THE LIBRARY OF CONGRESS
Congressional Research Service

WASHINGTON, D.C. 20540

02
9

U.S. -- NORTHERN MARIANA ISLAND COVENANT

By
Robert L. Tienken
Senior Specialist in
American Public Law
American Law Division
July 2, 1975

THE LIBRARY OF CONGRESS
Congressional Research Service

WASHINGTON, D.C. 20540

U.S. -- Northern Mariana Islands Covenant

The proposed covenant between the Islands and the United States, signed by both parties, and adopted by the Mariana Islands District Legislature and accepted by the voters of the Islands would terminate the trusteeship agreement between the United States and the United Nations approved July 18, 1947 (61 Stat. 397) as respects the Mariana Islands. It would effect a compact between the United States and the Islands under which the Islands would attain a commonwealth status similar in purpose with that of Puerto Rico. Regardless of the nomenclature given to the proposed status of the Marianas they would neither become a state nor a territory incorporated into the union preliminary to statehood. Like Puerto Rico they would have the legal status of an unincorporated territory (see, for instance, Guerrido v. Alcoa S.S. Co., (C.A. Puerto Rico) 234 F. 2d 349 (1956)).

This means that the provisions of the Constitution as a whole do not automatically apply to them, but only a part of the limitations or restrictions, those which guarantee certain fundamental rights (Dorr v. U.S., 195 U.S. 138 (1904)), and others as may be extended to them by Congress (Downes v. Bidwell, 182 U.S. 271 (1901), Government of the Virgin Islands v. Rijos, (D.C. Virgin

Islands) 285 F. Supp. 126 (D 68)). In addition, such status means that such territory merely belongs to the United States as distinguished from territory which is incorporated into the United States (Balzac v. People of Puerto Rico, 258 U.S. 298 (1922)), and which is destined for statehood. In the absence of an incorporation clause in the treaty by which United States dominion was extended over the area, or in an organic act, incorporation does not take place until Congress so determines (Alcoa S.S. Co. v. Perez, (D.C. Puerto Rico) 295 F. Supp. 187, case remanded on other grounds, 424 F. 2d 433 (1968)).

While the authority of Congress to legislate over incorporated and unincorporated territories is the same, the political status of the two kinds of territories is different and the final tie to the United States is different.

General acts of Congress do not extend to newly acquired territory in the absence of an intention so to do (U.S. v. Cancy, (D.C. Minn.) 54 F. Supp. 755, aff'd, 149 F. 2d 788, cert. den. 326 U.S. 767 (1944)), but specific federal statutes may be extended by an express provision in the law itself, or by a provision applicable to a particular territory (People of Puerto Rico v. Shell Co., 302 U.S. 253 (1937); Alaska S.S. Co. v. Mullaney, (C.A. Alaska) 180 F. 2d 805 (1950)). Laws not locally inapplicable or otherwise excepted may also be extended to territories by a general provision applicable to organized territories or by a general provision in the organic law (see, Corpus

Juris Secundum, Vol. 86, "Territories", p. 614 (1954)). One of the purposes of the proposed Covenant with the Marianas is to designate U.S. statutes which are or may be applicable in whole or in part.

Another function of the proposed Covenant is to provide a separate organized government for the Marianas, that is, to create a territorial government which can enact legislation and administer it, an essential element of an unincorporated territory and a commonwealth.

Since the Constitution as a whole is not extended to unincorporated territories, the result is that only certain fundamental principles of constitutional liberty such as freedom of religion, freedom of speech, freedom of access to Courts of Justice, etc., limit the legislative power of Congress over territories and possessions (Downes v. Bidwell, supra), or certain treaty covenants by the United States prescribe guidelines for Congress,* and consequently, except for

---

*/The United States may, by treaty, agree to grant certain future status to aliens living on territory acquired by the United States by purchase (see treaty with Mexico, 1853, whereby the United States purchased land south of Arizona and New Mexico and agreed to grant future citizenship to Mexicans living there and to protect their freedom of religion in the same manner as was promised in Article IX of the Treaty of Guadalupe-Hidalgo in 1848 respecting Mexicans living on land ceded to the United States at the end of the Mexican War; Francis v. Thorpe, "The Federal and State Constitutions, Colonial Charters, and Other Organic Laws", (1909), Vol. I, pp. 257-381). The United States covenanted to further the political, economic, social, and educational status of the inhabitants of the Pacific Trust Territory in its 1948 agreement with the United Nations (61 Stats. Pt. 3, pp. 3301-03, (1947)). Such pledges are standards applicable to the United States in the discharge of its responsibilities and powers over an area acquired by it through treaty.

these factors the legislative authority of Congress over territories and possessions is plenary (see, Constitution, Art. IV, section 3, cl. 2; Sere v. Pitot, 10 U.S. 332, (1810); Downes v. Bidwell, supra; Hooven & Allison Co. v. Evatt, 324 U.S. 652, rehearing denied 325 U.S. 892 (1945); Congress also posses authority under the doctrine of "exclusive sovereignty which must exist in the national government and can be found nowhere else", U.S. v. Kagama, 118 U.S. 380 (1886)). Pursuant to such authoirty Congress possesses the sovereign powers of the general government plus the powers of a local or state government in all cases where legislation is possible (Cincinnati Soap Co. v. U.S., 301 U.S. 308 (1937)).

