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MEMORANDUM

SUBJECT: "Military Retention Land" in the Northern Mariana Islands

Negotiations are currently under way between the United States and the Northern Mariana Islands of the Trust Territory of the Pacific Islands aimed at bringing the Northern Marianas under the sovereignty of the United States as a self-governing Commonwealth upon termination of the present United Nations Trusteeship Agreement. One of the critical unresolved issues in these negotiations relates to the rights held by the United States in a large amount of public land in the Northern Marianas commonly called "military retention land." Some twenty years ago a series of "Use and Occupancy Agreements" were executed by the United States granting it "indefinite" use rights in return for a payment of $40 an acre. The United States now claims that it thereby obtained permanent use rights in the land, and is therefore not required to pay the fair market value of that portion of the military retention land which it desires to use after termination of the Trusteeship Agreement. The Marianas Political Status Commission, on behalf of the Northern Mariana Islands, contends that such a construction of the Use and Occupancy Agreements is inconsistent with the terms of the Agreements

and is, in any event, contrary to the provisions of the Trusteeship Agreement under which the United States administers the islands. This memorandum analyzes the Use and Occupancy Agreements to determine whether the United States did or could obtain use rights which extend beyond termination of the Trusteeship.

SUMMARY AND CONCLUSIONS

The United States Delegation and the Marianas Political Status Commission have agreed that the political status agreement will make available to the United States for military purposes about 18,000 acres of land in the Northern Mariana Islands -- nearly one-quarter of the entire land area of these islands. The determination of the just compensation which the United States will pay for this land has been impeded by the insistence of the United States that it has permanent use rights -- rights which extend beyond termination of the Trusteeship -- in about half of this land, including some of the most valuable parcels. With respect to this portion, the United States has taken the position that it need only pay about 2% of the land's fair market value. The Commission rejects the United States' position that it has permanent use rights, and insists that fair market value be paid.

The United States says that it obtained permanent use rights in this land -- military retention land -- through a series of Use and Occupancy Agrements. These Agreements,

executed in 1956 but purporting to have been made "as of" 1944, convey from the Trust Territory Government to the United States use of certain public land "for an indefinite period," in return for a $40 an acre payment. Use of the land is required to be "consistent with the purposes and provisions of the Trusteeship Agreement." The Agreements were signed on behalf of the Trust Territory Government by one Rear Admiral, acting under the direction of his military superior and of the Secretary of the Navy. They were signed on behalf of the United States by another Rear Admiral, acting under the direction of his superior and of the Secretary of the Navy.

An analysis of the Agreements themselves shows they do not grant use rights which extend beyond termination of the Trusteeship Agreement. The requirement that the use by the United States be consistent with the Trusteeship Agreement certainly implies this. And any other interpretation would lead to the incongruous result that the United States would be bound by the Trusteeship Agreement with respect to its use of this land even after termination. It cannot be imagined that the United States, which drafted and caused the Agreements to be executed, would have so bound itself. Other provisions of the Agreements lend support to this conclusion as well. In the context of these Agreements, then, "indefinite" does not mean "permanent." This interpretation is especially appropriate in view of the very serious legal problems raised by the United States' contention that the Agreements grant it use rights beyond termination of the Trusteeship.

If the Use and Occupancy Agreements do grant permanent use rights to the United States, they are invalid because in violation of the Trusteeship Agreement itself. For the United States to grant itself the right to use land in the Trust Territory after termination is beyond its "full powe[r] of administration," for this grant is appropriately made only by a sovereign -- and it is clear the United States does not have sovereignty as Trustee. A grant to itself of permanent use rights is also inconsistent with provisions of the Trusteeship Agreement which require the United States to "promote the development of the inhabitants of the [T]rust [T]erritory toward self-government of independence" and to "protect the inhabitants against the loss of their lands and resources." Finally, the grant violates the fundamental duty of the United States, as Trustee, to refrain from self-dealing which benefits it to the detriment of the people of the Trust Territory. If the contentions now advanced by the United States were allowed to prevail, the United States would succeed, by the plainest sort of self-dealing, in taking from the people of the Northern Mariana Islands the right to use their public land after termination. It would, by its own actions, avoid paying the fair market value of land which will be made available to it after termination. The United States cannot so abuse its Trust.

