisgall, *supra* note 263, at 74; *see also* Hills, *supra* note 43, at 585 n.10. The United States conducted 66 nuclear proving tests at Bikini and Enewetak. The takeover of Bikini began in 1946 even before the Trusteeship Agreement became effective. *See* S. DE SMITH, *supra* note 27, at 135.

267. *See* Weisgall, *supra* note 263, at 77-78; *Radio Bikini* (Crossroads Film Project Ltd. 1987); *The Marshall Islands: Living with the Bomb* (Film Australia 1983). The desire of the Bikinians to return to their island was noted in the United States Congress at the time that the Trusteeship Agreement was being considered. *See* 93 CONG. REC. 8732-33 (1947) (statement of Rep. Mansfield).

268. *See* Weisgall, *supra* note 263, at 74.

269. *See* S. DE SMITH, *supra* note 27, at 135; D. MCHENRY, *supra* note 49, at 58.

270. *See* D. MCHENRY, *supra* note 49, at 58; *see also* Sager, *Paradise Lost*, Wash. Post, Aug. 23, 1987 (Post Magazine) at 1.

271. *See* Sager, *supra* note 270, at 12; Weisgall, *supra* note 263, at 82-83.

272. Weisgall, *supra* note 263, at 89-90.

273. *See* Peter v. United States, 6 Cl. Ct. 768, 770-71 (1984); S. DE SMITH, *supra* note 27, at 135.

274. *See* Weisgall, *supra* note 263, at 84; Hills, *supra* note 43, at 585.

of those islands were thus exposed to the radiation and, while the United States has made some attempts at redress,[275] the efforts at reparations to the people of Rongelap and Utirik has been criticized as inadequate and failing to ensure the well-being and long-term health care of the exposed population.[276] The people of Rongelap were resettled on their island only to evacuate again in May 1985 because of continuing questions about the risks of exposure to radiation contaminants on the atoll.[277]

An integral part of the Bravo testing was the taking of the land from the people of Bikini and Enewetak for the purpose of conducting the nuclear explosions. The propriety of an administering authority effectively taking land from an area that was controlled under a trusteeship agreement is extremely questionable.[278] The taking seems inconsistent with the tenor of the United Nations Charter provisions in chapter XII. The taking is not provided for in any of the specific provisions in the Trusteeship Agreement. Additionally, the conduct of extremely hazardous activity in the Trust Territory also seems to be absolutely inconsistent with the duty to "promote social advancement" under article 76(b). The nuclear testing should be deemed a per se violation of the Trusteeship Agreement and United Nations Charter, similar to the determination by the International Court of Justice that the application of apartheid in Namibia constituted an indefensible, flagrant violation of the Charter.[279]

Acknowledging the inability to undo any breaches of the Trusteeship Agreement in this regard, the reasonable course of conduct would be for the United States to make proper reparations to those people

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275. *See* Hills, *supra* note 43, at 585-86.

276. *See* D. MCHENRY, *supra* note 49, at 59-60. While McHenry suggests that the medical treatment has been adequate, he observes that the people of Rongelap received more than $10,000 per person while some Japanese fishermen who were caught in the same incident warranted a settlement of $2.3 million or about $100,000 each; *see also* Malcomson, *supra* note 244, at 52-53 ("From that day to this, the Rongelapese have been regularly tested by doctors . . . . The Rongelapese have been afflicted with leukemia and miscarriages, given birth to malformed and retarded children, and had their thyroids removed because of tumors.").

277. *See* 55 U.N. TCOR (1650th mtg.) at 4-6, U.N. Doc. T/PV.1650 (1988) (statement of Glenn Alcalay).

278. *See* L. GOODRICH, E. HAMBRO, & A. SIMONS, CHARTER OF THE UNITED NATIONS 467-69 (3d ed. 1969). While testing and alienation of land began before the formal execution of the Trusteeship Agreement, the obligation of the United States to make reparations for the entire course of conduct can be justified on the grounds that the United States was effectively acting as trustee prior to formal execution. Moreover, the United States acknowledged the duty to make reparations for the entire testing period in section 177 of the Compact of Free Association for Micronesia and Marshall Islands, *supra* note 145.

279. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 15, 56-57 (Advisory Opinion of June 21).

who have suffered physical injury and whose land has been harmed, probably irreversibly. The United States has made some efforts at redressing the harm suffered by the inhabitants of the affected islands,[280] and the Compact of Free Association, in a subsidiary agreement under section 177, does provide for the establishment of a $150 million fund for further payment of claims arising out of the nuclear testing.[281] This amount would grow by approximately $18 million per year for fifteen years to a total of approximately $270 million. The settlement agreement is designed to settle all claims arising from the testing program.

Despite the negotiations toward this settlement, cases were filed in United States District Courts and the Court of Claims on behalf of 8000 Marshallese residents for damages that allegedly resulted from the United States' nuclear testing.[282] Those claims that were pending in the United States courts were said to total more than $5 billion.[283] Predictably those who held claims based upon the nuclear testing were heard to complain that the settlement amount was too small and that they had been denied their day in court by representatives of the Marshall Islands government who had not suffered from the nuclear testing.[284]

The claimants in these lawsuits have mounted an attack upon the validity of the Compact of Free Association and section 177. The Claims Court, however, ruled against the plaintiffs in a group of three decisions in 1987.[285] The Court addressed several issues in the lead case of *Juda v. United States,* where it dismissed the action for lack of subject matter jurisdiction. First, the *Juda* court decided that although Security Council approval is required to terminate the Trusteeship Agreement *de jure* or formally,[286] the Trusteeship Agreement

280. *See* Hills, *supra* note 43, at 586 n.11.

281. AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE GOVERNMENT OF THE MARSHALL ISLANDS FOR THE IMPLEMENTATION OF SECTION 177 OF THE COMPACT OF FREE ASSOCIATION, H.R. DOC. NO. 192, 98th Cong., 2d Sess. 307 (1984).

282. *See* Antolok v. United States, 873 F.2d 369, 372 (D.C. Cir. 1984); Juda v. United States, 13 Cl. Ct. 667, 668-69 (1987). The 14 petitions filed in the Court of Claims evolved into action under three case names. The claims of the residents of Bikini Atoll were pursued in the case of Juda v. United States, 6 Cl. Ct. 441 (1984); the claims of the people of Enewetak were handled in the case of Peter v. United States, 6 Cl. Ct. 768 (1984); and all the other claims of people whose islands were not actual test sites were consolidated in Nitol v. United States, 7 Ct. Cl. 405 (1985). Separate cases were filed in the District Courts in California and the District of Columbia. Antolok v. United States, 873 F.2d at 372.

