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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE NORTHERN MARIANA ISLANDS

THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **v.** **THE UNITED STATES OF AMERICA,** **Defendant and Counterclaim Plaintiff.**	**No. CV 99-0028** **UNITED STATES' MEMORANDUM IN OPPOSITION TO PLAINTIFF COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS' MOTION FOR SUMMARY JUDGMENT**

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THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	
Plaintiff,	**No. CV 99-0028**
v.	**UNITED STATES' MEMORANDUM IN OPPOSITION TO PLAINTIFF COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS' MOTION FOR SUMMARY JUDGMENT**
THE UNITED STATES OF AMERICA,	
Defendant and Counterclaim Plaintiff.	

The United States of America, defendant and counterclaimant herein, hereby submits this memorandum in opposition to the motion for summary judgment filed December 13, 2002, by the plaintiff Commonwealth of the Northern Mariana Islands ("Commonwealth" or "CNMI"). In that motion, the CNMI seeks summary judgment concerning its claim to ownership of submerged lands underlying a twelve-mile territorial sea, as measured from archipelagic baselines.

In the United States' motion for summary judgment and memorandum in support, we have shown

why the Commonwealth's complaint must be dismissed because Section 101 of the Covenant grants the United States the paramount rights in and under the territorial sea as an incident of the United States' sovereignty over the Commonwealth. In that memorandum, the United States also demonstrated why its counterclaim should be granted in which the United States is seeking a declaratory judgment decreeing that the CNMI's Submerged Lands Act and Marine Sovereignty Act are null and void because they conflict with the federal paramountcy doctrine and a host of U.S. laws regulating resources in the territorial sea abutting the Commonwealth. The United States incorporates the arguments in its December 13 memorandum if and to the extent they supplement the United States' opposition arguments set forth below.

In its December 13, 2002 memorandum in support ("CNMI 1st Br."), the CNMI asserts that it possesses title to these lands pursuant to the "collective words" of a November 1973 U.S. policy statement concerning the transfer of title to public lands in Micronesia, U.S. Department of the Interior Secretarial Order No. 2969, Section 801 of the "Covenant To Establish A Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" ("Covenant"), and Interior Secretarial Order No. 2989. In addition, the CNMI asserts that these rights derive, in part, from an "historical claim" (i.e., aboriginal title), customary international law, and the U.N. Convention on the Law of the Sea. As explained below, these claims are wholly without merit.

ARGUMENT

As the United States explained at length in its memorandum supporting its own motion for summary judgment filed on December 13, 2002, this quiet title dispute is controlled by Sections 101 and 104 of the Covenant. Section 101 expressly cedes full and complete sovereignty over the Northern Mariana Islands to the United States. Sovereignty means political and diplomatic autonomy, and carries with it the authority to conduct foreign affairs and enter into treaties with foreign governments. As a corollary, section 104 of the Covenant cedes foreign affairs and defense authority over the Commonwealth to the United States. As a matter of both U.S. and international law, ownership and control of the territorial sea, and the authority to regulate an exclusive economic zone ("EEZ"), is an integral component of sovereignty, foreign affairs, national security, and/or defense. United States v. California, 332 U.S. 19, 33-34 (1947); 1958 Territorial

Sea Convention, Articles 1-2; Law of the Sea ("LOS") Convention, Article 2, 55-75. Subordinate political entities of sovereign nations, such as state, local, and territorial governments, do not have control over the territorial sea and lands situated thereunder because they do not have sovereignty and/or the right to conduct foreign affairs as autonomous states. Because Sections 101 and 104 of the Covenant are unambiguous, and plainly confer sovereignty, foreign affairs, and defense authority to the United States, it follows, as a matter of law, that the Marianas people necessarily have also ceded paramount rights (ownership and control of the territorial sea, and exclusive jurisdiction over an EEZ) to the United States when those sections of the Covenant became effective on November 4, 1986.

The United States government is of the view that, as a matter of policy, the Commonwealth should be accorded the same treatment concerning submerged lands that generally applies to states and other U.S. territories. To that end, the U.S. government has repeatedly offered to sponsor legislation to confer ownership of three nautical miles of oceanic submerged lands as measured from the Commonwealth's low-water mark -- offers that, to date, the CNMI has refused.. Unless and until such legislation is enacted, the CNMI has no claim to lands underlying the territorial sea as a legal consequence of the federal paramountcy doctrine.

I. THE CNMI'S SUMMARY JUDGMENT MOTION FAILS TO ESTABLISH THAT THE COMMONWEALTH OWNS LANDS SEAWARD OF THE LOW-WATER MARK

In its summary judgment memorandum, the CNMI argues that it owns the submerged lands underlying the territorial sea and lands situated thereunder. (CNMI 1st Br. 27.) However, instead of seeking to find support for its position in the express language of the Covenant, which alone defines the boundaries of the U.S. - CNMI relationship, the CNMI has relied on a more nuanced approach that attempts to divine from "collective words" of a November 1973 land return policy statement, Secretarial Order No. 2969, Covenant § 801, and Secretarial Order No. 2989, a U.S. intent to convey oceanic submerged lands to the Commonwealth. As explained below, this approach is flawed because the United States has obtained paramount rights in the submerged lands at issue in this case as a legal consequence of Covenant § 101, see United States v. California, 332 U.S. 19, 32-33 (1947), and it would take a clear expression of intent in the Covenant itself to divest the United States of those property interests. Cf. Watt v. Western Nuclear, Inc.,

462 U.S. 36, 59 (1983). Moreover, the duty of the United States to convey ownership of Trusteeship lands in the NMI to the Commonwealth government is defined solely by Section 801 of the Covenant, which is the only other provision of the Covenant arguably relevant to this dispute. Section 801 does not reference oceanic submerged lands, and does otherwise constitute a clear expression of intent to convey or reserve such lands to the Commonwealth. Rather, the plain meaning of Covenant § 801 establishes that it is limited to surface lands. Because the CNMI's claim that it owns submerged lands seaward of the low water mark flies in the face of Covenant §§ 101 and the federal paramountcy doctrine, it must be rejected.

"[T]he authority of the United States towards the CNMI arises solely under the Covenant." Hillblom v. U.S., 896 F.2d 426, 429 (9th Cir. 1990). Indeed, "[t]he Covenant has created a 'unique' relationship between the United States and the CNMI, and its provisions alone define the boundaries of those relations." Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682, 687 (9th Cir.1984). Because this Court has analogized the Covenant to a contract between the United States and the Marianas people, U.S. ex rel. Richards v. De Leon Guerrero, 1992 WL 321010, * 29 (D.N.M.I. 1992), it would be appropriate to construe the Covenant in accordance with the well-established principles of contract interpretation that:

> A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations. Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. Whenever possible, the plain language of the contract should be considered first. [And the] fact that the parties dispute a contract's meaning does not establish that the contract is ambiguous; it is only ambiguous if reasonable people could find its terms susceptible to more than one interpretation.

Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210-11 (9th Cir. 1999) (citations omitted).

The Covenant is also a federal statute. Pub. L. No. 94-241, 90 Stat. 263 (1976), reprinted as amended in 48 U.S.C.A. § 1681 note. Accordingly, well-established canons of statutory construction could alternatively be applied here. A cardinal canon of statutory construction holds that, when construing a federal statute, the judiciary must give effect to unambiguous language used by Congress. See Wilderness

Society v. U.S. Fish and Wildlife Service, No. 01-35266 (9th Cir. Jan. 13, 2003), slip. op. ("[i]f the statute is unambiguous and the intent of Congress is clear, we . . . must give effect to that unambiguous intent"); see also Commonwealth of the Northern Mariana Islands v. United States, 279 F.3d 1070, 1072 (9th Cir. 2002) ("we must interpret statutory terms by their plain meaning in the absence of strong evidence that Congress intended a different meaning") (citing Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 548(1987). And, in the absence of any definition of a term used in a statute, courts must construe the "term in accordance with its ordinary or natural meaning." FDIC v. Meyer, 510 U.S. 471, 476 (1994) (citing Smith v. United States, 508 U.S. 223, 228 (1993)).

