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MEMORANDUM FOR CAPTAIN EDWARD C. WHELAN, JR.
EA&PR, ISA, OASD

SUBJECT: Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America

My opinion to Mr. Abramowitz was directed exclusively to the questions which he had raised. But in addition to those questions, the coordinating services lawyers and I have come to the conclusion that other matters in the Covenant call for attention. We would prefer to see these - particularly those indicated as essential below - be adopted as part of the Covenant, via modification of the provisions. Alternatively, but as a less appropriate fall back, some of the other changes (some judgment is required) may be adopted by a legislative record, provided it is agreed to by the Micronesians in writing, to wit: that it shall be agreed to be the authoritative interpretation of the Covenant. (The use of "agreed Minutes" is recognized and acceptable). The preferred route of changing the Covenant language wherever possible is obviously better since it enables all third parties referring to the Covenant to have clarified and unambiguous language before them.

Notwithstanding the interpretation of Article VIII of the Covenant which I have taken in my memorandum to Mr. Abramowitz and considering that the legal advisers of the Marianan delegation apparently believe that any exercise of eminent domain in the Marianas by the USG must be limited under the Covenant to the acquisition of a leasehold interest, some changes to the present language of Article VIII are recommended to make absolutely clear that any future exercise of the eminent domain power by the USG is not so limited.

Revise Section 802(b) to read:

"(b) The United States affirms that it has no present need for or present intention to acquire any property additional to that which is listed in subparagraph (a), or to acquire any greater interest in the property leased by the United States under subparagraph (a), in order to carry out its defense responsibilities."

In the second line of Section 803(a), after "Section 802" insert "(a)".

In the second and third lines of Section 803(b) following the terms "...of this lease," delete "including the renewal option" and replace with:

"....including the 50 year term of the lease as extended under the renewal option...."

Reason. Unless this change, which is essential, is made there will be only an agreement to pay for an option, not for the renewal term.

In the third line of Section 806(a), before "real property", insert "parcels of"; in that same line delete "transferred to it under" and substitute "listed in".

In the second and third lines of Section 806(c), delete "will have and".

As an unrelated matter, it is pointed out that Section 804(b) could be construed as permitting the Government of the Northern Mariana Islands unilaterally to determine the charge which the United States Government should pay in the event that there is substantial use of Isely Field by military and naval aircraft. To clarify that the amount to be paid by the United States Government is a matter for negotiation, the following change is

recommended. In the fifth line of Section 804(c), after "substantial,", revise the remainder of the subsection as follows: "The United States Government shall make a fair and reasonable contribution to the cost of operating and maintaining the facilities, the amount of such contribution being determined by agreement between the Government of the Northern Mariana Islands and the Government of the United States."

In Section 806, notwithstanding our interpretation there will be greater clarity and purpose, if in (a) the sixth line we replace "sought" with "required," and in the penultimate line "the requirement" by "its requirement." In (c) the first two lines rewrite "the interest it requires..." and on the last line of the page "...eminent domain within the United States."

The following changes have been proposed by the JAG-N. Many of these are intended by way of clarification, and for the reasons given.

1. Preamble.

Recommendation: In line 1 of the first paragraph, substitute "Nations" for "States".

Reason: To correct obvious error.

Recommendation: In line 2 of the second paragraph, delete "inalienable".

Reason: The people of the Marianas will exercise their right of self-determination in the plebescite prescribed in the Covenant. If they decide to join "in political union with and under the sovereignty of the United States of America" (Article 101), their only remaining right of self-determination will be as part of that larger corporate body; they will no longer have a separate

right of self-determination which could, at their unilateral option, permit them to sever their ties with the United States. Thus, the term "inalienable" is legally inaccurate.

2. Section 105.

Recommendation: In the third line of the first sentence place a period after "Islands", and delete the remainder of that sentence beginning with "so long as...." Add a new second sentence as follows: "Legislation not generally applicable to the States of the United States, and which does not specifically state its applicability to the Northern Mariana Islands, shall not be applicable to the Northern Mariana Islands." In the second line of the last sentence, delete "its" before "authority"; after "authority" add "to enact legislation applicable to the Northern Mariana Islands."

Reason: To state the intent of this section with greater clarity.

3. Section 203(c).

Recommendation: To the end of the first sentence, after "legislation", add the words "not otherwise inconsistent with the supreme law of the Northern Mariana Islands as defined in Section 102."

Reason: The recommended language points to the standard by which "rightful subjects" are determined. It is also more consistent with the formula for the legislative power granted the Guam Legislature.

4. Section 501.

Recommendation: In the last line, after "Islands", insert "only with the approval of the Government of the Northern Mariana Islands".

Reason: To correct inadvertent omission from earlier draft of Covenant.

5. Section 502.

Recommendation: In line three place a colon after "Islands" and delete the remainder of lines three and four; in subsection (a) add "except as otherwise provided in this Covenant" after those clauses in which the legislation described is modified by sections in the Covenant, e.g., after "Social Security Act..."

Reason: "as follows" is redundant. The exception proviso in its present location applies to all three subsections even though it was not intended so to limit all legislation made applicable to the Northern Mariana Islands. For example, federal legislation made applicable through subsection (b) includes sections 105-110 of 4 U.S.C., which permits states and territories to collect sales, use and income taxes from persons within Federal areas while protecting from such taxes sales by the U. S. Government and its instrumentalities, and the Soldiers and Sailors Civil Relief Act of 1940, as amended (50 U.S.C. Appendix sec. 501ff), which grants various protections to servicemen including protection from various taxes by states or territories other than their domicile. Subsequent provisions of the Compact, notably sections 602, 603(b) and 604(b), confer upon the GNMI various taxing powers similar to the taxing powers of a state. The cited federal legislation protects the federal government and its military personnel from the exercise of those state powers to tax within the states, but, ironically, the exception proviso as presently located, could nullify that federal legislation and give the GNMI a taxing power over federal activities and military personnel greater than that enjoyed by the States. More judicious locating of the exception proviso would solve this particular problem.