283. *See* Antolok v. United States, 873 F.2d at 392 n.12 (Wald, C.J., concurring).

284. *See id.* at 392-93.

285. Juda v. United States, 13 Cl. Ct. 667 (1987); Nitol v. United States, 13 Cl. Ct. 690 (1987); Peter v. United States, 13 Cl. Ct. 691 (1987).

286. Juda v. United States, 13 Cl. Ct. 667, 678-82 (1987).

has been terminated *de facto* with regard to the Marshall Islands.[287] In arriving at this conclusion, the court acknowledged that "[t]here may be doubt as to the significance at international law in the November 3, 1986, Proclamation that the Trusteeship Agreement" had been terminated,[288] but conceded its effectiveness under domestic law.

The *Juda* court, while noting that it was the unquestionable intent of both parties to the Compact and the subsidiary Section 177 Agreement to achieve a complete settlement of all claims,[289] also addressed the argument that the Marshall Islands government was not in a position to espouse the nuclear testing claims because of the rule of continuity of nationality in espousing claims. The argument asserts that because there was no state of the Marshall Islands at the time the injury occurred, the new state could not espouse the claims. The court made two important observations about that issue. First, the court reasoned that the rationale underlying the continuity principle did not apply to the particular circumstances of the emerging state of the RMI because there was no risk of a claimant changing nationality in an opportunistic fashion. The Court went on to state, moreover, that the international law in this area is "unresolved."[290] The court was correct in assessing the continuity of nationality principle as being questionable.[291]

The *Juda* court found the lack of clarity surrounding the international law to be indeterminative in the case because it ultimately concluded that the effect of the Compact and the subsidiary Section 177 Agreement was to withdraw the Government's consent to be sued.[292] The only reservation within the court's decision was the possibility that if the alternative forum provided for the plaintiffs' claims under the Section 177 Agreement does not, in fact, yield adequate compensation, then a Fifth Amendment takings claim under the United States

287. *Id.* at 682-83. The court stated:

The fact that the Trusteeship Agreement has not been terminated de jure does not resolve the issue of whether the Compact with the RMI is in effect. Actions by the RMI, the UNTC, and the United States determine that issue. As to the RMI, the Trusteeship Agreement is terminated in fact. De facto termination of the Trusteeship Agreement may be accomplished piecemeal, with termination de jure to be deferred until all four parts of the trust territory are brought to a status where the capacity for self-government is recognized. *See* Morgan Guaranty Trust Co. v. Republic of Palau, 639 F.Supp. 706 (S.D.N.Y. 1986).

288. *See* Juda v. United States, 13 Cl. Ct. at 683.

289. *Id.* at 684.

290. *Id.* at 685-86.

291. *See* Antolok v. United States, 873 F.2d 369, 394 (D.C. Cir. 1989) (Wald, C.J., concurring); I. BROWNLIE, *supra* note 6, at 481-82.

292. Juda v. United States, 13 Cl. Ct. 667, 690 (1987); *accord* Antolok v. United States, 873 F.2d 369, 375 (D.C. Cir. 1989) The court opinion of Judge Sentelle went on to reason in dictum that the court would also lack jurisdiction on grounds of the political question doctrine. *Id.* at 379-84.

Constitution might be had.[293] Subsequently, the Bikini plaintiffs have agreed to a dismissal with prejudice of their appeal based upon the creation of a $90 million Resettlement Trust Fund by act of Congress.[294] The other Marshall Islands nuclear injury claimants appear to have come near to the end of the road in the United States courts by virtue of a decision in the Federal Circuit Court of Appeals affirming the *Juda* Court decisions.[295]

There was some sentiment in the pro-Compact groups that section 177 reflected as much as the Marshall Islands could hope for in the way of a settlement.[296] One can guess that the people of Bikini may have accepted the latest settlement offer based upon a similar feeling that it was as much as could be hoped for under the domestic law of the United States. This view ignores the fact that the termination of the Trusteeship Agreement, and thereby the settlement agreement as well, should be subject to the approval of the Security Council and therefore the Marshall Islands need not settle for anything less than adequate compensation.

In addition to the fund created by the *Juda* settlement, the Compact includes provisions for the potential rehabilitation of Bikini, Rongelap, and the Enewetak island of Enjebi.[297] There have been some signs, however, that the United States' settlement efforts are intended to allow the United States government to wash its hands of the situation under the theory that the Marshallese must now accept responsibility for the nuclear cleanup.[298] More troubling is the proposal offered by Amata Kabua, President of the Republic of the Marshall Islands, that the Bikini Atoll be considered as a possible nuclear waste storage site for the United States and Japan.[299] The proposal has the

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293. *Id.* at 687-89.

294. People of Bikini v. United States, 859 F.2d 1482 (Fed. Cir. 1988).

295. People of Enewetak v. United States, 864 F.2d 134 (Fed. Cir. 1988), *cert. denied* 109 S. Ct. 3198 (1989). *Accord* Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989).

296. *See* A. RANNEY & H. PENNIMAN, *supra* note 113, at 91.

297. *See* Compact for Micronesia and Marshall Islands, *supra* note 145, tit. 1, § 103; *see also* Wilford, *Destiny of Bikini Is Again at the Mercy of Technology*, N.Y. Times, Apr. 19, 1988, at C1, col. 2. Congress has continued its assessments through the Bikini Atoll Rehabilitation Committee which has studied the feasibility and cost of cleaning and resettling the islands. The Committee has identified three methods which vary in cost and predicted effectiveness: removal of topsoil, salt water drenching of the soil, and potassium treatment of the soil.

298. *See* Wilford, *For Pacific's Atomic Nomads, A Symbolic Ground-Breaking*, N.Y. Times, Apr. 10, 1988, at 1, col. 1 (quoting Howard Hills, Navy and State Department lawyer, and Larry Morgan of the Department of Interior as stating that it is now time for a "once and for all" settlement and for the Bikinians to become "self-reliant").

299. *See* Wilford, *Atom Waste: Worth Money to Bikinians?*, N.Y. Times, Apr. 14, 1988, at A21, col. 1. The proposal found some positive reception in the United States Congress. *See id.* Representative Barbara F. Vucanovich of Nevada urged the Reagan Administration to open negotiations with the Republic of the Marshall Islands as an alternative to considering storage

attractive feature of generating even greater income for the central Marshallese government at the sacrifice of the hope of the Bikinians for a return to the atoll. The possibility of the permanent loss of land as a result of a chain of events set in motion by the administering authority of a trust should cause some concern in the context of a Security Council review.

