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20 July 1973

**MEMORANDUM FOR MR. W. SOLF, JAG-A**

**CAPT. R. L. FRUCHTERMAN, JAG-N**

**SUBJECT: Survival of Leases to Military Retention Lands on the Marianas following Termination of Trusteeship Administration.**

**May I have your comments with respect to the following:**

The third concern raised in my memorandum to Mr. Markon (dated 16 July 1973) was addressed to whether the leases with respect to Military Retention Lands on the Marianas would survive the termination of the Trusteeship Administration, or the change from government by the administering authority to a new form of government.

We have reviewed this problem and see no legal impediments to the survival of the leases, subject however to the matters raised in the comments, which call for separate review. It is noted at the outset that the United States position is that not only of a sovereign State, enjoying sovereign rights at present with respect to the territory, but that it will continue to exercise sovereignty over that territory and its peoples, subject to the allocation of "sovereign rights" to be set out in the Commonwealth agreement.

The present proposals indicate that the Marianas, separate and apart from the rest of Micronesia, would be enabled to reach independence, and become momentarily "sovereign," and as a "sovereign people" to choose the anticipated Commonwealth relationship with the United States. But the real sovereign - or governing power - is reposed for these purposes in the United States.

Two fundamental issues - whose affirmative determination are precedent to the present question must be resolved (see 16 July Memorandum), i. e. that there are no outstanding "claims" by interested persons in the lands to be resolved, and that the sums paid for the lands embraced by the leases in question are acceptable and not subject to renegotiation for any reason. Assuming that these two issues are resolved favorably, it is apparent from the authorities (cf. Hackworth, Whiteman, Hyde, and the specialized effort of O'Connor, on STATE SUCCESSION (Cambridge, 1967, 2 v. see especially V. 1, pp 237-268) that the leases would be treated as binding contracts. Put differently, if the United States were no longer entitled to hold leased lands at the time of termination of the Trusteeship Agreement, it would have then been entitled to compensation for expropriation of whatever interests were retained in them.

The argument that the Marianas during their period of "sovereignty" might exercise a right of eminent domain is at best tenuous and legalistic. For one thing it is a major objective in negotiating and establishing the new Commonwealth arrangement that the United States will retain its interests in these lands, and that negotiations, if any, shall extend solely to certain lands that might be given up if they are would serve no foreseeable military or strategic purpose. A part of such negotiations will also address an understanding that should the United States require additional lands - either for use, occupancy, access or to traverse - it will have sufficient authority and competence to acquire such future rights either directly through a power of eminent domain (and conceivably reinforced by police powers), or through procedures akin to such a power, subject to some form of notification (and if time permits, consultation) to the peoples involved. In other words the United States negotiations presuppose that it has pre-empted the rights with respect to the lands, and the only surviving issues will be those relating to interested persons and the amounts paid on the leases, if these issues and claims associated with them have not been resolved.<sup>1</sup>

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1. The termination of the Strategic Trust Agreement will raise one issue apart from these noted in connection with the survival of leases which should be noted. That Agreement provides for most-favored-nation treatment to be afforded third States. The unresolved issue is whether such treatment can be properly addressed if the United States seeks unilaterally to terminate the Agreement.

The United States argument is predicated upon the widely accepted doctrine of international law with respect to acquired rights. The legal system, presently in force in the Marianas will not evaporate, and accordingly it is apparent that it will though modified support the United States claims under its existing leases. Put in the simplest form the change envisaged is a change in "governments" and whatever argument might be made as to a transitional sovereignty in the peoples of the Marianas, the "sovereignty" which initially persisted through the United States as administering power in actual fact continues and will be established in its altered position as "sovereign" vis-a-vis the Commonwealth of the Marianas.

SIGNED

Harry H. Almond, Jr.  
Office of Assistant General Counsel  
International Affairs

cc: Capt E. C. Whelan, EA&PR, ISA  
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