BACKGROUND

The Trusteeship Agreement under which the United States administers the Northern Mariana Islands, and the rest of the Trust Territory, came into effect in 1947, following U.S. military occupation of the islands growing out of World War II.[1/] In 1956, the Saipan District of the Trust Territory -- the principal islands of which were Saipan and Tinian -- was administered by the Department of the Navy.[2/] Responsibility for the administration of the Saipan District rested with the Commander-in-Chief of the United States Pacific Fleet at Honolulu, and was exercised through the Commander of Naval Forces in the Marianas, at Guam, and a Naval officer in Saipan known as the Naval Administrator of the District.[3/] There were only limited opportunitites for participation by

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1/ Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301 (July 18, 1947). The Trusteeship Agreement was approved by the Security Council of the United Nations on April 2, 1947 and by the President of the United States, pursuant to a Joint Resolution of Congress, on July 18, 1947. See Exec. Order No. 9,875, 12 Fed. Reg. 4837 (July 22, 1947).

2/ See 48 U.S.C.A. § 1681(a) (Supp. 1974); Exec. Order No. 10,408, 17 Fed. Reg. 10277 (Nov. 13, 1952); Exec. Order No. 10,470, 18 Fed. Reg. 4231 (July 21, 1953). The remainder of the Trust Territory was administered by the Department of the Interior, see Exec. Order No. 10,265, 16 Fed. Reg. 6419 (July 3, 1951). The administration of what was the Saipan District was transferred to the Interior Department in 1962. See Exec. Order No. 11,021 (May 8, 1962), 48 U.S.C.A. § 1681 note (Supp. 1974).

3/ 1956 United Nations Visiting Mission Report on the Trust Territory of the Pacific Islands 30-34.

indigenous inhabitants of the Saipan District in governmental affairs.[4/]

In 1956, the Commander of Naval Forces in the Marianas, acting on behalf of the Government of the Trust Territory of the Pacific Islands and under the direction of his military superior and of the Secretary of the Navy, executed a series of "Use and Occupancy Agreements" conveying to the United States use rights in large amounts of land in the Northern Marianas.[5/] These Agreements were signed on behalf of the United States by the Director of the Pacific Division of the Navy's Bureau of Yards and Docks, also acting under the direction of his superior and of the Secretary of the Navy. These Agreements, which state that they are "made as of the 9th day of July, 1944," assert that "the Government of the Trust Territory of the Pacific Islands, Saipan District" is the "owner" of land which the United States desires to use.

4/ Id.

5/ An illustrative Use and Occupancy Agreement is found at Attachment A to this memorandum. We understand that the bulk, if not all, of the Use and Occupancy Agreements were executed in 1956 in the form of Attachment A. Subsequently, certain of the Agreements have been cancelled, we have been informed. In one relatively recent instance of which we are aware, a Use and Occupancy Agreement for one area was cancelled and a new one was executed covering another area. The new Agreement is in relevant respects similar to Attachment A. It is signed on behalf of the Trust Territory by a civilian rather than a Naval officer, of course, since the Department of the Interior is now responsible for administration. See note 2, supra.

They provide that "in consideration of the sum of" $40 an acre, the United States is granted "the right to use and occupy the land . . . for an indefinite period of time, to continue so long as the [United States] has a use for said land."[6/] The Agreements require that the use by the United States "be consistent with the provisions and purposes of the Trusteeship Agreement." They also provide for a periodic review of the United States' need for the land, with the final decision on need placed in the hands of the President of the United States.

Today, approximately 14,000 acres of land in the Northern Mariana Islands are subject to Use and Occupancy Agreements -- about 18% of the total land area of the Northern Marianas.[7/]

In the course of the current political status negotiations, the United States has stated that it will require the use of about 18,000 acres of land in the Northern

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6/ The money received by the Trust Territory was placed in a trust fund and was supposed to have been used for the benefit of the people of the Saipan District. See generally 1973 United Nations Visiting Mission Report on the Trust Territory of the Pacific Islands 119.