Missile Testing on the Kwajalein Atoll

A substantial parallel exists between the treatment of the people on Kwajalein and those of Bikini and Enewetak. The United States military chose the Kwajalein Atoll as the target site for test missiles launched from military bases in the continental United States. In order to conduct the tests, the people of Kwajalein had their land taken and were relocated to the island of Ebeye. As with the people of Bikini and Enewetak, there is the basic question of whether the taking of land is consistent with United States' obligations under the United Nations Charter and the Trusteeship Agreement.[300]

The Kwajalein Atoll has been described as the largest atoll in the world and the chief pride of the people of the Marshall Islands.[301] The people of Kwajalein, like the people of Bikini and Enewetak, were relocated to a place that had inadequate natural resources to support the new inhabitants — the island of Ebeye. Ebeye is widely known as "the slum of the Pacific" and the worst eyesore in the Trust Territory.[302] A recent visitor described Ebeye as having a population of about 10,000, in an area where perhaps twenty people had once lived, and under conditions such as "ten people to a one-room house, frequent suicides, rampant alcoholism, derisory health care and worse education, gangs, teen pregnancies, and so forth . . . ."[303]

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sites in the state of Nevada and the Congress had previously adopted legislation voicing similar sentiment.

300. *See supra* notes 278-279 and accompanying text.

301. *See* W. PRICE, AMERICA'S PARADISE LOST 55 (1956).

302. *See* D. MCHENRY, *supra* note 49 (asserting that "all agree that Ebeye is an overcrowded and disgusting slum right in the middle of 'paradise.' Lamented one American official 'The stench is so bad you can hardly walk the street.' "); Hollis, S.F. Examiner, June 21, 1987, at A13, col. 3; Mather, *'Star Wars' Atoll: Slum in the Pacific*, S.F. Examiner, Nov. 9, 1986, at A17, col. 1 ("Ebeye consists of some 76 acres of disease-ridden dirt with hardly any open space. Many hovels are constructed out of packing cases, with rusty corrugated metal roofs held in place by old tires and timber collected from the beach . . . . Although there is no high school in Ebeye, Marshallese children are barred from the American High School at Kwajalein. On Ebeye, classes of up to sixty are common in the island's public school."); Patterson, *At the Birth of Nations*, 170 NATIONAL GEOGRAPHIC 460, 467, 470 (1986) (contrasting Ebeye's squalor, pocked asphalt lane, wall-to-wall sheetmetal and cinder block houses without space for grass or trees, children roaming in streets as playgrounds and lack of grocery stock with Kwajalein's golfing condominium appearance).

303. Malcomson, *supra* note 244, at 19, 52-53.

While 2000 acres of Kwajalein Atoll is devoted to missile activity and the 2600 Americans who work there, 9000 Marshallese are left to live on sixty-five acres of Ebeye. Thus, the Marshallese population density is 100 times greater than the American.[304] There has been an acute lack of fresh water, the medical facilities have been grossly inadequate, and the housing has been insufficient to satisfy the needs of the Kwajalein people.[305] In 1962, a polio epidemic in Ebeye lead to revelations about the primitive state of health services and spurred President Kennedy to take corrective action.[306]

During the United States' administration of the Trust Territory, it has invested billions of dollars in the Kwajalein Missile Range testing area. The Kwajalein facility has also become an important test facility for the Strategic Defense Initiative, or "Star Wars" program, that was begun during the Reagan Administration.[307] The importance of the Kwajalein testing range to the United States military is such that the islanders from Kwajalein should be well paid for the surrender of their land.[308]

With the prospect of the Trusteeship's end in sight, the United States has held a great interest in assuring the continued use of the facility under favorable conditions. Not surprisingly, then, the Compact between the Republic of the Marshall Islands and the United States provides for long-term continued rental of the Kwajalein facility. The 1983 plebiscite featured debate on whether the rental arrangements were proper in the amount of the rental fee, the length of the lease and the contracting parties.[309] Some Marshallese also opposed the Compact on the grounds that these provisions abridged the basic land rights of the Kwajalein natives who had been relocated to

304. *See* 53 U.N. TCOR (1605th mtg.) at 6-7, U.N. Doc. T/PV.1605 (1986) (statement of Mr. Balos before the Trusteeship Council).

305. *See id.* at 6-10 (statement of Mr. Balos before the Trusteeship Council).

306. R. GALE, *supra* note 45, at 102 (citing Don Oberdorfer, *America's Neglected Colonial Paradise*, SATURDAY EVENING POST, Feb. 29, 1964, at 31-32).

307. *See* 55 U.N. TCOR (1650th mtg.) at 7, U.N. Doc. T/PV.1650 (1988) (statement of Glenn Alcalay citing statements of Colonel Richard Chapman in public hearings in March 1988 explaining plans to expand Kwajalein to conduct SDI testing); Hollis, *supra* note 302; Mather, *supra* note 302; Patterson, *supra* note 302, at 467, 470.

308. *See* D. MCHENRY, *supra* note 49, at 73. "The military considers Kwajalein a 'must' for the United States due to the expense of the equipment already there. The facilities are seen as 'unique' and 'extremely difficult to duplicate.' "

309. The Land Use Agreement concluded under Title One, section 103(d) of the Compact for the Federated States of Micronesia and the Republic of the Marshall Islands provides for annual payments of $9 million for an initial thirty year period. This reflects an increase from $7 million per year and change from two or three year leases. The Compact also changes the parties to the rental agreement, making it a contract between the Republic of the Marshall Islands and the United States as opposed to previous lease agreements with the land owners. *See* H.R. DOC. 192, 99th Cong., 2d Sess. 349 (1984); A. RANNEY & H. PENNIMAN, *supra* note 113, at 92.