Given these controlling principles, and because (as discussed below) Section 801 of the Covenant is unambiguous, the intent of the Covenant must be derived from its plain meaning, and the Commonwealth's effort to establish a claim of ownership of submerged lands on the basis of extraneous materials, such as the November 1973 U.S. land return policy statement and Secretarial Order No. 2969, must be rejected.

A. The CNMI Cannot Rely On Matters Outside the Covenant Because Section 801 Of The Covenant Is Unambiguous

As previously stated, because Covenant § 101 cedes sovereignty to the United States (and, as a corollary, paramount rights in and under the territorial sea), the only provision that could arguably have a bearing on the CNMI's claim to ownership of lands underlying the territorial sea is Section 801 of the Covenant. Covenant § 801, however, is clear on its face. It provides, as relevant here, that "[a]ll right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to real property in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands." (U.S. Exh. 10 at 28; emphasis added.) Although the term "real property" in Section 801 is not defined in the Covenant, it is not ambiguous. As explained in the United States December 13 memorandum, the commonly understood, ordinary meaning of "real property" connotes land, buildings, and other permanent fixtures. (December 13, 2003 Memorandum In Support of U.S. Motion for Summary Judgement ("U.S. 1st Br.") at 25 n.22. And the commonly understood, ordinary

meaning of "land" is an area of the earth's surface not covered by water. Id.

In contrast, the construction of "real property" advocated by the CNMI here -- as including lands underlying the territorial sea -- is not a commonly understood, ordinary meaning of "real property" because it would apply to lands covered by a body of water, i.e., the exact opposite of the ordinary meaning of "land," as explained above. Furthermore, the CNMI's construction of "real property"-- as including lands underlying the territorial sea -- is unreasonable because, if given effect and allowed to trump the federal paramountcy doctrine in this case, it would nullify the operative legal consequences of Sections 101 and 104 of the Covenant, in derogation of the principle of construction that a "written contract must be read as a whole and every part interpreted with reference to the whole," Klamath, 204 F.3d at 1210, and in violation of the principle that property disposals by the United States are "not lightly to be inferred." United States v. Holt State Bank, 270 U.S. 49, 55 (1926). This Court should not nullify the effects of Sections 101 and 104 of the Covenant, pursuant to which the CNMI has ceded paramount rights over the territorial sea to the United States, based on such a strained interpretation of the term "real property."

The CNMI nonetheless asserts that the term "real property" as used in Covenant § 801 must include oceanic submerged lands because Section 802 of the Covenant required the NMI government to include "waters immediately adjacent to" Tinian and Farallon de Medinilla ("FDM") Islands within "property" it must lease to the United States. As a threshold matter, it is noteworthy that Section 802 of the Covenant does not use the term "real property" when describing geographical areas consisting partially of surface lands and partially of "waters immediately adjacent to" surface lands. One may reasonably infer from this that the term "real property" as used in Section 801 of the Covenant had a narrower definition than "property" as used in Section 802 of the Covenant, and thus included only lands within the Northern Mariana Islands not covered by water.

In any event, contrary to the CNMI's suggestion, nothing in Section 802's characterization of the "waters immediately adjacent" to Tinian and FDM Islands as "property" of the CNMI establishes NMI ownership of the territorial sea and/or the lands situated thereunder. The historical record demonstrates that the United States' defense needs required it to lease both surface lands (i.e, lands upward of the high watermark, as well as tidelands (needed for access to and egress from the leased surface areas by sea)), and

harborworks on Tinian and FDM Islands. Both tidelands [1/] and harborworks are situated in "waters immediately adjacent to" the Tinian and FDM Island surface lands, and both are considered CNMI internal waters, which are not at issue in this case. Thus, the fact that Section 802 characterizes these waters as "property" of the CNMI does not translate into a conclusion that the CNMI's "property" includes ownership of territorial sea and the lands situated thereunder.

B. Even If Section 801's Reference To "Real Property" Were Deemed Ambiguous, Extrinsic Evidence Establishes That The United States In The Covenant Negotiations Never Agreed To Transfer Ownership Of Oceanic Submerged Lands To The Commonwealth

Because the meaning of "real property" is clear, it is unnecessary for this Court to look beyond the four corners of the Covenant to determine the intent behind Section 801 of the Covenant. But assuming arguendo that the term "real property" could be deemed ambiguous, the negotiating background of the Covenant proves conclusively that the parties never agreed that such term would include lands underlying the territorial sea. For this, the Court need look no further than the CNMI's admissions that the "United States and the CNMI never bargained for, much less arrived at, an agreement concerning the transfer of title over the submerged lands" at issue in this case. CNMI 1st Br. 43. Also compelling are the CNMI's statements in 1986 and 1987 position papers declaring that "the Covenant is silent on the subject of ocean jurisdiction of the Northern Mariana Islands in general," and that "it is a curious blind spot in the Covenant that the jurisdiction of the Commonwealth over its oceans, submerged lands, and the natural resources was not specified." (U.S. Exh. 30, at 3; see also U.S. Exh. 31, at 4). Moreover, as is clear from the declarations of the two lead U.S. negotiators of the Covenant (see U.S. Exh. 97 (Declaration of Franklin Haydn Williams); U.S. Exh. 68 (Declaration of James Morrison Wilson)), the Marianas representatives were put on notice in May 1973 of the U.S. position that:

> So far as submerged lands are concerned, we feel that these should vest in the future Marianas government as in the case of the states of the United States and other territories

U.S. Exh. 2 at 7. The clear implication of the above statement is that title to submerged lands would vest

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[1/] "Tidelands" is the term commonly used to describe the lands between the high water mark and the low water mark. Tidelands are submerged at high tide but exposed at low tide. Reed, 3 Shore and Sea Boundaries 392.

in the Northern Mariana Islands government in the same way it vested in states of the United States and other U.S. territories, i.e., by specific U.S. legislation conveying it title to such lands.

Another source of extrinsic evidence of meaning of Section 801 of the Covenant -- the Section-By-Section Analysis of the Covenant ("SBS Analysis") -- likewise reveals no U.S. intent to convey title to oceanic submerged lands to the CNMI. In the SBS Analysis, the Marianas Political Status Commission characterized "real property" as used in Section 801 in terms of "all land," "buildings," and "fixtures." Specifically, as relevant here, the SBS provides:

> Section 801 provides that all of the real property (including buildings and permanent fixtures) to which the Government of the Trust Territory of the Pacific Islands holds any right, title or interest will be transferred to the Government of the Northern Marianas. The transfer will take place no later than the termination of the Trusteeship. The Section [801] applies to all land which the Trust Territory Government has rights on the date that the Covenant is signed, or which it thereafter acquires in any manner whatsoever. This section serves as a guarantee that all public land in the Northern Marianas will be returned to its rightful owners, the people of the Northern Mariana Islands. It is expected that a very substantial amount of land will be returned far sooner than the termination of the Trusteeship. Under the United States Land Policy Statement and its implementing Secretarial Order, it is expected that much public land will be transferred as soon as a land entity is established by the Mariana Islands District legislature to hold land in trust for the people of the Northern Marianas. This Section assures that all of the land will come back no later than termination, and that no land can be disposed of other than through the Government of the Northern Marianas.