7/ Based on information supplied by the United States, the total land area of the Northern Mariana Islands (Saipan, Tinian and Rota) is approximately 77,600 acres. Of this, approximately 14,300 acres are privately held; the remainder, some 63,300 acres, is public land. "Military retention land" -- i.e., public land, see note 35, infra, subject to a Use and Occupancy Agreement -- accounts, then, for approximately 22% of the public land in the Northern Mariana Islands.

Marianas for military purposes after termination of the Trusteeship Agreement. The Marianas Political Status Commission has agreed to include provisions meeting this requirement in the political status agreement.[8/] The United States has agreed to pay just compensation for the interest in this land which it will obtain.[9/] Approximately 9,300 acres of the 18,000 acres, however, is currently subject to Use and Occupancy Agreements -- including all of the very valuable land at Isely Field and Tanapag Harbor on Saipan, and nearly half of the land to be made available on Tinian.[10/]

8/ The political status agreement will be submitted for approval to the Mariana Islands District Legislature, to the people of the Northern Mariana Islands in a plebiscite, and to the United States Congress.

9/ The negotiating parties have not yet reached agreement on the interest in this land which the United States will obtain. The United States Delegation has proposed that the United States obtain title in fee simple. The Commission has proposed a 50-year lease with an option to renew for 50 years.

10/ The approximately 4,700 acres of military retention land which will not be made available to the United States under the status agreement is no longer needed by it. The Use and Occupancy Agreements with respect to this land, the United States has agreed, will be cancelled prior to termination of the Trusteeship. However, the United States insists that the amount it will pay for the land which will be made available to it should be reduced by a sum which reflects the value of what it claims are its permanent use rights in this 4,700 acres. As discussed in the text below, the Commission rejects the argument that the United States has permanent use rights. Furthermore, with respect to this 4,700 acres, the Commission believes that under the terms of the Agreements the use rights of the United States are now extinguished, since the United States has admitted it has no need for the land.

Since the United States insists that the Use and Occupancy Agreements grant it permanent use rights -- rights which last as long as the United States believes it needs the land, even beyond termination of the Trusteeship -- it refuses to make any significant payment for the use under the new status agreement of this 9,300 acres. At most, the United States says, it is willing to pay for this 9,300 acres the value of the Trust Territory Government's reversionary interest -- an interest the United States says is worth approximately 2% of the fair market value of the land. Thus for the almost 200 acres of prime land at Tanapag Harbor on Saipan, for example -- all of it military retention land -- the United States would be willing to pay $37,500, although even by its estimates the fair market value of the land is $1,875,000. 11/

The position of the Marianas Political Status Commission is quite different. The Commission is prepared to assume, solely for the purposes of the negotiations, that the Use and Occupancy Agreements do grant to the United States use rights which last until termination of the Trusteeship. However, the Commission believes that both the structure of the Agreements themselves and the legal obligations imposed on the United States as Trustee show that the Agreements were not intended to and could not grant to the United States use

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11/ The Commission's land valuation expert's preliminary estimate of the fair market value of the land at Tanapag Harbor is $5,240,000. If the United States accepted this estimate, it presumably would be willing to pay $104,800.

rights which extend beyond termination. Based on this conclusion, the Commission insists that the United States pay the fair market value of the land which will be made available to it under the status agreement. 12/

THE USE AND OCCUPANCY AGREEMENTS DO NOT GRANT LAND USE RIGHTS TO THE UNITED STATES WHICH EXTEND BEYOND THE TERMINATION OF THE TRUSTEESHIP

The United States' position that its use rights under the Use and Occupancy Agreements extend beyond termination of the Trusteeship must be based entirely on an interpretation of the grant to it, in Section 1 of the Agreements, of "the right to use and occupy the land . . . for an indefinite period of time, to continue so long as the grantee [United States] has a use for said land." This Section alone, however, is not conclusive. A review of the entire text of the Agreements reveals that the use rights were not intended to extend beyond termination -- an interpretation which assures the compatibility of the Use and Occupancy Agreements with the Trusteeship Agreement itself.