6. Section 602.

Recommendation: In the second line place a comma after "appropriate" and insert "and which are not otherwise inconsistent

with the laws of the United States applicable to the Northern Mariana Islands,".

Reason: Section 602 grants a very broad tax power to the GNMI, which is probably a very valuable asset for its political development. Language should be included, however, to insure that this Section, which is part of the supreme law of the Northern Mariana Islands under Section 102, does not serve as justification and support for local exercises of the taxing power inconsistent with federal law applicable to the Northern Mariana Islands, which is also part of the supreme law under Section 102. The inclusion of the recommended language would merely ensure that the GNMI, in its exercise of its taxing power, was subject to restraints analogous to those placed by federal legislation upon the States of the Union with regard to their own taxing powers.

7. Section 603(b).

Recommendation: In the second line of this subsection, after "United States", add the following language: "and not otherwise inconsistent with the law of the United States applicable to the Northern Mariana Islands."

Reason: The present language appears to permit the imposition by the GNMI of customs duties on imports from areas outside the customs territory of the United States and on exports from its territory both for U.S. Governmental agencies located in the Marianas and for their personnel present in the Marianas solely by reason of their employment or military orders. Normally the imposition of such taxes within the United States on agencies of the Federal Government is avoided by the Federal immunity from state and territorial taxes while military personnel are protected by the Soldiers and Sailors Civil Relief Act. Under Section 102 of the Covenant, however, the provisions of the Covenant and federal laws applicable to the Northern Mariana Islands are both parts of the supreme law of the NMI, and presumably of equal authority. Commonwealth legislation imposing a customs duty on articles imported by the U. S. Government or its instrumentalities, or on household effects

imported by servicemen stationed in the NMI would raise a conflict between these two segments of the supreme law of the Marianas. Since the Covenant will be the most recent in time, a court could decide that the intent was to override those sections of federal legislation inconsistent with the Covenant. The recommended change obviates this risk.

8. Section 604(b).

Recommendation: At the conclusion of this subsection, after "United States", add the following words: "and not otherwise inconsistent with the law of the United States applicable to the Northern Mariana Islands."

Reason: As given in the preceding paragraph. It may be noted that the Government of Guam, which lacks authority for imposing customs levies, does levy a use tax on the purchase and consumption of goods in Guam. In the past the Government of Guam has attempted to collect that tax on liquor purchased in the United States and sold in Navy exchange package stores in Guam and upon household goods shipments of military personnel present in Guam under military orders. Both 603(b) and 604(b) recognize that the taxing authority conferred must be limited so as to be consistent with the international obligations of the United States. It would appear important also to limit that authority by requiring consistency with the laws of the United States applicable to the Northern Mariana Islands.

9. Section 802(b).

Recommendation: Revise Section 802(b) to read: "(b) The United States affirms that it has no present need for or present intention to acquire any property addition to that which is listed in subparagraph (a), or to acquire any greater interest in the property leased by the United States under subparagraph (a), in order to carry out its defense responsibilities."

Reason: The present language of Section 802(b), along with certain features of Sections 803(a) and 806(a) and (c), can be read as basing the USG right of eminent domain on the Covenant, rather than upon the U.S. Constitution and federal law, and limiting eminent domain to the acquisition of a leasehold interest. While this is certainly not the more probable interpretation of these sections, its tenuous nature is given more substance by indications that this is the interpretation held by the legal advisers to the Marianan delegation. The change recommended to 802(b), and the following changes recommended to Sections 803(a) and 806(a) and (c) eliminate the slight support for such an interpretation adverse to USG interests by eliminating any ambiguity on this question.

Recommendation: In the second line of Section 803(a), after "Section 802" insert "(a)".

Recommendation: In the third line of Section 806(a), before "real property", insert "parcels of"; in that same line delete "transferred to it under" and substitute "listed in".

Recommendation: In the second and third lines of Section 806(c), delete "will have and".

10. Section 804(b).

Recommendation: In the fifth line of Section 804(c), after "substantial,", revise the remainder of the subsection as follows: "the United States Government shall make a fair and reasonable contribution to the cost of operating and maintaining the facilities, the amount of such contribution being determined by agreement between the Government of the United States and the Government of the Northern Mariana Islands."

Reason: The present text could be construed as permitting the Government of the Northern Mariana Islands unilaterally to determine the charge which the United States Government should

pay in the event that there is substantial use of Isely Field by military and naval aircraft. The change recommended clarifies that the amount to be paid by the United States Government is a matter for negotiation.

11. Section 805.

Recommendation: Revise lines 10 through 13 to read as follows: "the acquisition of such interests to citizens of the Northern Mariana Islands and may regulate the extent to which and conditions by which a person may acquire or hold public land."

Reason: Two changes are accomplished by this recommendation. First, more precise description of those persons eligible to acquire permanent and long term interests is accomplished. Second, provision is made for land which, though not now public, may become public in the future.

This concluding portion will pick up several matters with respect to eminent domain which was fully covered in the memorandum to Mr. Abramowitz. My opinion took a positive and unqualified position with respect to the power of the United States, while the present memorandum simply indicates some changes with respect to Section 806 which will ensure clarity and no ambiguity. But it should be borne in mind that when the United States Congress asserts a claim on lands - its legislation constitutes a sufficient showing of "public purpose" under the Federal law and procedures within the Federal Courts. Issues may be raised with respect to compensation during these proceedings, but they are of course subjected to well-established practice as well.

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