As there is no mention of seabeds, submerged seamounts, submerged reefs, or the like, in the SBS Analysis, that Analysis -- which can explain the Covenant, but cannot alter its plain meaning -- does not remotely suggest that lands underlying the territorial sea are included within the meaning of "real property" as used in Section 801 of the Covenant.

Finally, extrinsic evidence of the CNMI's own contemporaneous understanding of Section 801 and 802 of the Covenant can be gleaned from the CNMI Constitution, which was approved in December 1976, just 9 month after the Covenant became effective. In Article XI, § 1 of the Constitution (which is entitled "Public Lands"), the framers described "lands as to which right, title or interest have been or hereafter are transferred to or by the government of the Northern Marianas Islands under Article VIII of the Covenant" separately from "the submerged lands off the coast of the Commonwealth." See U.S. Exh. 13, at 19. The clear implication of this is that the CNMI constitution framers themselves did not consider "submerged lands off the coast of the Commonwealth" to be either "real property"subject to section 801 of the Covenant, or "property" (including waters immediately adjacent to Tinian and FDM Islands) subject to Covenant,

section 802.

C. The Extrinsic Evidence That The CNMI Purports To Rely On -- That Is, The "Collective Words" Of The November 1973 Land Return Policy Statement, Secretarial Order No. 2969, Section 801 of the Covenant, and Secretarial Order No. 2989 -- Do Not Establish CNMI Ownership Of Oceanic Submerged Lands

As explained above, neither the plain meaning of Covenant § 801, the history of the Covenant negotiations, nor the SBS Analysis supports a CNMI's claim to ownership of oceanic submerged lands that could trump the United States' paramount rights in such lands pursuant to Covenant §§ 101and 104. On these bases alone, the United States is entitled to summary judgment dismissing the CNMI's quiet title claims.

The CNMI nevertheless argues that it owns the lands underlying the territorial sea because the "collective words of the Land Return Policy, Secretarial Orders 2969 and 2989, along with Covenant Section 801" caused a transfer of title to oceanic submerged lands to the constitutional Government of the Northern Mariana Islands ("GNMI") no later than January 9, 1978, i.e., the date on which that government became operational. (CNMI 1st Br. 24.) Because this argument obfuscates important distinctions between the land return policy statement, Secretarial Order No. 2969, Section 801 of the Covenant, and Secretarial Order No. 2989, and mischaracterizes their application to the CNMI, further elaboration of the historical context of these materials exposes the fallacy of the CNMI's argument that their "collective words" somehow conveyed ownership of oceanic submerged lands to the Commonwealth as of January 9, 1978.

As early as 1972, the CNMI broke ranks with the other TTPI districts concerning negotiations with the United States over their future political status. See U. S. ex rel. Richards v. De Leon Guerrero, 1992 WL 321010, *5 (D.N.M.I.). Early on, it appeared that both the United States and the NMI were interested in a political relationship pursuant to which the NMI would become a self-governing commonwealth subject to U.S. sovereignty. (U.S. Exh. 3 at 4.) That was not the case with the other TTPI districts which, from 1972 through at least 1976, were very much undecided whether they would become independent sovereigns in "free association" with the United States, or enter upon some closer political relationship with the United States. U.S. Exh. 69.

The issue of the Trust Territory Government's ("TTG") retention and administration of land became a stumbling block to continued negotiations by the TTPI districts (other than the Northern Marianas) concerning the future political relationship of those districts with the United States. (U.S. Exh. 8 at 1.) To remove this impediment to negotiations, the Secretary of the Interior, in cooperation with the U.S. Office

of Micronesian Status Negotiations, issued a "Land Return Policy Statement" pursuant to which the Trust Territory Government would transfer title to public lands administered by the TTG in each of the districts, including "tidelands, filled lands, submerged lands and lagoons," to the local governments in each TTPI district, including the NMI, once the Congress of Micronesia enacted legislation authorizing the transfer of title to such lands to the districts. (U.S. Exh. 8 at 2.) The policy also required the Trust Territory government to "retain the right to control activities" within such "tidelands, filled lands, submerged lands and lagoons" to the extent they affected the public interest. (Id. at 4.)

In 1974, the Congress of Micronesia enacted legislation authorizing the TTPI districts to receive title to public lands, but the legislation stopped short of acknowledging the Trust Territory government's reserved right to control navigable waters, submerged lands, and tidelands. U.S. Exh. 70 at 2-3. For this reason, in late 1974, the Department of the Interior issued Secretarial Order No. 2969, U.S. Exh. 9, which implemented the land return policy statement and required the High Commissioner to transfer all "right, title, and interest of the Government of the Trust Territory of the Pacific Islands" in public lands in each of the TTPI districts, including the NMI, to the districts themselves. Id. at 2. This title transfer requirement was subject to preconditions that, inter alia, required the TTPI district legislatures to enact laws establishing legal entities that would be authorized to receive and hold title to such public lands in trust for the people of the district. Id.

During the fifteen months that elapsed between the issuance of Secretarial Order No. 2969 and Congress' ratification of the Covenant on March 24, 1976, the NMI district legislature failed to satisfy at least one of the preconditions for implementation of that Order, i.e., the establishment and activation of a legal entity authorized to receive title to public land in trust for the Marianas people. U.S. Exh. 15 at 142. As a result, the High Commissioner never transferred title to any public lands to the NMI district pursuant to Secretarial Order No. 2969. See CNMI 1st Br. 12; CNMI Exh. 15 at 12.

In the meantime, six weeks after Secretarial Order No. 2969 was issued, the Marianas Political Status Commission and the United States representatives signed the Covenant, pursuant to which the NMI people would cede sovereignty, foreign affairs and defense powers to the United States effective upon termination of the trusteeship, and all "real property" administered by the Trust Territory Government in the NMI would be transferred to the NMI government, no later than termination of the trusteeship. U.S. Exh. 10 at 28.

As noted, Congress ratified the Covenant on March 24, 1976. At that time, there was no

constitutional government in the Northern Mariana Islands yet in existence to receive the transfer of "real property" contemplated by Section 801 of the Covenant. Accordingly, on that same day (March 24, 1976), the Department of the Interior issued Secretarial Order No. 2989 to establish a separate civil administration in the NMI to be overseen by a newly established "Resident Commissioner," effective April 1, 1976. U.S. Exh. 12. In addition, Secretarial Order No. 2989 vested title to "public lands situated in the Northern Mariana Islands" in the Resident Commissioner. Id. at [Bates] 0288.

By its terms, Secretarial Order No. 2989 was to remain in effect only until the date on which the CNMI constitutional government became operational. Id. at 0289. On December 5, 1976, the NMI representatives approved a constitution which established a Marianas Public Lands Corporation to receive title to any public lands transferred to the NMI government pursuant to Secretarial Order No. 2969, Section 801 of the Covenant, and Secretarial Order No. 2989, but not submerged lands off the coast of the Commonwealth. CNMI Const., Art. XI. §§ 3, 2; U.S. Exh. 13 at (Bates) 0310. According to the CNMI Constitution, submerged lands off the coast of the Commonwealth would be considered "public lands" only to the extent the "Commonwealth now or hereafter may have a claim of ownership under United States law." Id. at Art. XI, § 1. The "Analysis of the CNMI Constitution," issued on December 6, 1976 by the Constitution's drafters, confirmed that the legal status of oceanic submerged lands abutting the Commonwealth would be governed by United States law. (U.S. Exh. 15 at [Bates] 0330. Specifically, it acknowledged that:

> The United States is the owner of submerged lands off the coasts of the states under territorial waters. The states have no rights in these lands beyond that transferred by the United States. The federal power over these lands is based on the provisions of the United States Constitution with respect to defense and foreign affairs. Under [Article] 1, section 104 of the Covenant, the United States has defense and foreign affairs powers with respect to the Commonwealth and thus has a claim to the submerged lands off the coast of the Commonwealth as well. Section 1 recognizes this claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states with respect to the submerged lands off their coasts.