Section 2(A) of the Agreements requires that "the use to which the land is put by the [United States] shall be

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12/ The Commission is prepared to allow the United States a credit to reflect the United States' use rights prior to termination in the approximately 9,300 acres of military retention land which will be made available to it under the status agreement. This credit would be based on the amount the United States paid for its use rights ($40 an acre) over the period between the date as of which the Agreements were entered into (1944) and the anticipated termination of the Trusteeship (approximately 1982).

consistent with the provisions and purposes of the Trusteeship Agreement . . . ." This implies that the use contemplated is one based on the obligations the United States undertook and the powers it obtained under the Trusteeship Agreement. The United States will not have these obligations or powers after it consents to the termination of the Trusteeship Agreement.[13/] Thus, after termination, the United States will no longer have the kind of use for the military retention lands contemplated by the Use and Occupancy Agreements.

Any other interpretation of Section 2(A) leads to the incongruous conclusion that the United States is bound by the "provisions and purposes of the Trusteeship Agreement" with respect to military retention land in perpetuity. This would mean that even after the termination of the Trusteeship Agreement the United States would be required to recognize the authority of the United Nations with respect to its use of this land. There is no reason that the United States, whose representatives drafted and executed the Agreements, would have bound itself in this way, for the authority of the United Nations is significant.[14/] Surely if the United States had

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13/ See Case Concerning the Northern Cameroons (Preliminary Objections), 1963 I.C.J. 15, 34, reprinted in 3 Int'l L. Mat. 122, 127 (1964); Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, reprinted in 10 Int'l L. Mat. 677, 701-02 (1971).

14/ For example, Article 13 of the Trusteeship Agreement makes Article 87 of the U.N. Charter applicable to the Trust Territory, except to the extent its applicability is limited by the Administering Authority with respect to areas closed

[footnote continued]

intended to grant itself permanent use rights through the Use and Occupancy Agreements, those Agreements would contain only the requirement that for so long as the Trusteeship Agreement is in effect, the use of the land by the United States must be in accordance with it. The wording of Section 2(A), then, indicates an intent to grant rights only until termination.

This intention is also indicated by the requirements imposed by Sections 2(B) and (C) of the Use and Occupancy Agreements. Under these provisions the United States' need for the land is to be reviewed every five years by a representative of the Trust Territory and a representative of the Department of the Navy. If this review does not result in agreement as to the need for continued operation of any particular Use and Occupancy Agreement, "the matter shall be presented to the President of the United States for final decision." This is an appropriate way for a dispute between two entities under the control of the President to be resolved.

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for security reasons. Article 87 of the Charter provides, among other things, that the Trusteeship Council may accept petitions concerning the Trust Territory and arrange for periodic visits to the Trust Territory. And even with respect to an area which has been closed by the Administering Authority for security reasons, Article 13 contemplates that the Trusteeship Council would be authorized to "keep itself informed" of developments. United States Explanatory Comments on Draft Trusteeship Agreement, Dept. of State Bull., March 9, 1947 at 422 (explaining Article 13); see also Sayre, Legal Problems Arising From the United Nations Trusteeship System, 42 Am. J. Int'l Law 263, 294 (1948).

But after the Trusteeship is terminated, an independent, sovereign country might replace the Trust Territory. Surely the United States, when it drafted the Use and Occupancy Agreements, did not intend to bind a future sovereign country to a determination made exclusively by the President of the United States, especially with respect to such a critical matter as the use of land for military purposes. If this were intended, one would at least expect an explicit statement that the use rights extend beyond termination; but there is no such statement in the Agreements.

For these reasons, the Use and Occupancy Agreements are most sensibly read to grant to the United States land use rights "for an indefinite period of time" prior to termination of the Trusteeship Agreement. In the context of these Agreements, "indefinite" need not mean "permanent."[15/] For at the time the Agreements were entered into, no one could predict how long the Trusteeship would continue to exist. The Trusteeship Agreement makes no provision for its termination, except to provide in Article 13 that it cannot be terminated without the consent of the United States. The United States plainly believed that termination would not occur for a lengthy

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15/ Cf. Brunell v. United States, 77 F. Supp. 68, 72 (S.D.N.Y. 1948) ("The United States has only undertaken for an indefinite period to act as trustee of" Saipan); Callas v. United States, 253 F.2d 838, 843 (2d Cir.), cert. denied, 357 U.S. 936 (1958) ("administration by the United States [will be required] for an indefinite period in the future") (Lumbard, J., dissenting).