In exercising its authority over unincorporated territories Congress may legislate directly, or organize a local government for the territory by legislation, or by compact with the territory as it did in the case of Puerto Rico, to provide for its internal governance. Because such authority is plenary except for certain fundamental constitutional limitations and treaty commitments Congress may create a territorial government for an unincorporated territory (Harris v. Boceham, (C.A. Virgin Islands), 233 F. 2d 110 (1956)). Whether this is accomplished through congressional legislation or by means of a compact is immaterial. The final authority rests with Congress.

The power conferred upon a territorial government usually covers all matters regulated by the laws of a state (District of Columbia

v. John A. Thompson Co., 346 U.S. 100 (1953)). The acts of a territorial government are normally subject to the supervision of Congress, but those of the legislature of the Commonwealth of Puerto Rico are not, nor does the proposed Covenant with the Marianas include a supervisory provision.

The usual procedure is for Congress to enact an organic act creating the territorial government and defining its powers. There is no organic act in the case of the Mariana Islands. They have been governed, along with the rest of the Trust Territory primarily through Executive Orders with the acquiescence of Congress (see 48 U.S.C. § 1681 and Executive Order No. 11021 thereunder). Consequently, Congress is in the unique situation of considering an organic act for the Marianas in the form of a compact. Congress is in no way, however, inhibited from altering or amending the proposed compact in its initial consideration. Any such changes would be sent back to the Marianas for concurrence.

Adoption of the Covenant by the Congress would, to repeat a paragraph from House Report 2275, 81st Congress on S. 3336, (1950), the Puerto Rican Compact Act, "not commit the Congress, either expressly or by implication, to the enactment of statehood legislation for Puerto Rico in the future. Nor will it in any way preclude a future determination by the Congress of Puerto Rico's ultimate political status."

The Covenant will create domestic government for the Marianas and regulate relations between the United States and the Marianas. Its major features are as follows:

Political Relationships

Article I provides that the Marianas are in no sense sovereign, but are under the sovereignty of the United States (as are all our possessions).

It provides that relations between the two will be governed by the Covenant, and this, together with those provisions of the Constitution, treaties and laws of the U.S. applicable to the Marianas will be the Supreme law of the Islands. This is a statement of congressional legislative authority over the Marianas including a voluntary divestiture of authority to legislate respecting local matters of the Marianas.

Specific congressional legislation applicable only to the Marianas must be so identified, a practice in line with legislation respecting other unincorporated territories.

Section 105 of Article I prohibits amendment of Articles I (Political Relationship), II (Constitution of the Marianas), and III (Citizenship and Nationality). and sections 501 (Applicability of certain provisions of the U.S. Constitution) and 805 (Restriction on alienation of real property to persons of Mariana Islands descent) without the consent of the proposed Government of the Northern Mariana Islands. Should Congress so wish to voluntarily restrict itself it may do so. It rejected a Senate proposal in 1952 which would have required congressional approval of amendments to the popularly adopted Puerto Rican Constitution (see, House Report 2350, June 28, 1952, 82nd Congress,

2nd Sess.). Should the United States alone attempt to amend any of the designated provisions, such would amount to a case or controversy pursuant to section 203 of the Covenant, justiciable in a U.S. court.

Constitution of the Northern Marianas Islands

Article II provides for the adoption of a constitution by the people of the Marianas for approval by Congress on the basis of its consistency with the Covenant and with those provisions of the Constitution, treaties and laws of the U.S., applicable to the Marianas. The Constitution will be resubmitted if disapproved. Amendments may be made without the consent of the U.S., but subject to constitutional review in the courts of the U.S. This is substantially similar to the situation in Puerto Rico.

Section 203(c) provides for a bi-cameral legislature with representation in the one house based on chartered municipalities rather than population. This clashes with section 501(a) of the Covenant which applies Amendment XIV, section 1 to the Islands. This section contains the equal protection of laws clause under which the Supreme Court, in Reynolds v. Sims, 377 U.S. 533 (1964) held invalid state constitutional provisions which provided for apportionment on any basis but population. It is arguable that this contradiction does not actually exist, because Congress, in approving the Covenant under its authority over unincorporated territories has in fact stated that it can create an exception to the extension of Amendment XIV, section 1

to the Marianas, that is, in section 203(c) of the Covenant, (see section 501(b) discussed infra). Congress can extend any or all Constitutional provisions to a territory and can consequently limit the application of any of them.