Id.

The CNMI constitutional government became effective on January 9, 1978, which terminated the interim government (administered by a Resident Commissioner) established by Secretarial Order No. 2989. U.S. Exh. 14, at 0324. In a June 29, 1978 letter responding to an NMI legislator's inquiry about the legal status of submerged lands off the coast of the Commonwealth, a Department of the Interior Assistant

Solicitor for Territories, Brewster C. Chapman, wrote that

> [A] reading of the Section-By-Section Analysis of the Covenant prepared by the Marianas Political Status Commission to explain the Covenant to the Mariana District Legislature and to the electorate of the [NMI] strongly indicates that the real property referred to in Section 801 were fast lands as well as the improvements thereon and not the submerged lands.

(U.S. Exh. 19 at 0358.) Notwithstanding his conclusion that the concept of "real property" referenced in Section 801 of the Covenant was limited to fast (i.e., "surface") lands and improvements, Mr. Chapman opined that the NMI government "probably" had "temporary title and jurisdiction" over submerged lands off the coast of the Commonwealth. Id. This determination was based on three factors. First, "Section 505 of the Covenant provides that the laws of the Trust Territory not inconsistent with the Covenant or with those provisions of the Constitution, treaties, or laws of the United States applicable to the Northen Marianas will remain in force until and unless altered by the Government of the Northern Mariana Islands." Id. Second, Mr. Chapman apparently believed that 67 TTC § 2 (which provided that marine areas below the ordinary high water mark belonged to the government) also extended seaward of the low water mark, and thus applied to the submerged lands underlying the territorial sea. Id. Third, the NMI constitutional government had, by that time, succeeded the Resident Commissioner as the political entity in charge of the separate civil administration in the NMI. Id. Thus, Asst. Solicitor Chapman believed that NMI constitutional government in June 1978 was authorized, per Covenant § 505, to administer the laws of the Trust Territory Code, including 67 TTC § 2, which (as noted above) he "probably" assumed to extend to oceanic submerged lands. Based on these factors, Asst. Solicitor Chapman wrote:

> The Government of the Northern Mariana Islands probably has ownership of and exclusive jurisdiction over these submerged lands, at least at this time. But this is only a temporary title and jurisdiction. When the Northern Mariana Islands are proclaimed a Commonwealth and territory of the United States, the laws of the United States applicable to its territories will come into effect in the Northern Marianas. One of the rules . . . is that submerged lands around an island territory belong to the federal -- not to the local -- Government.

Id.

In the meantime, two months prior to Mr. Chapman's June 29, 1978 letter, Trust Territory Government officials expressed the view that Secretarial Order No. 2989 had been self-executing, and that the constitutional NMI government succeeded to the title vested in the Resident Commissioner, without the need for the execution of deeds confirming the transfer of title, when that government became operational in January 1978. Thus, in a draft April 7, 1978 letter, High Commissioner Winkel stated:

> Secretarial Order 2989, Part VII, implemented the provisions of Section 801 of the Covenant, with respect to the transfer of title from the Trust Territory Government (TTG) to the Government of the Northern Mariana Islands (GNMI) of all real property (i.e., public lands, buildings, and permanent fixtures) in the Northern Mariana Islands (NMI). The Secretary directed this action notwithstanding the fact that such transfer could have been made at the time the Trusteeship is terminated.

(CNMI Exh. 4, at 1.) Similarly, in a December 11, 1978 letter to the Acting Director of the Marianas Public Lands Corporation, the TTG's Chief of Lands wrote:

> Title to all public lands in the [NMI] was vested in the Resident Commissioner by Part VII, Section 1 of Secretarial Order No. 2989, effective as of April 1, 1976. From that date until the effective date of the [CNMI] Constitution, the Resident Commissioner performed all executive functions concerning public lands, such as execution of homestead deeds and lease agreements. The [CNMI] Constitution subsequently transferred ownership of public lands to the "people of the Commonwealth"(not the Public Land Corporation) without further ministerial acts [i.e., deeds] being required of the Resident Commissioner or the High Commissioner of the Trust Territory.

CNMI Exh. 15 at 1. The TTG Chief of Lands' letter went on to conclude that "no additional deed is required to be issued by this Government" in order to "transfer title to public lands located in the [CNMI] to the Mariana Public Land Corporation." Id.

The TTG's view of the self-executing nature of Secretarial Order No. 2989 was short-lived, however. On or about February 5, 1979, Brewster Chapman, DOI Assistant Solicitor for Territories, wrote a memorandum to the Director of DOI's Office of Territorial Affairs explaining that Secretarial Order No. 2989 was not self-executing, and did not convey title to any TTPI public lands to the NMI government. Mr. Chapman concluded that an actual transfer of legal title by the Trust Territory government was required before title could vest in the Northern Marianas government. (U.S. Exh. 49.) Accordingly, on August 9, 1979, TTG High Commissioner Winkel wrote a letter to Pedro Tenorio, Executive Director of the Marianas Public Lands Corporation, stating that TTG had prepared "confirmation deeds" for public lands that had vested in the Resident Commissioner on April 1, 1976 pursuant to Secretarial Order No. 2989. As for "lands below the ordinary high watermark," Mr. Winkel's letter stated the TTG would be "prepared to execute a confirmation deed for them "as soon as the Commonwealth government determines in what manner title should vest therein." [2/]

[2/] As we will demonstrate below, Mr. Winkel's expression of willingness to prepare confirmation deeds for "lands below the ordinary high water mark" was consistent with a position and legal guidance of Asst. (continued...)

With the foregoing background in mind, we now show that the CNMI's claim that the Land Return Policy Statement, Secretarial Order No. 2969, Section 801 of the Covenant, and Secretarial Order No. 2989 "collectively" transferred title to oceanic submerged lands is unfounded.

1. The CNMI's Suggestion That The Land Return Policy Statement Created Vested Property Rights That Survived The Issuance Of Secretarial Order No. 2969 Is Without Merit

The CNMI asserts that the United States, in its November 1973 Land Return Policy Statement, obligated itself to transfer all public lands, including oceanic submerged lands, back to the people of the TTPI districts. CNMI 1st Br. 10-11. As the CNMI points out, the Land Return Policy Statement applied to all public lands in the TTPI districts described in the policy statement as "lands acquired by the prior Spanish, German, and Japanese Administrations for governmental or other public purposes as well as such lands as the Trust Territory itself may have acquired for public purposes. Tide lands and marine lands are considered public domain as well." Id. at 12; see also U.S. Exh. 8. The CNMI further emphasizes that the policy statement went on to state that "title to tidelands, filled lands, submerged lands and lagoons shall be turned over to the districts." CNMI 1st Br. 23. As we now explain, these arguments must be rejected because they wrongly suggest that the 1973 land return policy statement imposed an obligation on the United States that survived Secretarial Order No. 2969, that it is enforceable by the CNMI, and that it was intended to convey oceanic submerged lands permanently.

