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X original Capt. Whelan 9 May 74

MEMORANDUM FOR CAPTAIN WHELAN

Subj: Draft Marianas Covenant

Ref: (a) Your memo of 7 May 1974

1. As requested in reference (a), the following comments are offered on the subject Draft Covenant attached to reference (a).

2. Preamble. The first paragraph of the Preamble indicates ~~some~~ indecision whether to refer the Marianans' ^{right of} self-determination as "inalienable" or "sovereign". To describe the right as inalienable might support an argument at some future time that the Marianans can unilaterally ~~determine~~ ^{terminate} the Covenant. Consequently, I recommend use of the term "sovereign."

3. The relationship between the Titles of the Covenant and the Articles of Agreement is unclear, but I assume that both together comprise the Covenant ~~as indicated in paragraph 5 of the Preamble~~. One difficulty from this unclear relationship will be the role of the Titles in adding judicial interpretation of the specific Articles of Agreement in the future. It is recommended that the description of the Covenant in line 4 of paragraph 5 of the Preamble be revised as follows: "Covenant, ^{consists of} ~~comprising~~ General Principles and Articles of Agreement". It is further recommended that the General Principles be labeled as Principles I, II, or III rather than designated Titles.

4. For clarity it is recommended that "Marianan District Court" in line 4 of Title 3 be deleted and "United States District Court for the Commonwealth of the Northern Marianas" be substituted.

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5. Title VII and Section 402 both speak of Marianan "ancestry". This is not ^a very precise ^{term}. It would permit transfer of land to persons presently

resident in the United States or foreign nationals whose parents, grand-
parents or more distant relations were born in the Marianas, ^{but with possibly residence in the U.S. or foreign countries, which} but deny

^{transfer of land to persons who} ^{are now} ^{whose ancestors} ~~lived elsewhere.~~ ~~ancestors and domicile.~~ It is recommended that either "residency" or

"domicile" be substituted for "ancestry."

6. ~~Under~~ Title VIII ~~In the third line~~ after "Articles" add "and Title V."

The defense responsibilities of the United States are not detailed in the Articles of Agreement. Therefore, reference to Title V, which deals with United States responsibility and authority for foreign affairs and defense, should be included. ~~in this principle involving land.~~

7. Section 102 refers to a list of "fundamental provisions" which may be modified only with the consent of the Marianan Government. It is unclear whether "fundamental provisions" refers only to the ~~General~~ Principles or also includes some of the Articles of Agreement. It is strongly urged that the list to be inserted in this Section be made available with adequate time for staffing and review before the Draft Covenant is presented to the Marianas for their perusal.

8. ^{Under} Section 303 ~~provides for communications between~~ the High Commissioner of the Trust Territory ^{communicates directly with} and the Congress of the United States concerning certification of the Marianan Constitution, ^{This is not} without any role prescribed for the United States ^{President of the} ~~presently~~. This is ^{in accordance with} ~~conformable~~ to the procedure followed for certification of the Constitution of Puerto Rico. ~~It is~~

~~also pointed out that~~ Until the Marianas Islands become a commonwealth, many aspects of our relationship with them involve foreign affairs in which the President plays a large constitutional role. It is recommended therefore that ~~submission of~~ the Draft Marianan Constitution ^{be submitted} to the United States Congress for approval ~~be done~~ by the President of the United States ^{after} ~~only upon~~ his certification that the proposed constitution is not contrary to applicable provisions of the United States Constitution ^{and federal law and} the Covenant. ~~and applicable federal law.~~

9. ~~The present~~ Section 305 does not indicate any requirement that amendments to the Marianan Constitution ^{to be} ~~must~~ be consistent with the Covenant, the United States Constitution and federal law. Therefore, it is recommended that the second sentence of Section 305 be revised as follows:

"Such amendments will not require approval by the United States before they enter into force, but ^{they} must not be inconsistent with this Covenant and with applicable provisions of the United States Constitution and ^f United States laws. The courts of the United States shall be competent to pass on such consistency."