The judiciary provisions of Article II are the usual.

The oath required of legislators, officers and employees of the Government of the Northern Mariana Islands, is acceptable because it is to the superior documents (i.e., the U.S. Constitution, etc.) in addition to the inferior (i.e., the Covenant).

Citizenship and Nationality

These provisions are not out of the ordinary. The provision in section 302 permitting persons to become nationals of the U.S. merely will permit residents of the Marianas to return to the status they now enjoy (see 8 U.S.C. § 1408(1)).

Judicial Authority

The provisions on the judiciary are substantially similar to those respecting the U.S. District Court of Guam (48 U.S.C. § 1424).

Applicability of Laws

Section 501(a) is similar to 48 U.S.C. § 1421b(u)(Guam) and § 1561(u)(Virgin Islands), except that section 501 includes Article I, section 10, clauses 1 and 3 (prohibiting states from entering into treaties, from enacting bills of attainder, expost facto laws, etc; prohibiting states from laying duties on tonnage, keeping troops, and

ships of war during peace, etc.), and Amendment XXVI (Voting at age 18). The statutes for Guam and the Virgin Islands do not include the first sentence of section 1 of Amendment XIV (citizenship). Since Congress will consent to Article III of the Covenant on citizenship it is arguable that Article III is an exception of that part of section 501(a) which extends Amendment XIV, section 1 to the Marianas.

The Constitution of the Marianas will have its own bill of rights (section 203(a)) as does the Constitution of Puerto Rico. The federal provisions are a guarantee against congressional denial, of course.

The clause on other provisions of the U.S. Constitution not applying without the consent of the Marianas prevents the Marianas from being pulled into a closer relationship with the United States such as voting for presidential electors or becoming a state.

Section 501(b) which provides that the applicability of the constitutional provisions of 501(a) will be without prejudice to the validity of and the power of the Congress to consent to sections 203, 506 (limited application of the immigration laws), and 805 (restricted alienation of property) and the proviso in 501(a) limiting the availability of jury trial and grand jury indictment, is a provision whereby Congress, pursuant to its authority over unincorporated territories, will make some exceptions to the extension of some of the designated constituional provisions to the Marianas.

Section 502 contains the previsions usually found in organic acts or elsewhere as respects which United States statutes will be applicable to the Marianas. It includes certain specified laws, laws of general application to the states which are also applicable to Guam, laws applicable to the Trust Territory including subsequent amendments if made specifically applicable to the Marianas, and U.S. coastal shipping laws which will be applicable to the activities of the U.S. Government and its contractors in the Marianas.

Section 503 describes certain laws not now applicable to the Trust Territory but which can be made applicable to the Marianas by Congress after separation of the Islands from the Trust Agreement.

Section 504 is the normal provision for a commission to study and make recommendations as to which U.S. laws should and should not be made applicable to the Marianas (see, 118 U.S.C. § 1574(d) for a similar commission for the Virgin Islands).

Section 505 is the usual carry-over clause whereby local statutes, ordinances, and applicable Executive and District orders respecting the Marianas in force and not inconsistent with the Covenant or the provisions of the U.S. Constitution or statutes applicable to the Marianas, will remain in force and effect until and unless altered by the Government of the Northern Mariana Islands.

Section 506 applies certain provisions of the U.S. Immigration and Nationality Act (title 8, U.S.C.) to the Marianas after the Islands became a Commonwealth. These are 8 U.S.C. § 1401 (see, 301 of

the Act), and 8 U.S.C. 1408 (sec. 308 of the Act) dealing with citizenship and nationality of children born abroad to U.S. citizens and nationals of the Marianas.

It also extends to the Marianas, 8 U.S.C. § 1151(b)(section 201(b) of the Act), the definition of "immediate relative", and provides for the extension of permanent admission status to such persons in the Marianas.

Revenue and Taxation

Article VI provides that the U.S. income tax laws will apply in the Marianas after commonwealth status is achieved, as a local territorial income tax, the proceeds of which shall be covered into the treasury of the Marianas as is the case with Gaum (see 48 U.S.C. § 1421(i)).

Authority is granted to the Marianas to impose other taxes as is deemed appropriate (section 602).

(Note - Puerto Rico imposes its own income tax, see Puerto Rico Code, title 13, § 3001 et seq.. U.S. income tax is not imposed on permanent residents of Puerto Rico the total income for whom is derived from Puerto Rico, 26 U.S.C. § 933).