Ebeye.[310]

The Compact of Free Association provides for improvement of conditions on Ebeye[311] and there are presently projects underway that will help.[312] Nonetheless, there have been assertions that the present levels of funding will never adequately address the social problems.[313] There have also been reports that rent money intended by the United States government for land owners from Kwajalein has been diverted by the central government leaders.[314]

The Compact, including these post-trust arrangements, was put to vote in a September, 1983 plebiscite. 83.5% of registered voters participated with 58% of the voters approving the Compact of Free Association. It is noteworthy that there was strong sentiment for free association even among those opposing the Compact, but with better terms on nuclear claims settlement and the rental of the Kwajalein military facility.[315]

In reviewing the termination of the Trusteeship Agreement with particular regard to the Marshall Islands, the concern of the Security Council should be to ensure that the post-trust arrangement does justice to the inhabitants of the Marshall Islands as a whole, with due respect for the minority comprised of the Bikini, Enewetak, Utirik and Rongelap residents and Kwajalein landowners. The claims of the islanders that proved unsuccessful in United States courts should be considered anew in the international forum where there is no preemption by the acts of the executive and legislative branches of the United States government. The espousal issue should also be addressed, but one would suppose that the academic aspect of the question is not particularly important to the landowners. What is more important to

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310. *See* A. RANNEY & H. PENNIMAN, *supra* note 113, at 88.

311. Section 103(d) of the Compact authorizes the President to make loans and grants to the Kwajalein Atoll Development Authority for improvement of Ebeye and the rest of the atoll.

312. Hollis, *supra* note 302, col. 3 (reporting recent completion of huge electrical power plant and water desalination plant that will provide every home on Ebeye with running water and improve sanitation conditions); Malcomson, *supra* note 244, at 52-53 (citing progress toward making Ebeye into a modern city by building sidewalks and asphalt roads, housing and community health center, and with a power plant and water system already in place); *see also Compact of Free Association: Hearings on National Security Implications of the Compact of Free Association Before the Subcomm. on Public Lands and National Parks of the House Comm. on Interior and Insular Affairs,* 98th Cong., 2d Sess. 242-52, 308-30 (1984) (memoranda describing origins and capital improvement plans of the Kwajalein Atoll Development Authority).

313. *See* 53 U.N. TCOR (1605th mtg.) U.N. Doc. T/PV.1605 (1986) (statement of Mr. Balos before the Trusteeship Council).

314. *See* Hollis, *supra* note 302 (citing congressional staff report issued by House Public Lands Subcommittee); Malcomson, *supra* note 244, at 54; 53 U.N. TCOR (1605th mtg.) at 16-17, U.N. Doc. T/PV.1605 (1986) (statement of Mr. Balos before the Trusteeship Council).

315. *See* A. RANNEY & H. PENNIMAN, *supra* note 113, at 93-94.

the claimants is that the amount of settlement and method of disbursement be fair and equitable.

The strategic trust concededly gave the United States greater discretion with regard to the administration of the Trust Territory. At the end of the trust, one cannot simply accept that the United States had greater discretion. Instead, one must insure that the rights of the Micronesian people under the United Nations Charter and other international law obligations are properly respected. When the matter is considered by the Security Council, particular care should be taken to insure that past shortcomings are fully addressed and that payments for future use of lands are more than minimally adequate.

Economic, Social and Educational Conditions

Article 76 provides that a basic objective of the Trusteeship System is the political, economic, social and educational advancement of the inhabitants of the trust territories.[316] In practice, the General Assembly and Trusteeship Council have examined other trust territories to determine not only the degree of political advancement toward self-government or independence but also to evaluate the achievement of the other objectives.[317] Recent visiting missions of the Trusteeship Council have generally approved the United States' administration of the Trust Territory,[318] but it will yet fall to the Security Council to concur or disagree with that judgment. A very difficult aspect of making such an assessment is the lack of clear standards by which to assess the level of achievement. The United States representative to the Trusteeship Council recently stated that neither the Trusteeship Agreement nor the United Nations Charter provides a "yardstick" by which economic development can be measured.[319] Nonetheless, the

316. *Supra* note 36.

317. *See* L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 278, 467-69 (3d ed. 1969) (stating that the General Assemby and Trusteeship Council have shown particular interest in protecting land rights, economic development, labor conditions, promotion of human rights and improvement in medical and health services). *But see* Macdonald, *supra* note 8, at 253-55 (asserting that consistent with General Assemby Resolution 1514 provision that lack of political, economic, social or educational development should not be "pretext for delaying independence" those factors have not been important in trust termination).

318. *See Report of the United Nations Visiting Mission to Palau, Trust Territory of the Pacific Islands, 1988*, 56 U.N. TCOR Supp. (No. 1) at 24-26, U.N. Doc. T/1935 (1989); *Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands, 1985*, 53 U.N. TCOR Supp. (No. 1) at 3-5 U.N. Doc. T/1878 (1986); *Report of the United Nations Visiting Mission to Trust Territory of the Pacific Islands, 1982*, 50 U.N. TCOR Supp. (No. 2) U.N. Doc. T/1850 (1983). The 1989 mission limited its visit to Palau in accordance with the Council's and United States' position that the Trusteeship Agreement has been fulfilled with respect to other parts of the Trust Territory.

319. *See* 56 U.N. TCOR (1670th mtg.) at 7, U.N. Doc. T/PV.1670, at 7 (1989) (statement of U.S. Representative Patricia Byrne). Byrne was speaking with particular reference to economic

Security Council would be seized with making an assessment of economic and other development during the Trusteeship. The effect of such a review is not likely to be determinative of whether free association or commonwealth arrangements should be approved, as a general matter, but may warrant some modification in post-trust agreements to address any failure in these areas during the period of the trust.

The observation has been advanced that the United States' interest in Micronesia has been entirely for security reasons:

> [S]he has unilaterally transformed the Pacific Islands Mandate she had taken over from Japan into a "strategic Trust Territory.". . . [I]n practice, the territory has provided naval and military bases for the administering authority, as well as a field for the testing of nuclear weapons. More of a national strategic area than this trust territory would be hard to imagine.[320]

In fact, United States leaders were quite candid in stating that the islands were desired only for security reasons.[321] The acknowledgment of United States motives is usually accompanied by charges that the United States has failed in its obligation to promote the economic, educational and social advancement of the Micronesian people. The fact that the United States had no interest in exploiting any economic interest in the Trust Territory may have indeed worked against economic development.

During the first two decades of its administration, the primary United States policy emphasis was to avoid disturbance of the indigenous culture and thereby allow the native culture to develop on its own.[322] Both the failure to cause new development and the crumbling of the existing infrastructure contributed to the nicknaming of Micronesia as the "Rust Territory."[323] The 1961 visiting mission of the Trusteeship Council was highly critical of the American administra-

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development in Palau but her statement also has relevance to judging all areas of development throughout the Trust Territory.