As a threshold matter, the Land Return Policy Statement did not survive Secretarial Order No. 2969. Among other things, the policy statement called upon the Congress of Micronesia to enact legislation that would enable the districts to receive title to the public lands transferred, subject to prescribed preconditions. When the Micronesian congress failed to do so by the fall of 1974, the Department of the Interior unilaterally acted to implement the policy statement in the form of Secretarial Order No. 2969. [3/] There is nothing in Secretarial Order No. 2969 that suggests that there was any aspect of the policy statement that was not fulfilled or reserved for implementation at a future date. In these circumstances, as of December

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[2/](...continued)
Solicitor Brewster Chapman who wrote in June and July 1978 that the CNMI probably had a "temporary title and jurisdiction" over such lands pursuant to Covenant § 505 and Section 2 of Title 67 of the Trust Territory Code. See U.S. Exh. 19 at 0358.

[3/] See U.S. Exh. 9; 40 Fed. Reg. 811, 812 (1975) ("the purpose of this Order is to implement the provisions of the United States Policy Statement of November 4, 1973").

28, 1974, Secretarial Order No. 2969 superseded the policy statement as the agency's position on the transfer of title to public lands to the districts, and thus no "collective words" of the policy statement survived to be "transformed into action" at a later date.

The CNMI's implicit argument that the land return policy statement somehow created an enforceable obligation on the part of the United States to transfer title to tidelands, submerged lands, and marine lands to the TTPI districts is equally flawed. It is well-established that an agency policy statement

> does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future.

Pacific Gas & Elec. Co. v. Federal Power Commission, 506 F.2d 33, 38 (D.C. Cir. 1974); see also Public Citizen v. Nuclear Regulatory Com'n, 901 F.2d 147, 157 (D.C. Cir. 1990). The United States Department of the Interior never published the land return policy statement as a rule, nor has it ever incorporated the land return policy statement by reference as a binding norm in any subsequent order such as Secretarial Order No. 2969 or Secretarial Order No. 2989. In these circumstances, the Land Return Policy Statement created no enforceable obligation on the part of the United States because its provisions never were binding on it. By the same token, it created no enforceable rights on the part of the Northern Mariana Islands district.

Finally, even if the land return policy statement could be interpreted to have created enforceable rights that survived Secretarial Order No. 2969, there is nothing in the Land Return Policy Statement that suggests that its references to "marine lands," "tidelands," and "submerged lands" were meant to extend seaward of the low water mark. Those terms could just as readily have been used to described lands underlying internal waters, i.e., waters landward of the low water mark of atolls and islands without reef systems, or, in the case of an atoll or island or portion thereof having a barrier, fringing, or other reef system, landward of the reef system. Cf. 19 TTC § 101(2) (1970) (defining "territorial waters" as waters three nautical miles seaward of these areas). Because the land return policy statement makes no explicit reference to oceanic submerged lands, it does not support the CNMI's claim of ownership of such lands.

In sum, the "words" of the November 1973 Land Return Policy Statement did not survive the implementation of Secretarial Order No. 2969 and, even if it did, it was a non-binding policy statement that does not make any reference to submerged lands underlying the territorial sea.

2. The CNMI's Argument That The Title Transfer Obligations Of Secretarial Order No. 2969 Were Transformed Into Action On January 9, 1978, And Vested Title To Oceanic Submerged Lands In The Commonwealth Is Equally Groundless

The CNMI also asserts that the "collective words" of Secretarial Order No. 2969 were likewise "transformed into action" on January 9, 1978, when the CNMI constitutional government became effective. CNMI 1st Br. 24. As we now explain, this argument fares no better.

As discussed above, Secretarial Order No. 2969 was issued on December 28, 1974 to implement the land return policy statement. The Order required the High Commissioner to transfer "right, title, and interest of the Government of the Trust Territory of the Pacific Islands" in public lands in each of the TTPI districts, including the NMI, to the districts themselves. This title transfer requirement was subject to certain preconditions, however, including a requirement that the TTPI district legislatures enact laws establishing legal entities that would be authorized to receive and hold title to such public lands in trust for the people of the district.

In defining "public lands," Secretarial Order No. 2969 provided that unless "the context requires a different construction, application or meaning . . . , 'Public Lands' means: those lands defined as public lands in section 1 and 2 of title 67, of the Trust Territory Code." U.S. Exh. 9 at 0170 (left col.), 40 Fed. Reg. 812 (1975) (emphasis added). As relevant here, section 1 of the Title 67 of the Trust Territory Code ("TTC") provided:

> Public lands are defined as being those lands situated within the Trust Territory which were owned or maintained by the Japanese government as government or public lands . . . .

And 67 TTC § 2 provided in pertinent part:

> Rights in Areas Below High Water Mark. That portion of the law established during the Japanese administration of the area which is now the Trust Territory of the Pacific Islands, that all marine areas below the ordinary high water mark belong to the government, is hereby confirmed as part of the law of the Trust Territory . . . .

Although Secretarial Order No. 2969 incorporated areas subject to 67 TTC § 1 and 67 TTC § 2 within its definition of "public lands," it nonetheless did not contemplate a transfer of title to oceanic submerged lands to the Commonwealth. Lands subject to 67 TTC § 1 must be interpreted as limited to surface lands only, because construing lands subject to 67 TTC § 1 to include lands below the ordinary high water mark would render 67 TTC § 2 meaningless surplusage. Although 67 TTC § 2 states that marine

areas below the ordinary high water mark belong to the government, nothing in that section of the Code describing "marine areas" suggests that such areas extend seaward of the low-water mark and/or internal waters, i.e., to lands underlying the territorial sea. [4/]

To the contrary, the intent of 67 TTC § 2 appears to have been to authorize the Trust Territory government to assert ownership of tidelands (shore lands between the high and low water marks that are intermittently submerged by the ebb and flow of the tide), and to regulate activities on land at or near the shoreline (such as filling, fishing, acquisition of materials such as coconuts deposited on the shoreline, protection of vessels stranded on reefs and shores, and protection of mangrove trees on the beaches). Indeed, every Trust Territory case of which we are aware which applied 67 TTC § 2 (or its predecessor, Section 32 of the 1959 TTC) involved a dispute over the right to conduct such activities in swamps or in areas covered by the ebb and flow of the tide or the filling of such lands. [5/] The provision may also have

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[4/] A November 5, 1976 letter (see CNMI Exh. 13) from the TTG's Asst. Chief for Lands and Surveys to the Acting Chief for Marine Resources, cited by the CNMI at 1st Br. 14, is not to the contrary. Although it did state that the TTG owns all "marine lands" situated below the low water mark, the entire focus of that letter appears to be on property rights in marine areas that are tidelands, i.e., intermittently submerged lands between the ordinary highwater mark and the low water mark, because the letter itself assumed "that at least some shore side facilities would be part of any such project." Although the letter does reference "some "offshore lands," it is unclear whether the reference pertains to internal waters such as lagoons and marine areas between the shores and barrier or fringing reefs. In any event, this letter was written 8 months after the Covenant became effective, i.e, at a time when the nature of the United States' obligation to transfer title to public lands in the Commonwealth was no longer defined by Secretarial Order No. 2969. Rather, it was defined by Covenant § 801. Accordingly, this letter is irrelevant to the dispute at hand.