Section 603 deals with customs. The Marianas will not be included within the customs territory of the United States (which is the States, the District of Columbia, and Puerto Rico, 19 U.S.C. § 1202, "Tariff Schedules", "General Headnotes and Rules of Interpretation"). This is within the authority of Congress to prescribe since

Congress does not extend to the Marianas Article I, section 8, clause 1 of the Constitution requiring that all "duties, imports and excises shall be uniform throughout the United States", (see Downes v. Bidwell, supra). Guam, for instance is not within the customs territory of the United States.

Section 603 authorizes the Marianas to levy duties on imports from any area outside the customs territory of the United States and impose duties on exports from its territory. Here again there is no violation of the Constitution, Article I, section 10, clause 2 which forbids states to levy duties on imports and exports without the consent of Congress.

Customs duties on imports into Gaum are United States duty rates (48 U.S.C. § 1421b) and these are covered into the treasury of Guam.

The Federal Relations Act of Puerto Rico, § 3, (48 U.S.C. §241) prohibits export duties on exports from Puerto Rico, but the same import duties as are levied on foreign goods by the United States are levied in Puerto Rico and paid into the treasury thereof (48 U.S.C. §§ 739, 740).

Section 603 (c) provides that imports into the United States from the Marianas will be charged the same rates as those from Guam. Such rates are prescribed in 19 U.S.C. § 1202, "Tarrif Schedules," "General Headnotes and Rules of Interpretation," 3(a)(see also 19 Code of Federal Regulations, § 7.8 et seq.).

Other provisions in Article VI relating to levying of excise taxes by the United States and the Marianas are not out of line (see 48 U.S.C. § 1421 b).

Other provisions deal with customs duties on the property of the United States and its personnel, and the creation of a separate Northern Mariana Islands social security retirement fund with eventual inclusion of such fund into the appropriate Federal Social Security Trust Funds.

Finally, provisions place a limit on Marianas public indebtedness for a specified period. There was a substantially similar provision in effect as respects Puerto Rico (48 U.S.C. § 745), but it was repealed when Puerto Rico became a commonwealth (see footnote, 48 U.S.C. § 745).

United States Financial Assistance

Article VII covers this. It is primarily a matter of policy.

Section 703(b) is a "cover-into" provision under which proceeds from U.S. taxes respecting the Marianas will be paid into the treasury of the Marianas.

Section 704(a) continues available for obligation any funds not obligated or spend by the Marianas by the end of a fiscal year. This authorization is within the power of Congress to grant.

Section 704 (b) provides that approval of the Covenant by the United States will constitute an authorization for the appropriation

of a pro-rata share of the pledged payments by the United States under section 702 of the Covenant. Treaties may provide authorization for the appropriation of monies (see, Cannon's, Precedents of the House of Representatives, Vol. VII, §§ 1342, 1143). The Covenant is not a treaty but is an exercise of the legislative power and its approval could certainly constitute authorization for appropriation of the funds in section 702.

Property

Article VIII contains section 805 which restricts alienation of real property in the Marianas to persons of Mariana descent. As has been noted heretofore, Congress, in the circumstances, can adopt such a feature.

In section 806 (b), (c), the United States reserves the right to exercise the power of eminent domain in the Marianas. The extension in the Covenant, of Amendment V of the Constitution effectuates this. Even in the absence of congressional extension of the Constitution overseas, the just compensation clause has, in fact, been applied to takings of property located outside the United States where the taking is by the United States itself (Porter v. U.S., (ct. cl.) 496 F. 2nd 583 (1974).

Northern Mariana Islands Representation and Consultation

Article IX provides for the election or appointment of a resident (commissioner ?)from the Marianas to the United States whose

qualifications and duties are substantially similar to those for the resident commissioner from Puerto Rico (see, 48 U.S.C. §§ 891 - 894), the only significant difference is that the term of the commissioner from Puerto Rico is for four years instead of two. Further privileges could be extended to the resident commissioner from the Marianas by the U.S. House of Representatives.

The Article also contains section 903 under which the United States consents to be sued in U.S. courts respecting cases or controversies arising under the Covenant. Consent to be sued can, of course, be granted by Congress (United States v. Clarke, 8 Pet. (33 U.S.) 436 (1834)). This is a unique provision but within the authority of Congress to legislate about (see, Constitution, Article III, secs. 1, 3).

In summary, consideration of the proposed Covenant by the Congress is actually an exercise of legislative authority over territory and possessions of the United States. In this instance it is the organization and creation of what is legally, an unincorporated territory, In considering the Covenant Congress will be in the same position as though it were legislating as respects overseas territory and its legislative authority is thus plenary subject to certain constitutional limitations and international commitments.

The purpose is to create a political unit that is domestically autonomous but to which U.S. laws will be applicable as determined by the Covenant and by Congress.

When the Covenant has been adopted Congress will have restricted its plenary legislative authority over the Marianas, much as in the case of Puerto Rico, but except for that exemption, the legal status of the Marianas will be that of an unincorporated territory with all that that implies.