320. C. TOUSSAINT, *supra* note 16, at 250.

321. *See* 93 CONG. REC. 8733 (1947) (statement of Rep. Mansfield: "We have no concealed motives because we want these islands for one purpose only and that is national security. Economically they will be a liability, socially they will present problems, and politically we will have to work out a policy of administration."); *Trusteeship Agreement for the Territory of the Pacific Islands: Hearing on S.J. Res. 143 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 18 (1947) (statement of General Dwight D. Eisenhower, Chief of Staff: "They are of very little economic value. Our sole interest in them is security.").

322. *See* D. MCHENRY, *supra* note 49, at 8; Macdonald, *supra* note 8, at 236-37.

323. *See* H. NUFER, *supra* note 45, at 121-22; S. DE SMITH, *supra* note 27, at 136-37. The "rust territory" nickname may also have resulted from the importation into Micronesia of corrugated iron roofs for use on American built buildings. The iron roofs were expected to have a life of eight years but began to rust after only one year so that throughout the Trust Territory one could find "a symphony of different shades of brown according to the degree of rust." W. PRICE, *supra* note 301, at 98-100.

tion, including complaints that the economy had been "allowed to remain static for too long" and that there never had been a "coordinated plan for economic development."[324] The extreme nature of the economic dependency is reflected in the fact that the aid from the United States has often made up more than 90% of the revenues received by the Micronesian governments and never less than 80%.[325]

While Micronesia has the agricultural and marine natural resources to sustain a subsistence economy, the islands do not lend themselves to easy economic development.[326] A primary difficulty is that Micronesia consists of small, sparsely populated islands that are widely dispersed.[327] The natural resources that might be used for economic development are quite limited, except for marine resources which are believed to contain large amounts of commercially valuable fish.[328] The fishery resources and the licensing of foreign fishing vessels are even more valuable in light of the emergence of a standard 200 mile exclusive economic zone that can be claimed by the states in Micronesia.[329] The marine resources may also yield valuable minerals

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324. R. GALE, *supra* note 45, at 100-01; *Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands, 1961*, 27 U.N. TCOR Supp. (No. 2), U.N. Doc. T/1582 (1961). The 1956 visiting mission offered similar criticism of the failure of the Administering Authority "to provide sufficient funds for essential economic and social development." *See The Challenge in the Pacific Islands*, 3 U.N. REV. 46, 47-48 (1956).

325. *See* A. RANNEY & H. PENNIMAN, *supra* note 113, at 2; *see also* D. NEVIN, THE AMERICAN TOUCH IN MICRONESIA 30 (1977) ("The money [United States contribution to the Trust Territory budget] accounts for more than 90% of the Trust Territory budget [of about $72 million]. While the total budget figure includes some $5 million raised locally, the source for most of that $5 million is income taxes paid on salaries which are paid from the [United States contribution], and business taxes that come largely from the same source. Thus, directly and indirectly, the United States not only supports Micronesia—in effect, it is Micronesia's fiscal life. There are estimates — and no one really knows — that in real terms the United States supplies about 98% of Micronesia's funding.").

326. United Nations Visiting Missions have concluded that "complete self-sufficiency for Micronesia, except at a standard of living which would be unacceptable to most of its people, [is] doubtless unobtainable . . . ." *Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands, 1976*, 43 U.N. TCOR Supp. (No. 3) at 41, U.N. Doc. T/1774 (1976). *See* D. MCHENRY, *supra* note 49, at 7-8.

Economic advancement was experienced during the period of Japanese administration between the wars and was ceased only by the advent of World War II. The Japanese-led economic development has been described as artificial because it relied upon alien rather than native labor. Severe economic problems existed at the time that the United States assumed trust responsibilities at the end of World War II. The Japanese efforts had been negated by the deportation of the Japanese, Koreans, Okinawans, and Formosans who had come to outnumber the native islanders in some parts of Micronesia. *See* S. DE SMITH, *supra* note 27, at 133-34; Louis, *supra* note 44, at 83; H. NUFER, *supra* note 45, at 119-20.

327. *See* S. DE SMITH, *supra* note 27, at 134. In this respect, Micronesia is quite similar to other island states in the South Pacific, none of which may ever truly arrive at economic independence. *See* Kristof, *Pacific Isles: Paradise Lost In Economics*, N.Y. Times, June 28, 1987, at 15, col. 1.

328. *See* C. HEINE, *supra* note 31, at 4; *see* Dolan, *supra* note 220. Federated States of Micronesia now earns about $4 million per year from foreign commercial fishing licensing.

329. *See* R. GALE, *supra* note 45, at 189-91.

when deep-sea mining becomes feasible.[330] Other economic alternatives include tourism,[331] handicrafts, agriculture and shipping services. Also, the islands may become involved in the delivery of energy resources to Japan and other industrial nations, serving either as a place for oil storage and processing plants along the route from the Middle East, or as a place to produce energy through the absorption of hydrogen from sea water.[332]

During the United States administration of Micronesia, the failure to encourage economic development looms as the biggest United States failure.[333] Not only did the United States not invest effectively into the economic development of Micronesia, but it also excluded other foreign investment.[334] The lack of a real effort to develop the economy has fostered the view that the United States has engaged in a "conspiracy to create a situation in which Micronesia could never stand alone and thus would be bound to the patron nation's strategic needs."[335] Whether dependency was the design or not, it has been the effect. Recent reports indicate that unemployment is incredibly high in most of the Trust Territory,[336] while United States aid continues to constitute a disproportionate share of budgets with no prospect for financial independence during the terms of the Compacts.[337]

Reviews of the general social conditions have noted the appearance

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330. *See id.* at 191.

331. Most of the tourism business goes to the Northern Mariana Islands with only about 25% of tourists traveling to other areas. *See* H. NUFER, *supra* note 45, at 140. Generally speaking, however, tourism may not be as great a potential as is generally thought due to the remote location and the lack of hotel development and things for tourists to do. *See* D. NEVIN, *supra* note 325, at 195; Dolan, *supra* note 220.

332. *See* R. GALE, *supra* note 45, at 182-89. The somewhat desperate search for revenue sources has lead the Marshall Islands to consider not only storing nuclear waste, *see supra* note 299, but also the storage of non-toxic waste. *See* Clark, *Marshall Isles: Home for U.S. Waste*, CHRISTIAN SCIENCE MONITOR, May 4, 1989, at 4.

333. *See* D. HUGHES & S. LINGENFELTER, *supra* note 112, at 200.

334. *See* J. WEBB, *supra* note 43, at ch. 10.