[5/] See, e.g., Simiron v. Trust Territory of the Pacific Islands, 8 Trust Territory Reports ("TTR") 615, 616, 621 (government dredging of tidelands); Tulenkun v. Government of Utwe, 5 TTR 628 (1972) (dispute over filled land originally below ordinary high water mark); Teresia v. Neikinia, 5 TTR 228 (1970) (dispute was between family members over the fishing rights on a reef on the western side of an island abutting Truk lagoon); Peretiw v. Remos, 3 TTR 495, 499 (1968) (government owned the mangrove swamps between "dry landholdings and deep water"); Protestant Mission of Ponape v. Trust Territory of the Pacific Islands, 3 TTR 26, 30 (1965) (involving filled seashore land, "question of ownership of shore land between high-water mark and low water mark . . . is one peculiarly dependent on local law"); Ngiraibiochel v. Trust Territory of the Pacific Islands, 1 TTR 485, 488 ("filling in the land between the high and low water marks"). Another case arguably on point is Yangruw v. Manggur, 2 TTR 205, 207 (1961), but that case dealt "solely with zum ey fishing rights in [shallow] Palau Village waters" that were deemed privately owned. In upholding the private right to fish in shallow offshore waters, the Court cautioned that "no inference should be drawn from it as to rights to any other kind of fishing or in any other waters."

extended to areas underlying internal waters. [6/] But there is nothing in 67 TTC § 2 which applies to territorial waters.

A conclusion that "marine areas below the high water mark" does not include submerged lands underlying territorial waters finds support from other contextual provisions in Title 67 of 1970 edition of the Trust Territory Code. Thus, 67 TTC § 2(2) requires written notice of any legal interest or title to "lands be filed with the District Land Office." The functions of the District Land Office were to (1) make determination as to the extent of public lands within each District, (2) administer, manage and control those public lands, and (3) administer claims arising out of the use by the U.S. Government of private lands. 67 TTC § 51. The District Land Office was headed by a District Land Title Officer. 67 TTC § 52. 67 TTC § 151 requires public roads and paths for access to public lands, including those that are subdivided. Section 152 of Title 67 conditions authorization to subdivide public lands abutting sea or tidal areas on providing similar public roads and paths. None of these public amenities would be applicable if lands that are submerged at all times were included within the phrase "marine areas below the ordinary high water mark." 67 TTC § 301 authorizes the lease of "public lands" for a limited period of time. In sum, these various provisions in Title 67 of the TTC strongly suggest that "public lands" did not include "submerged lands," but only dry (fixed) lands and tidelands.

On the other hand, whenever the Trust Territory Code intended to refer to marine areas within the territorial waters, it did so expressly. See 19 TTC §§ 1, 2, 51 (regulating and requiring licensing of vessels in territorial waters); see also 19 TTC § 101(2) (defining "territorial waters" as "that part of the sea comprehended within the envelop of all arcs having a radius of three marine miles drawn from all points of the barrier reef, fringing reef, or other reef system of the Trust Territory, measured from the low water line, or, in the absence of such a reef system, the distance measured from the low water line of any islands,

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[6/] The Ngiraichiobel v. Trust Territory case, 1 TTR 485 (1958), relied on by the CNMI (at 1st Br. 25) is not to the contrary. In Ngirachiabel, a landowner sued the TTPI to establish his ownership of a "marine area" between the high and low water marks on the shoreline of Koror, which the landowner had previously contracted to a third party who subsequently defaulted on his purchase obligation. The court in Ngiraichiobel in four distinct parts of the opinion made clear that it was addressing only ownership of areas between the high water and low water marks, and thus was not addressing marine areas seaward of the low-water mark. See 1 TTR at 490. Marine areas below the low-water mark were not at issue, and nothing in the opinion purports to hold that the Trust Territory government owned marine areas seaward of the low-water mark.

islet, atoll, reef, or rocks within the jurisdiction of the Trust Territory). [7/] Nowhere in the Trust Territory Code of 1970 is there a claim to ownership of, or rights in, submerged lands seaward of the low water line, i.e., comparable to that for tidelands under 67 TTC § 2.

Even if Secretarial Order No. 2969 could be assumed to incorporate a broad construction of 67 TTC § 2 into its definition of "public land," and, on that basis, be construed, as a general rule, to apply to waters seaward of the low water mark, it should not be construed that broadly in this case. As stated previously, Secretarial Order No. 2969 defines "public lands" to include marine areas subject to 67 TTC § 2 unless "the context requires a different construction, application or meaning." U.S. Exh. 9 at 0170 (left col.)(emphasis added). The context of this case requires that the reach of Secretarial Order No. 2969 be limited to surface lands, tidelands, and lands underlying internal waters because that limited construction is necessary to give legal effect to the CNMI's transfer of sovereignty in Section 101, and with it, the vesting of all right, title and interest in the submerged lands off the coast of the Commonwealth in the United States as sovereign. United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950); United States v. Maine, 420 U.S. 515 (1975). Because there was no agreement that the CNMI would retain oceanic submerged lands after the sovereignty provisions took effect, there is no basis for applying Secretarial Order No. 2969 as broadly as the CNMI advocates here.

Furthermore, even if Secretarial Order No. 2969's definition of "public lands" could reasonably be read as contemplating a transfer of title to lands underlying the territorial sea, this aspect of Order No. 2969 (as opposed to the return of surface lands) never became effective in the Northern Mariana Islands. Secretarial Order No. 2969 was not self-executing. It authorized the High Commissioner to transfer title to public lands only to a legal entity established by a TTPI district legislature to hold such lands in trust for the people of the district. As the CNMI concedes (CNMI 1st Br. 12), the CNMI did not establish a district legal entity to receive title to public lands pursuant to Secretarial Order No. 2969 until the CNMI constitutional government became effective on January 9, 1978.

[7/] Secretarial Order No. 2969 may also have applied to "submerged lands" because, even though it did not define "public lands" as such, it nonetheless prohibited the High Commissioner from transferring title to a TTPI district until the district enacted a law reserving the right of the Trust Territory government to control conservation, navigation, or commerce concerning submerged land. See U.S. Exh. 9 at 0170 (rt. col.); 40 Fed. Reg. at 812. Nevertheless, a logical reading of the reference to submerged lands in Secretarial Order No. 2969 is that meant lands underlying internal waters. There is nothing in Order No. 2969 that necessarily implicates the territorial sea.

In the meantime, on March 24, 1976, any assumed obligation under Secretarial Order No. 2969 to transfer title to public lands to the NMI district was superseded and redefined by the United States' obligation to transfer all right title and interest of the Trust Territory government in "real property" in the NMI to the government of the Northern Mariana Islands. Section 801 of the Covenant did not incorporate by reference the definition of "public lands" set forth in Secretarial Order No. 2969. It did not otherwise define "real property." Thus, only a plain meaning construction may be applied to "real property," which, as previously discussed, means land not submerged in water, buildings, and other permanent fixtures. FDIC v. Meyer, 510 U.S. 471, 476 (1994).

As of December 5, 1976, the CNMI fully understood that title to any public lands transferred to the NMI pursuant to Secretarial Order No. 2969 would not encompass "submerged lands off the coast of the Commonwealth," because it expressly described such lands separately from lands transferred pursuant to Secretarial Order No. 2969. See CNMI Const. Art. XI, § 1; U.S. Exh. 13 at 0310. In addition, Art. XI, § 1 of the CNMI Constitution provided that submerged lands off the coast of the Commonwealth would become "public lands" only to the extent the "Commonwealth now or hereafter may have a claim of ownership under United States law." Id. If the Commonwealth had been expecting to receive title to oceanic submerged lands pursuant to Secretarial Order No. 2969, it had no reason to cite United States law as the applicable legal standard for determining the merits of possible claims it might have to ownership of oceanic submerged lands.