10. In line 7 of Section 307 it is recommended that "provisions of the Constitution and ^{the} ~~law~~" be inserted before "laws of the United States". This will make Section 307 consistent with the ^{oath} prescribed in Section 311.

11. In Section 401 the provisions of the United States Constitution made applicable to the Marianan Commonwealth include clause 6 of Article I; ^{Section 9,} ~~Section 9;~~ clauses 1 ^{Section 10,} through 3 of Article I; ^{Section 1 of} ~~Section 10,~~ Article IV;

~~Section 1~~, ^{and} clause 2 of Section 2, of Article IV; all of which refer to states rather than territories, ^{raising the question whether they can be made applicable -} ~~as well~~. On this issue I would defer to the opinion of the Department of Justice.

12. In line 5 of Section 402 "Article VI" should be deleted and "Article VII of this Covenant" should be substituted.

13. ~~Revise~~ ^{should be revised} Subsection 403a, as follows: "The laws of the United States presently ~~en~~ ⁱⁿforced or hereinafter enacted and expressly made applicable by the Congress of the United States to the Marianan Commonwealth." The suggested revision provides both for laws presently ~~en~~ ⁱⁿforced but not ~~presently~~ ^{in its present status,} applicable to the Marianan Commonwealth, as well as future laws, and indicates the agency which has the authority to ~~extend~~ ^{extend} their application to the Commonwealth.

14. In line 4 of Subsection 403d insert "the provisions of the United States Constitution made applicable to the Marianan Commonwealth in Sections 401 and 402 and with" before "the laws of the United States". In line 5 of Subsection 403d add "and with the Constitution of the Commonwealth of the Northern Marianas" before "will remain in force". The recommended changes indicate more fully those sources of law with which present Trust Territory and Marianas District laws and regulations must be consistent.

15. ~~Subsection 602a(2) provides for the payment by the United States of compensation at fair market value for land made available to the United States Government for purposes specified in Article VII. There are~~

Subsection 703 a(2).

several problems with ~~this provision~~. First, there is no description of "purposes" in Article VII except the power to acquire property for "public purposes" in Section 703. Second, is ~~this~~ ^{the} compensation ^{paid under this} ~~being~~ ^{subsequently} ~~paid~~ ^{subsection} for land made available under Section 702 or for land ^{subsequently} acquired subsequently under Subsections 703a and 703b. Third, if this compensation is for land made available under Section 702, is it only for those portions of the land not presently included within the retention agreements referred to in Subsection 703c, or for ~~the~~ ^{all parcels} land ~~made~~ ^{listed} available ⁱⁿ ~~under~~ Section 702. How is the "fair market value" to be determined, by negotiation between the President's personal representative and the Marianas political status commission, by appraisal, or by a court. Is the fair market value to be for title, ^{for} lease, or ^{for option} agreements. For those lands over which the United States Government already has retention agreements, the only ^{interest} ~~thing~~ remaining ^{to obtain} is "title" which should have relatively ^{little} incremental value over the rights already possessed under the retention agreements.

16. For clarity it is recommended that Subsection 703c be revised as follows: "Nothing herein will impair the existing agreements between the Trust Territory Government and the United States Government or any agency or instrumentality ^{thereof} ~~and over~~ in so far as ~~they~~ ^{they} related to land use and retention. All title transferred ^{to} the Government of the Marianan Commonwealth under Section 701 shall be subject to such agreements. Retention and use by the United States Government under such agreements will at all times be consistent with the public purposes of the United States."

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17. In Section 802 it is recommended that the entirety of Article VII be included among those articles and sections which shall become effective upon the approval of the Covenant. ~~That is because all~~ *Each* sections of Article VII includes provisions which by their own terms may be implemented before the Trusteeship is terminated.

K. C. Young