335. D. NEVIN, *supra* note 325, at 26.

336. Although the value of unemployment statistics should not be overvalued in light of the basic subsistence society structure, *see Report of U.N. Visiting Mission to the Trust Territory of the Pacific Islands, 1985*, U.N. Doc. T/1978, at 3 (1985), the rates are still troubling. The unemployment rate at Kwajalein in the Republic of the Marshall Islands has been reported to be as high as 88%, *see* Hollis, *supra* note 302 (citing congressional staff report issued by House Public Lands Subcommittee); the unemployment rate in the Federated States of Micronesia is estimated to be at 80% with two-thirds of those employed working for the government. Dolan, *supra* note 220. In contrast, the unemployment rate in the Northern Marianas has been reported to be almost 10%, with the government employing about one-half of the resident population. *See* U.S. DEP'T OF THE INTERIOR, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, FACT SHEET 3 (1989).

337. In the Federated States of Micronesia, the United States aid constitutes 90% of the budget and the optimistic projection is that at the end of the 15 years under the Compact the

of a substantial suicide rate[338] along with other drastic changes in the culture, including alcohol abuse and violent crimes such as robbery, assault, and rape as Micronesia has been subjected to greater amounts of western cultural influence or dislocation.[339]

On a more positive note a native Micronesian writer has observed that:

> American education has been the most revolutionary of all the influences operative in Micronesia since the end of World War II, and indeed since the imposition of Western rule. It has been the chief instrument in the creation of a class destined to rule the future of Micronesia. Western education has created this new Micronesian elite.[340]

This education program has been spread throughout the islands over the past twenty years and stands in stark contrast to intentional programs of previous eras that were designed to restrict the political and social advance of the Micronesian people. It has been estimated that about 50% of Micronesian young people eventually graduate

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dependency may be reduced to 70% or 80%. Dolan, *supra* note 220 (quoting Michael Wygant, the United States representative to FSM).

In contrast, consider the statement of Benjamin Manglona, President of the NMI Senate, before the Trusteeship Council:

> We have also enjoyed many material benefits from our association with the United States. Our gross island product is up 100 per cent over the last decade. Our local internal revenues over that same period are up from $5 million to $72.4 million. A stable investment climate has spurred development in our islands. We see the possibility of economic self-sufficiency on the horizon."

56 U.N. TCOR (1663d mtg.) at 23, U.N. Doc. T/PV.1663 (1989). To the extent that Senator Manglona's optimistic report and forecast is accurate, one may wonder if what has been done in the Northern Marianas might not be achieved to some degree in the rest of the Trust Territory.

338. *See* 55 U.N. TCOR (1650th mtg.) at 6-7, U.N. Doc. T/PV.1650 (1988) (statement of Glenn Alcalay, citing the work of Professor Donald Rubenstein of the University of Hawaii who has identified a "suicide subculture" among young Micronesian males with the rate among the general population among the highest to be found in the world); *Micronesia's Male Suicide Rate Defies Solution*, N.Y. Times, Mar. 6, 1983, at A24, col. 1 ("Suicides among males between the ages of 15 and 30 are so prevalent that they have become an accepted method of problem-solving in the island societies where harmony is highly prized, according to the Rev. Francis Hezel and Dr. Don Rubinstein . . . [t]heir figures indicated annual suicides in the United States-administered Trust Territory of the Pacific, where about 120,000 people live, are averaging about 27 for 100,000 people. That rate is twice as high as the suicide rate in the United States, they said. When broken down by geographical regions and age group, some figures are even more dramatic. 'The general suicide rate for Truk is 40 per 100,000,' Father Hezel said. 'The rate for Trukese males between 15 and 25 is a startling 250 per 100,000. This is 20 times the youth rate in the United States.").

339. *See, e.g.*, 55 U.N. TCOR (1650th mtg.) at 6-7, U.N. Doc. T/PV.1650 (1988) (statement of Glenn Alcalay that the great majority of social scientists place blame for advent of violence in Micronesia on the Administering Authority); D. NEVIN, *supra* note 325, at 34-35, 189-91; Dolan, *supra* note 220 ("Health care has improved [in Federated States of Micronesia] but rates of alcoholism, suicide and stress-related diseases have risen."); Patterson, *supra* note 302, at 471:

> [d]espite an immense flow of American money, effort, and goodwill, many islands still suffer from a shortage of water and power, poor to nonexistent goods, struggling educational systems, meager public services, few job opportunities, limited natural resources, and, at the top of the list, inadequate health care. Much blame must be laid to the region's geography, especially difficult when it comes to delivering adequate health services.

340. C. HEINE, *supra* note 31, at 37-38.

from high school.[341] Unfortunately, the education program appears to have been poorly adapted to suiting the Micronesians with the skills that build local economies.[342] Still, the efforts at education must be considered a positive aspect of the United States administration that has paid particular dividends by preparing the indigenous people to engage in the political process by which their future will be determined.

The United States fostered movement toward self-government through the establishment of a system of local municipalities which built upon the remnants of traditional social structures of the islands.[343] The promotion of self-governance constituted a distinct improvement over prior foreign administrations which had largely denied such opportunities.[344] The creation of the Congress of Micronesia in 1964 was a significant development because it afforded the people of Micronesia their first forum in which progress toward post-trust relations could be considered, and where the United States could be questioned with regard to its administration of the Trust Territory.[345] During the course of the establishment of the post-trust governments, all four of the political entities have adopted constitutional structures. These constitutions have incorporated traditional social structures into western-styled governments.[346]

On balance the United States can claim some success in fostering educational advancement and thereby the ability of Micronesians to effectuate self-government and can place some blame for the lack of economic development and social advancement on the geographic and other immutable circumstances of Micronesia. Indeed, the United States is likely to argue, with supporting statistics, that the level of economic development and the standard of living in the Trust Territory is higher than in other former trusteeships at the time of termination.[347] Still, the lack of a coherent economic plan throughout the

341. *See* H. NUFER, *supra* note 45, at 210-11.

342. *See* Hirayasu, *supra* note 52, at 498.

343. *See* H. NUFER, *supra* note 45, at 47-48; C. HEINE, *supra* note 31, at 6-7.

344. *See* Hirayasu, *supra* note 52, at 497-98.

345. *See* C. HEINE, *supra* note 31, at 6-9; Macdonald, *supra* note 8, at 236-37 (citing Department of Interior Order No. 2882, Sept. 28, 1964). For a thorough treatment of the origins and evolution of the Congress of Micronesia, see N. MELLER, THE CONGRESS OF MICRONESIA (1969).

346. *See* A. RANNEY & H. PENNIMAN, *supra* note 113, at 3-4.