period of time.[16] The grant of use rights until termination, then, would reasonably have been considered in 1956 to protect the security interests of the United States. And, of course, no one could predict how long the United States would need a particular parcel of land for security pruposes while the Trusteeship was in existence. Thus, it is hardly surprising that the Use and Occupancy Agreements grant to the United States use rights for an indefinite length of time, without intending to grant rights beyond termination. This interpretation of the Agreements is particularly appropriate because it, unlike the interpretation advanced by the United States, assures that the Agreements are valid under the Trusteeship Agreement.[17]

THE USE AND OCCUPANCY AGREEMENTS CANNOT GRANT LAND USE RIGHTS TO THE UNITED STATES WHICH EXTEND BEYOND THE TERMINATION OF THE TRUSTEESHIP

If the Use and Occupancy Agreements are interpreted as the United States now contends, they are inconsistent with the Trusteeship Agreement and therefore invalid.[18] This

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16/ Cf. Statement of United States Representative Austin, 23 Security Council Official Records 474-475 (March 7, 1947) (independence for the Trust Territory "can be but remote and entirely unforeseeable at the present time").

17/ The 1970 United Nations Visiting Mission Report on the Trust Territory of the Pacific Islands clearly reflects the impression of the Mission that public lands in the Trust Territory had not been taken over by the United States (at 38)

18/ The Trusteeship Agreement is both an international agreement of the United States enforceable in the courts, and a part of the local law of the Trust Territory. See People of

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conclusion results not only from certain specific provisions of the Trusteeship Agreement itself, but also, and even more fundamentally, from the basic duty of the United States as Trustee to refrain from self-dealing which benefits it to the detriment of the people of the Trust Territory.

Plainly, nothing in the terms of the Trusteeship Agreement gives the United States the power to grant land use rights in the Trust Territory to itself which extend beyond the termination of the Trusteeship. Nor is there any basis in the Trusteeship Agreement for implying such a power. The United States does have the right "to establish naval, military and air bases and to erect fortifications in the [T]rust [T]erritory" under Article 5 (1) of the Trusteeship Agreement. By implication of this Article, the United States can no doubt arrange to use reasonable amounts of land for proper military purposes while the Trusteeship is still in existence.[19/] But the rights and obligations of the United States under the Trusteeship Agreement will end when that Agreement is

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Saipan v. United States Dep't of Interior, No. 73-1769 (9th Cir., July 16, 1974) (slip opinion at 9-11); 1 T.T.C. § 101(1) (1970). The Executive Order delegating responsibility for the administration of the Saipan District to the Department of the Navy required that Department to "carry out the obligations assumed by the United States as the administering authority of the [T]rust [T]erritory under the terms of the [T]rusteeship [A]greement," Exec. Order No. 10,408, supra note 2, as does the present Executive Order delegating responsibility for the Trust Territory to the Department of Interior, Exec. Order No. 11,021, supra note 2.

19/ McDougal and Schlei, The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, 64 Yale L.J. 648, 705 (1955)

terminated. The International Court of Justice has stated that when a Trusteeship Agreement is terminated, the "Trust itself disappeared; the [administrating authority] ceased to have the rights and duties of a trustee with respect to the [trust territory]. . . ."[20/] Thus there will be no need which can be bottomed on the Trusteeship Agreement for the United States to have military bases in the Trust Territory after termination. To imply such a power from the Trusteeship Agreement would be inconsistent with its purposes. As one commentator has put it[21/]:

> "Like the rights of a Trustee in [English] law so the rights of an international trustee state have their foundation in its obligations under the Charter and under the trust agreement; they are tools given to it in order to achieve the work assigned to it, and the measure of its powers, the test by which its possession of any particular power must be determined, is that the law has provided it with all the tools that are necessary for its task, but with those only."

Far from granting expressly or by implication the power the United States has now claimed, the Trusteeship Agreement contains provisions which show that the Trustee cannot grant itself permanent land use rights. Article 3 of the Trusteeship Agreement grants the United States "full powers of administration, legislation, and jurisdiction over"

20/ Case Concerning the Northern Cameroons (Preliminary Objections), 1963 I.C.J. Reports 15, 34, reprinted in 3 Int'l L. Mat. 123, 127 (1964).