The CNMI government further revealed that it had no expectation of receiving any title to oceanic submerged lands pursuant to Secretarial Order No. 2969 when its Constitution established a "Mariana Public Lands Corporation" empowered to administer surface lands, but not submerged lands off the coast of the Commonwealth. Compare CNMI Const. Art. XI, § 3 with CNMI Const. Art. XI, § 2. U.S. Exh. 13 at 0310. In the Analysis that accompanied the CNMI Constitution, the CNMI government made clear that "[i]t is intended that the [Marianas] public land corporation be the legal entity designated under Secretarial Order No. 2969 to receive the public lands in the Northern Mariana Islands." U.S. Exh. 15 at 0332. If the Constitution's drafters had genuinely believed that Order No. 2969 would transfer title to submerged lands off the coast of the Commonwealth to the NMI government (as the CNMI now asserts at 1st Br. 12,23), they would not have limited the jurisdiction of the Marianas Public Land Corporation to surface lands only, as they did in CNMI Const. Art. XI, § 3. See U.S. Exh. 13 at 0310.

The United States is cognizant that the Marianas Political Status Commission ("MPSC") anticipated

in the Covenant's SBS Analysis that the United States would return a large amount of land to the Northern Marianas government. Thus, in the SBS Analysis, the MPSC stated:

> It is expected that a very substantial amount of land will be returned far sooner than the termination of the Trusteeship. Under the United States Land Policy Statement and its implementing Secretarial Order, it is expected that much public land will be transferred as soon as a land entity is established by the Mariana Islands District legislature to hold land in trust for the people of the Northern Marianas.

U.S. Exh. 11 at 96. Those expectations, however, were ultimately fulfilled by Secretarial Order No. 2989 which implemented Section 801 of the Covenant, and transferred the 90% of lands within the Northern Mariana Islands that were public lands to a Resident Commissioner. [8/] In these circumstances, that lone reference in the SBS Analysis to the "United States Land Policy Statement and its implementing Secretarial Order" [i.e., Order No. 2969] did not transform the United States' obligation under Covenant § 801 to transfer title to real property," i.e., transform a duty to transfer surface lands, into a duty to transfer title to oceanic submerged lands to the Commonwealth.

Finally, compelling circumstantial evidence also exists suggesting that a transfer of title to submerged lands underlying the territorial sea was not contemplated by the districts when the United States issued the land return policy statement in November 1973 and Secretarial Order No. 2969 in December 1974. In November 1972, the Congress of Micronesia established a Joint Conference on the Law of the Sea ("COM-JCLS") to assert jurisdiction over a portion of the seas adjacent to the Micronesian islands. Because the first meeting of the Third U.N. Conference on the Law of the Sea was scheduled for December 1973, and because, by early 1973, the COM-JCLS had not "had sufficient time to consider the possible alternative forms of jurisdiction to the seas adjacent to the islands," nor to present those alternatives to the Congress of Micronesia ("COM") for their consideration, the COM's Senate passed a Resolution:

> declaring the intention of the Congress of Micronesia to claim jurisdiction over a portion of the seas adjacent to our islands . . . authorizing the Joint Committee on the Law of the Sea to meet as soon as possible with representatives from the United States Department of State to determine if they are able and willing to adequately represent the interests of Micronesia at the coming Law of the Sea Conference sponsored by the United Nations; and authorizing the [COM-JCLS] to seek independent standing at the Law of the Sea Conference in the event the United States is unwilling or unable to adequately represent Micronesia at the Conference . . . .

[8/] According to calculations as of November 1973, the public land area in the Northern Mariana Islands district was ninety per cent. U.S. Exh. 8 at 1.

U.S. Exh. 71 at 1.

If the land return policy (issued in November 1973, just one month before the highly anticipated first meeting of the Third U.N. Conference on the Law of the Sea in December 1973) had been perceived at the time as affecting the interests of the TTPI districts in the territorial sea, the land return policy surely would have become the focus of discussions between the United States and Micronesian representatives. Yet, in the Minutes of a November 13,1973 meeting between the Micronesian delegation (which by then no longer represented the Marianas in future political status negotiations) [9/] and U.S. representatives, there was no mention of oceanic submerged lands, a territorial sea, or an exclusive economic zone, as "public land" subject to the land return policy statement by either the Micronesian or the United States' delegations. [10/] From the Micronesian perspective, the only concerns expressed about the land return policy involved the Trust Territory government's retention of eminent domain authority over Micronesian lands, military retention land (i.e., land retained for U.S. military use), and continued leasing of land to the Trust Territory government. All of these issues discussed at the November13, 1973 meeting dealt with dry, above-surface lands, not the kind of oceanic submerged lands at issue in this case.

Moreover, because ownership and control of submerged lands is integral to foreign affairs and defense, it would have required a political entity with authority to conduct foreign affairs, i.e., the U.S. Department of State, to authorize a transfer of title that would have separated ownership of the territorial sea from the United States' foreign affairs' authority and treatymaking powers in the Trust Territory. Events subsequent to the November 1973 land return policy statement and Secretarial Order No. 2969 (December 1974) confirm that this did not happen simply as a result of the policy statement and Order No. 2969. Thus, in a letter dated April 23, 1975 (two months after the CNMI Covenant was signed), the Micronesian delegation on law of the sea issues wrote to John R. Stevenson, Special Representative of the President for the Law of the Sea Conference, complaining that the ultimate question of who, as between the United States and the TTPI districts (other that the Marianas) would control the territorial sea and ocean resources, after

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[9/] By that time, the U.S. negotiations with the Micronesian delegation involved the future status of all TTPI districts other than the Northern Mariana Islands because the U.S. and NMI representatives had previously agreed to hold separate negotiations over the future status of the Northern Mariana Islands.

[10/] This meeting occurred less than two weeks after the U.S. Land Return Policy Statement was issued and just one day before the opening of the Seventh Round Of Negotiations between the United States and the other TTPI districts' political status commission to discuss the future status of Micronesia. (U.S. Exh. 72.)

the termination of the Trusteeship, had not yet been resolved. In particular, the Micronesian Delegation's April 23 letter inquired whether the United States would allow the Congress of Micronesia, inter alia, to: 1) exercise and dispose of the resource rights confirmed by or arising from the U.N. Convention of the Law of the Sea; and 2) represent itself in international negotiations respecting those resource rights and other law of the sea conventions. The Micronesian Delegation's April 23 letter went on to state:

> In our previous discussions, reference has been made to the status negotiations as bearing on these points. The political status agreements so far negotiated, however, are silent on all of these points, and do not purport to cover them explicitly. The representatives of the Congress of Micronesia in the status negotiations did explicitly state to Ambassador Williams that they regard the sea resources of the economic zone as internal resources of Micronesia . . . , and not a part of "foreign affairs."
>
> Uncertainty arises because the existing draft documents confide foreign policy powers under future status agreements to the United States, and because in other contexts the United States Government has taken the strong position that foreign policy powers carry with them, as an incident of those powers, control over the resources of the sea. Such a conclusion would appear quite unwarranted in the context of a trust territory, over which the US does not exercise sovereignty, or in the case of the Trusteeship Agreement, in which not "foreign policy" or "foreign relations," but merely military security functions are entrusted to the trustee power . . . . Those responsibilities and powers are only in the smallest measure, however, related to the control of all the resource interests and powers of Micronesia in its economic zone or archipelagic or inland waters.