347. Patricia Byrne, U.S. Representative to the Trusteeship Council, recently made such a statement with regard to Palau and the same could certainly be said about the other new states. The available statistics indicate that the standard of living is higher in Micronesia than in former Trust Territories such as Somalia, Rwanda, or Burundi. The United States Government publication, *The World Factbook 1988*, provides the following data: Republic of Marshall Islands — 1981 Gross Domestic Product (GDP) was $1000 per capita; Federated States of Micronesia —

trusteeship should be considered a breach of trusteeship obligations. As with other problems related to administration or termination of the Trusteeship, the proper response to such a breach is not to delay the emergence of the new states into self-governance. Rather, the solution readily available is to require that post-trust arrangements include provisions to correct the deficiencies, to the extent possible. Security Council approval of termination should be conditioned upon the inclusion of such corrective provisions.

CONCLUSION

> "The United States Representatives took a leading part in the General Assembly in bringing about the establishment of the Trusteeship System in the face of sharp disagreements and other major difficulties that might have caused indefinite delay. The United States will support further steps during the coming year toward strengthening the Trusteeship System.
>
> "America has long been a symbol of freedom and democratic progress to peoples less favored than we have been. We must maintain their belief in us by our policies and our acts."[348]
>
> "I actually think we should be independent but that's not a popular idea here. Where would our money come from?"[349]

Several writers anticipated that the United States might attempt to terminate the Trusteeship Agreement unilaterally if Security Council approval did not appear to be forthcoming.[350] The recent conduct by the United States in this matter appears to have proven those predictions to be correct. This approach to termination is unfortunate for several reasons. First, the circumvention of the Security Council is clearly a breach of Trusteeship System procedure designed to protect

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1983 Gross National Product (GNP) was $1300 per capita; the Republic of Palau — 1986 GDP was $2257 per capita; and the Northern Mariana Islands — 1982 GNP was $9170 per capita. In contrast, the book reports the following data: Burundi — 1986 GDP was $240 per capita; Cameroon — 1987 GDP was $1230 per capita; Rwanda — 1985 GDP was $780 per capita; Somalia — 1982 GDP was $200 per capita; Papua-New Guinea — 1985 GDP was $700 per capita; Togo — 1985 GNP was $240 per capita. One might also compare other Pacific island statistics: Kiribati — 1985 GDP was $310 per capita; Vanuata — 1986 GDP was $580 per capita; and the Cook Islands — 1983 GDP was $1170 per capita. The Europa Year Book for 1987 offers similar estimates.

Two related observations should be made before overvaluing these statistics. First, the statistics for the Trust Territory are undoubtedly inflated by U.S. assistance; without U.S. assistance the standards would fall. Second, the statistics should not be the only measure of "fostering" economic development; an artifically high GNP may indeed conceal failure to foster economic development.

348. *H. Truman, Message to the Congress Transmitting First Annual Report on U.S. Participation in the United Nations* (Feb. 5, 1947), *reprinted in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN 118, 121.

349. Malcomson, *supra* note 244, at 19 (quoting Mitch Pangelian, Marianas politician.).

350. *See* Macdonald, *supra* note 8, at 258-60; Clark, *Self-Determination and Free Association*, *supra* note 43, at 83-86; D. MCHENRY, *supra* note 49, at 50.

the welfare of non-self-governing peoples. Second, it reflects a continued lack of confidence and a breach of faith in the United Nations system by the United States.[351] Considering the role of the United States in the founding of the United Nations and its status as a preeminent leader in the conduct of nations, this lack of faith can only diminish the efficacy of the international body.

A third and most unfortunate aspect of the attempt at unilateral termination is that it may be unnecessary for the accomplishment of United States objectives. If the United States presents to the Security Council a proposal for termination that is substantively fair and has the unanimous support of the Administering Authority and the governments of each of the emerging states, it would be difficult for the Security Council, or particularly any single member, to withhold approval and thwart the exercise of the right of self-determination by the Micronesian peoples. Still, the United States would need to take steps to correct current difficulties with the Northern Marianas and Palau before any such united front could be put before the Security Council. The United States must concede greater right to internal self-government before the Northern Marianas Covenant can satisfy relevant United Nations standards and must be willing to offer further accommodations of Palauan nuclear restrictions if the Compact does not gain approval of the people. Further, the United States might be required to make some adjustments in the general nature of the compact arrangements, such as foregoing a perpetual right of strategic denial in the associated states and increasing its commitment to long-term assistance programs designed to effectively develop the entire Trust Territory in areas of economic self-sufficiency, medical services, and similar concerns.

A central purpose of the United Nations Charter provisions relating to non-self-governing territories is the prevention of exploitation by powerful nations.[352] The line between the proper use of bargaining power and exploitation, however, is often difficult to define. In the case of the United States and the emerging states of the Trust Territory of the Pacific Islands, there are indications that the line may have been crossed on some issues, particularly in light of the fiduciary duty on

351. *Supra* note 9.

352. *See* Comment, *International Law and Dependent Territories: The Case of Micronesia*, 50 TEMP. L.Q. 58, 80 (1976) (citing O. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATION OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS 166-67 (1966): "The interests or concerns which have provided the foundation for the law of dependent territories may be grouped into two general categories: first, the concern over the proper international status for dependent territories; and second, the concern that people within the territories be protected from exploitation by larger, more powerful nations.").

the part of the United States as trustee of the Micronesians.[353]

The principles of non-exploitation and respect for the freely expressed wishes of non-self-governing people should guide the Security Council in reviewing the proposed termination of the Trust Territory of the Pacific Islands. Perhaps through a change of conscience on the part of the United States Government or a response by the Trusteeship Council or Security Council to the many petitions of the people of Micronesia for assistance, the United States can be brought to follow the proper legal procedure and submit its proposed termination of the Trust Territory of the Pacific Islands to international review. The present and future welfare of the people of the Trust Territory of the Pacific Islands is at stake and warrants the honoring of the "sacred trust" taken by the United States in an act of faith some forty years ago.

353. *See* 54 U.N. TCOR (1629th mtg.) at 7, U.N. Doc. T/PV.1629 (1987) (statement of Ibedul Yutaka Gibbons, traditional Palauan high chief: "I believe that the United States of America, the Administering Authority, and possibly the most powerful nation in the world should maintain the highest level of integrity as a Trustee. It should not even allow any appearance of impropriety that an effort is being made to subvert the Constitution of the Republic of Palau which was promoted by the Administering Authority in an effort to end the Trusteeship.").