21/ Brierly, The Law of Nations 166-67 (5th ed., 1955), quoted in 1 Whiteman, Digest of International Law 869 (1963).

the Trust Territory. These powers, broad though they are, are insufficient to permit the United States to grant to itself permanent use rights in land in the Trust Territory. The power of administration is plainly a temporary power, for it has always been contemplated that the Trusteeship would someday be terminated by the self-government or independence of the peoples of the Trust Territory.[22/] Use of land by the United States for military purposes may be proper, under Articles 3 and 5, before termination. But the granting of the right to use land in the Trust Territory for military purposes after the Trusteeship terminates involves a decision which is appropriately made only by the peoples of the Trust Territory. It is not a matter merely of administration. It is, rather, a power related to sovereignty.[23/] "In time of peace, a state may not send a [military] force into the territory of another state, or keep it there, without the

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22/ See, e.g., Marston, Termination of Trusteeship, 18 Int'l & Comp. L.Q. 1, 4 (1969).

23/ Cf. U.N. General Assembly Resolution on Permanent Sovereignty Over Natural Resources, Resolution 3171 (XXVIII) (Feb. 5, 1973) ("Reiterating also that an intrinsic condition of the exercise of the sovereignty of every State is that it be exercised fully and effectively over all the natural resources of the State, whether found on land or in the sea"). The classic definition of sovereignty is said to be that of Jean Bodin: "the most high, absolute and perpetual power over the citizens and subjects in a common wealth . . . . that is to say the greatest power of command," cited in Gerson, Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank, 14 Harv. Int'l L.J. 1, 22 n. 68 (1973). See generally 1 Whiteman, supra note 21 at 233-82.

consent of the territorial state."[24/] The United States does not have and has never claimed sovereignty over the Trust Territory[25/]; whether it will have sovereignty after termination in all or part of what is now the Trust Territory will be determined when the peoples of the Trust Territory exercise their sovereign and inalienable right of self-determination. The United States, as Trustee, therefore cannot grant to itself or to another nation the right to place military forces in the Trust Territory after termination.[26/] Yet this is the very right it claims to have received under the Use and Occupancy Agreements.

This analysis is supported by Article 6(1) of the Trusteeship Agreement, which requires the United States to "promote the development of the inhabitants of the [T]rust [T]erritory toward self-government or independence . . . ."[27/]

24/ Restatement (Second) of the Foreign Relations Law of the United States § 54 (1965).

25/ See United States Explanatory Comments on Draft Trusteeship Agreement, supra note 14 at 420; Sayre, supra note 14 at 268-72.

26/ Cf. Parry, The Legal Nature of the Trusteeship Agreements, 27 Brit. Yb. Int'l L. 164, 167 (1950) (speaking of title in the international sense, the author notes "that mere responsibility for administration does not give sufficient title to dispose of a territory in general international law" (footnote omitted)).

27/ See also U.N. Charter Article 76(b), made applicable by Trusteeship Agreement Article 4.

The United States has repeatedly recognized that independence is one option which must be offered to the people of Micronesia.[28/] If the United States could validly grant to itself use rights in land in the Trust Territory that will extend for so long as the United States wishes beyond the termination of the Trusteeship, it would undermine the right of the peoples of the Trust Territory to choose independence.[29/] For the Use and Occupancy Agreements, as interpreted by the United States, would be in effect forever; they provide no mechanism by which the peoples of the Trust Territory, even if after termination they constitute a sovereign state, can remove the United States from the military retention land.

Furthermore, the United States' position is inconsistent with Article 6(2) of the Trusteeship Agreement, which obligates the United States to "protect the inhabitants against the loss of their lands and resources." Use of land by the United States for military purposes while the Trusteeship is in existence, under Article 5(1), so long as reasonable in extent and purpose, cannot violate Article 6(2), of course. But the grant by the United States to itself of permanent use rights in land in the Northern Mariana Islands does undermine this obligation. The military retention land in the Northern

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28/ See, e.g., Statement of Under Secretary of State Katzenbach, 58 Dep't of State Bull. 729-30 (June 3, 1968), quoted in 13 Whiteman, Digest of International Law 688-690 (1968).