APPENDIX A

Statement of Ambassador Warren Austin before Security Council 116th Meeting, March 7, 1947

The United States wishes to record its view that the draft trusteeship agreement is in the nature of a bilateral contract between the United States, on the one hand, and the Security Council on the other. The agreement confines itself to provisions for the powers, duties, and responsibilities of the administering authority. Note the difference: it is the Charter that defines the duties, the powers, and the responsibilities of the Security Council, which is one party to this agreement; but it is this agreement which is necessary in order to define the powers that the United States may have if it becomes the trustee under the agreement. That is what we are dealing with: what power shall the mandatary [sic] have: what power shall the trustee exercise?

Thus Article 15 of the draft agreement defines the action which would be required of the administering authority with respect to changes in the agreement, and does not attempt to define the responsibilities of the Security Council in this respect. The latter are already defined; they are in the Charter; and no amendment or termination can take place without the approval of the Security Council. There is no need to repeat them here, though there would be no harm in doing so. If you want to make a change just for the sake of making a change, the United States would see no harm at all in saying that alterations in the terms of trusteeship can only be taken by agreement between the United States and the Security Council . . . .

I have already indicated that we are not arbitrary insofar as wording is concerned. Any wording that will preserve and protect the relationship between these two parties under this trusteeship agreement will be satisfactory to the United States Government. Therefore we suggest that if this must be changed —which we consider wholly unnecessary — some such language as the following should be used: *The terms of the present agreement shall not be altered, amended or terminated, except by agreement of the administering authority and the Security Council.*

APPENDIX B

Trusteeship Council Resolution 2183 (LIII) (1986)
53 U.N. TCOR Supp. (No.3) at 14-15, U.N. Doc. T/1901

The resolution read:

The future of the Trust Territory of the Pacific Islands

The Trusteeship Council,

Recalling the Trusteeship Agreement for the Trust Territory of the Pacific Islands approved by the Security Council on 2 April 1947,

Noting that Articles 73 and 76 of the Charter of the United Nations call upon the Administering Authorities of Trust Territories to assist their peoples in the progressive development of their free political institutions and towards self-government or independence,

Mindful that the peoples of the Federated States of Micronesia, the Marshall Islands, the Northern Mariana Islands and Palau have established constitutions and democratic political institutions providing the instruments of self-government,

Aware that political status negotiations between the Administering Authority and the representatives of the Trust Territory began in 1969 with the aim of facilitating the progressive development of the peoples of Micronesia towards self-government or independence as was deemed appropriate,

Aware also that this process has been successfully completed,

Noting further the recommendation of the Visiting Mission to Trust Territory in 1985 that termination of the trusteeship should be achieved as soon as possible,

Having heard the statements by the elected representatives of the Trust Territory Governments requesting early termination of the Trusteeship Agreement, and believing this to reflect the freely expressed wishes of the people of the Trust Territory,

Conscious of the responsibility of the Security Council in respect of the strategic areas as set out in Article 83, paragraph 1, of the Charter,

1. *Notes* that the peoples of the Northern Mariana Islands, the Marshall Islands, the Federated States of Micronesia and Palau have freely exercised their right to self-determination in plebiscites observed by the visiting missions of the Trusteeship Council and have chosen free association with the United States of America in the case of the Marshall Islands, the Federated States of Micronesia and Palau and Commonwealth status in the case of the Northern Mariana Islands;

2. *Requests* the Government of the United States, in consultation with the Governments of the Federated States of Micronesia, the Marshall Islands, Palau and the Northern Mariana Islands, to agree on a

date not later than 30 September 1986 for the full entry into force of the Compact of Free Association and the Commonwealth Covenant, and to inform the Secretary-General of the United Nations of that date;

3. *Considers* that the Government of the United States, as the Administering Authority, has satisfactorily discharged its obligations under the terms of the Trusteeship Agreement and that it is appropriate for that Agreement to be terminated with effect from the date referred to in paragraph 2 above;

4. *Requests* the Secretary-General to circulate as official documents of the Security Council the present resolution and all material received from the Administering Authority pursuant to this resolution.

APPENDIX C

COMMONWEALTH-WIDE INITIATIVE NO. 1
Commonwealth of the Northern Mariana Islands

TO REAFFIRM THE COVENANT GUARANTEEING SOVEREIGNTY TO THE PEOPLE OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS COVERING ALL INTERNAL AND LOCAL AFFAIRS.

WHEREAS the purpose of Section 2 of the Congressional resolution (Public Law 94-241) approving the executive agreement known as the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (hereinafter referred to as the Covenant) was according to its sponsor United States Senator Jacob Javits, to give the people of the Commonwealth of the Northern Mariana Islands the opportunity to review their vote on the Covenant because that agreement "might not give the Marianans participation in the United States Government which they may later desire and also to neutralize any argument that this was a step toward American "colonization" of part of its "trust."

Section 1. The Covenant is hereby reaffirmed with the clear and unambiguous understanding that the people of the Commonwealth in granting sovereignty over foreign affairs and defense in Section 104 clearly reserved and did not grant sovereignty over internal and local affairs (Section 103 of the Covenant). And it is clear that the only provisions of the United States Constitution applicable in the CNMI are those specifically listed in Section 501 of the Covenant. Section 501 was effective in January 1978 when the Commonwealth was part of the Trust Territory and not a territory of the United States; therefore neither the so-called Territorial Clause nor the Interstate Commerce Clause apply of their own force and can only upon the specific consent of the people be made applicable in the Commonwealth and used as a basis for legislation in the Commonwealth.

Section 2. Should the covenant's Section 902 discussions leave any substantial matters regarding self government or financial assistance unresolved as of July 1, 1989, the people of the Commonwealth by Initiative (Article IX, Section 1) shall have the right to reaffirm, reject, or renegotiate the Covenant.

Section 3. The People of the Commonwealth respectfully request and strongly urge the United Nations Security Council and Trusteeship Council in any resolution terminating the "Trusteeship Agreement for the formerly Japanese mandated islands" to include the following language or its equivalent:

"In terminating the 'Trusteeship Agreement for the formerly Japanese mandated islands' the United Nations Security Council and Trusteeship Council specifically recognize that the People of the Commonwealth granted sovereignty only over foreign affairs and defense (Section 104 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands) and reserved and did not grant sovereignty over local and internal matters (Section 103 of the Covenant), and neither the Territorial Clause nor the Interstate Commerce Clause of the United States Constitution are applicable in the Commonwealth (Section 501 of the Covenant)".