29/ See generally Cohen, The Concept of Statehood in United Nations Practice, 109 U. Pa. L. Rev. 1127, 1144-47 (1961) (extensive military arrangements by colonial power in former colony may impair independence).

Marianas takes up a large portion of the total land of the islands, and includes some of the most valuable land. If the United States could grant itself permanent use rights, it would have failed to protect the people of the Marianas against the loss of their lands -- their most precious resource.[30/] Indeed, it is hard to imagine anything that could more clearly cause the inhabitants of the Trust Territory to lose their lands than for the Trustee to reserve to himself their use and occupancy forever.[31/]

Finally, even aside from the precise terms of the Trusteeship Agreement, the very existence of that Agreement creates an obligation on the United States to refrain from self-dealing which benefits it to the detriment of the people of the Trust Territory.[32/] The United States accepted "a

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30/ The United States pledged, in accepting the Trusteeship, that it would not take "advantage, for its own benefit and to the detriment of the inhabitants, of the meagre [sic] and almost non-existent resources and commercial opportunities that exist in these scattered and barren islands." Statement of United States Representative Austin, 31 Security Council Official Records 664 (April 2, 1947).

31/ The United States has recognized during the Northern Marianas status negotiations that it would be improper for it to obtain title to land in the Marianas prior to termination. Yet, the interpretation of the Use and Occupancy Agreements it is now advancing would give it, for all practical purposes, the equivalent of title to 14,000 acres of land in the Northern Marianas.

32/ That the United States was dealing with itself when it caused the Trust Territory Government to convey land use rights to it can hardly be doubted. See, e.g., Porter v. United States 496 F.2d 583, 592 (Ct. Cl. 1974) (explaining acceptance of jurisdiction in Fleming v. United States, 352 F.2d 533 (Ct. Cl. 1965)). The Trust Territory Government was created by the

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sacred trust" when it entered into the Trusteeship Agreement,[33] as it well realized.[34] Indeed, the United States has specifically recognized that it, through the Trust Territory Government, holds public land in trust for the peoples of the Trust Territory.[35] Yet its position with respect to the Use and Occupancy Agreements applicable to certain public land is utterly inconsistent with its trust obligations.

Under Anglo-American law -- which is, and was at the time the Use and Occupancy Agreements were entered into, the law of the Trust Territory with regard to the obligations

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United States for the purpose of administering the Trust Territory, see, e.g., People of Saipan v. United States Dep't of Interior, 356 F. Supp. 645, 654-57 (D. Haw. 1973), aff'd as modified, No. 73-1769 (9th Cir., July 16, 1974). See also Societá A.B.C. v. Fontana & Della Rocca [1955] Int'l L. Rep. 76 (1958) (Italy, Court of Cassation, 1954).

33/ See United Nations Charter Article 73.

34/ See Statement of United States Representative Austin, 20 Security Council Official Records 411-12 (Feb. 26, 1947).

35/ Transfer of Title of Public Lands from the Trust Territory of the Pacific Islands Administration to the Districts: U.S. Policy and Necessary Implementing Courses of Action (Attachment to Letter dated Nov. 1, 1973 from F. H. Williams, The President's Personal Representative for Micronesian Status Negotiations, to E. E. Johnson, High Commissioner of the Trust Territory). Cf. 27 T.T.C. § 2(1) (1970) (imposing on the Attorney General of the Trust Territory a duty to "deal with alien property in the interest and for the benefit of the indigenous inhabitants of the Trust Territory, in accordance with the terms of the Trusteeship Agreement . . .").

That the land covered by the Use and Occupancy Agreements is public land is clear. See 67 T.T.C. § 1 (1970); U.S. Policy Statement, supra (stating that 90% of the land in the Marianas is public land).

of a trustee[36] -- a trustee of land could not sell or lease himself land held in trust, in the absence of a specific grant of authority in the trust instrument.[37] This is so whether or not the transaction was entered into in good faith and whether or not reasonable compensation was paid.[38] These rules are based on the duty of loyalty owed by a trustee to the beneficiary: the duty "to administer the trust solely in the interest of the beneficiary."[39]

This basic duty of loyalty is equally applicable to the United States as the Trustee under the International Trusteeship System.[40] Speaking of the trust imposed on South Africa as a Mandatory under the League of Nations' system which preceded the current United Nations Trusteeship System, the International Court of Justice recently stated that[41]

36/ 1 T.T.C. § 103 (1970). For an earlier version of this statute, see Fleming v. United States, 352 F.2d 533, 536 (Ct. Cl. 1965).

37/ E.g., 2 Scott on Trusts § 170.17 at 1351-52 (1967).

38/ Id.; see also 1 Restatement (Second) of Trusts § 170, Comments (b) and (l) at pp. 364-69 (1959).

39/ Restatement, supra note 38, § 170(1) at 364.

40/ See Ngodrii v. Trust Territory, 2 T.T.C. 142, 147 (1960) (Trust Territory Government, as Trustee, cannot profit when inhabitant relies on its statement to his detriment).

41/ Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, reprinted in 10 Int'l L. Mat. 677, 690 (1971). See also League of Nations, The Mandates System: Origins-Principles-Application 23-24 (1945), quoted in 1 Whiteman, supra note 21 at 624-25 (Mandatories were obligated to "exercise their authority in the interests" of the people of the Mandate, and to "maintain an entirely disinterested attitude in their dealings with them").

> "[i]t is self-evident that the 'trust' had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their own and to possess a potentiality for independent existence on the attainment of a certain stage of development . . . ."

This same view had been expressed by Judge McNair of the International Court of Justice in his separate opinion in an earlier case involving South Africa's obligations. He noted that the determination of the rights and obligations of an international trustee can properly draw on the private law concerning trusts. "Nearly every legal system," the Judge continued, "possesses some institution whereby the property" of one can be entrusted to another.[42/] He concluded[43/]:

> "There are three great principles which are common to all these institutions:
>
> "(a) that the control of the trustee . . . over the property is limited in one way or another; he is not in the position of the normal complete owner, who can do what he likes with his own, because he is precluded from administering the property for his own personal benefit;
>
> "(b) that the trustee . . . is under some kind of legal obligation, based on confidence and conscience, to carry out the trust or mission confided to him for the benefit of some other person or for some public purpose;
>
> "(c) that any attempt by one of these persons to absorb the property entrusted to him into his own patrimony would be illegal and would be prevented by law."

42/ International Status of South-West Africa, 1950 I.C.J. 128, 149.

43/ Id.

Since the United Nations International Trusteeship System was intended to be an advance over the League's system, the same principles must apply.[44/] The Italian Court of Cassation, dealing with an issue raised under the United Nations Trusteeship Agreement for Somaliland, affirmed this when it noted[45/]

> "that the régime [sic] of Trusteeship Administration is connected, like that under the former Mandate system, with the Anglo-Saxon legal institution of trusteeship, which consists in entrusting the full administration of property to a person for the benefit of a third person."

The United States position with respect to the Use and Occupancy Agreements is wholly inconsistent with this basic obligation imposed by the Trusteeship Agreement. If its position were to be upheld, the United States, by the plainest sort of self-dealing, entirely unauthorized by the Trusteeship Agreement, would succeed in taking from the people of the Marianas the right to use public land in the Marianas after termination of the Trusteeship. The effort of the United States to grant itself this benefit, standing alone, is inconsistent with the Trusteeship Agreement. But when the United States attempts to use its self-dealing to avoid the payment of the present fair value of the rights which the people of the Marianas will grant to the United States after

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44/ See, e.g., Comment, International Law - Trusteeship Compared With Mandate, 49 Mich. L. Rev. 1199, 1200 (1951).

45/ Società A.B.C. v. Fontana & Della Rocca [1955] Int'l L. Rep. 76 (1958).

termination, its position is absolutely untenable. The amount of the loss which the people of the Northern Marianas would suffer (the loss of a payment for the use of their land after termination, a sum running into the millions of dollars) is exactly the amount of gain the United States would obtain, if the contentions now advanced by the United States are allowed to prevail. The United States cannot so abuse its position as Trustee. Indeed, the United States has implicitly recognized as much by entering into negotiations with the Marianas Political Status Commission with respect to its land use rights after termination, rather than just creating new Use and Occupancy Agreements, as the logic of its present position says it could do.

For these reasons, the Use and Occupancy Agreements could not have created land use rights in favor of the United States which extend beyond the termination of the Trusteeship.

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