(U.S. Exh. 73 at [Bates] 940-41.) It is apparent from this letter by a representative of the Congress of Micronesia ("COM") that the COM's understanding of the United States' position in April 1975 was that matters affecting the territorial sea were within the United States' exclusive "foreign affairs" domain. And it is also clear from a May 5, 1975 letter by a COM official, that the United States would not allow the remaining TTPI districts to assert property interests in the territorial sea and beyond until the issue of future sovereignty in those districts had been decided. (U.S. Exh. 76.) If the Congress of Micronesia had understood back in April and May 1975 that the land return policy statement or Secretarial Order No. 2969 had guaranteed a transfer of title to the TTPI districts of lands and resources underlying the territorial sea, clearly some reference to the land return policy and Secretarial Order No. 2969 would have been made in the foregoing historical materials. Thus, the foregoing events demonstrate clearly that, as of May 1975 (four months after the Covenant was signed), the issue of ownership of a territorial sea was understood to be unsettled even in the TTPI districts other than the CNMI.

3. The CNMI's Argument That Secretarial Order No. 2989 "Transformed" The Land Policy Statement And Secretarial Order No. 2969 "Into Action" On January 9, 1978, And Vested Title To Oceanic Submerged Lands In The Commonwealth Is Wholly Without Substance

The CNMI also argues that Secretarial Order No. 2989 was a link in the chain of circumstances "transforming" the November 1973 policy statement and Secretarial Order No. 2989 "into action" on January 9, 1978, when the CNMI's constitutional government became effective. (CNMI 1st Br. 21-22.) As now explained, nothing could be further from the truth.

As previously explained, Congress ratified the Covenant on March 24, 1976. At the time, there was no constitutional government in the Northern Mariana Islands yet in existence to receive the transfer of "real property" contemplated by Section 801 of the Covenant. Accordingly, on that same day (March 24, 1976), the Department of the Interior issued Secretarial Order No. 2989 to establish a separate civil administration in the NMI to be overseen by a newly established "Resident Commissioner,"effective April 1, 1976. In addition, Secretarial Order No. 2989 vested title to "public lands situated in the Northern Mariana Islands" in the Resident Commissioner.

Secretarial Order No. 2989 was the vehicle adopted by the U.S. Department of the Interior to implement fully the United States' "real property" title transfer obligations under Section 801 of the Covenant. Although Secretarial Order No. 2989 used the term "public lands" as shorthand for describing TTPI government "real property" subject to Covenant § 801, there is no legal significance to this difference in terminology because the Trust Territory government made it clear that it deemed the term "public lands" in Order No. 2989 and the term "real property" as used in Covenant § 801 was synonymous "in meaning and intent." (See CNMI Exh. 4 at 1-2.) In contrast, there is nothing in Secretarial Order No. 2989 which indicates an intent to incorporate by reference the concept of "public lands" as described in the November 1973 land policy statement, or the definition of public lands as defined in Secretarial Order No. 2969.

Secretarial Order No. 2989 also made clear that nothing remained to be transferred to the Commonwealth pursuant to Secretarial Order No. 2969 after transfer of real property to the High Commissioner pursuant to Secretarial Order No. 2989. [11/] As Secretarial Order No. 2989 stated:

[11/] That Secretarial Order No. 2969 would not vest title to any lands in the NMI government was made clear by subsequent (December 11,1978) correspondence in which a TTG official informed the NMI government that:

(continued...)

> All . . . public lands situated in the Northern Mariana Islands title to which is now vested in the Trust Territory Government and which have not been transferred to the legal entity created by the Mariana Islands District Legislature according to Secretary of the Interior Order No. 2969 shall vest in the Resident Commissioner.

(U.S. Exh.12, 41 Fed. Reg. 15895 (rt. col.)(1976); emphasis added.) The foregoing passage further establishes that Covenant § 801 and Secretarial Order No. 2989 were intended by the United States to supercede Secretarial Order No. 2969, and thus, following Secretarial Order No. 2989, Secretarial Order No. 2969 would have no prospective practical effect in the Northern Mariana Islands. [12/]

Finally, the CNMI itself acknowledged in December 1976 that Secretarial Order No. 2989 would not convey title to oceanic submerged lands to the Commonwealth. At that time, it adopted Article XI, § 1, of the CNMI Constitution, which expressly differentiates "submerged lands off the coast of the Commonwealth from "lands . . . vested in the Resident Commissioner under Secretarial Order 2989." See U.S. Exh. 13, at 19. If, as the CNMI now contends, submerged lands off the coast of the Commonwealth were already subsumed within "lands . . . vested in the Resident Commissioner under Secretarial Order 2989," there would have been no reason for the framers to describe Secretarial Order No. 2989 lands separately from oceanic submerged lands as it did in Article XI, §1 of the CNMI Constitution.

[11/](...continued)

> [a]lthough Secretarial Order No. 2969 is mentioned in Secretarial Order No. 2989 . . . , it does not and will not appear in the 'chain of title' to any public lands in the Commonwealth. First, no conveyance of title was ever made to a "legal entity"as defined in Order No. 2969 by either the High Commissioner or the Resident Commissioner, and, secondly, the present Marianas Public Land Corporation exists pursuant to the [CNMI] Constitution, not Order No. 2969.

CNMI Exh. 15 at 2.

[12/] Because Secretarial Order No. 2989 expressly applied to all public lands situated in the Northern Mariana Islands (i.e., real property) that had not yet been transferred to a legal entity established by the Marianas district legislature pursuant to Secretarial Order No. 2969 (and no such entity existed at the time), it did not include oceanic submerged lands within its coverage. As the above passage makes clear, the only public lands that were vested in the U.S. Resident Commissioner pursuant to Secretarial Order No. 2989 were those "situated in the Northern Mariana Islands." As a three-mile belt of ocean surrounding the Commonwealth is not situated "in" the Northern Mariana Islands, only a tortured reading of Secretarial Order No. 2989 would extend its coverage to lands underlying the territorial sea.

4. The CNMI's "Course Of Dealing" Evidence Does Not Establish That The United States' Conveyed Permanent Ownership Of Oceanic Submerged Lands To The Commonwealth

The CNMI next seeks to find support for its claim to ownership of oceanic submerged lands in two letters written by TTPI officials. See CNMI 1st Br. 13-14, 25. The first letter, dated December 11, 1978, is from Kozo Yamada, TTG Chief of Lands to Felip Ruak, the Acting Chairman of the Marianas Public Land Corporation, responding to Mr. Ruak's letter requesting that the TTPI government transfer title to public lands. CNMI Exh. 15. In that letter, Mr. Yamada informed Mr. Ruak that execution of deeds transferring title to oceanic submerged lands was unnecessary, given the provisions of Article XI, § 2 of the CNMI Constitution which stated that "management of submerged lands" would "be provided for by law." [13/] The second letter, dated August 9, 1979, was from High Commissioner Adrian Winkel to Pedro Tenorio, Executive Director of the Marianas Public Lands Corporation, which stated that the "Trust Territory is prepared to execute a confirmation deed for all lands below the ordinary high watermark as soon as the Commonwealth determines in what manner title should vest therein." (CNMI Exh. 10.)

Neither letter is helpful to the Commonwealth because neither reflects a U.S. intent permanently to convey oceanic submerged lands to the CNMI. Both letters were written after Asst. Solicitor Chapman issued his June 29, 1978 opinion letter, which had concluded that the Covenant provided for the transfer of only fast lands:

> [A] reading of the Section-By-Section Analysis of the Covenant prepared by the Marianas Political Status Commission to explain the Covenant to the Mariana District Legislature and to the electorate of the [NMI] strongly indicates that the real property referred to in Section 801 were fast lands as well as the improvements thereon and not the submerged lands.

(U.S. Exh. 19 at 2.) The Yamada and Winkel letters were also written after Asst. Solicitor Chapman issued a separate July 31, 1978 opinion letter to the Director of Territorial Affairs, reasserting that

> It is my position that these submerged lands will become the property of the United States by operation of law when the Northern Mariana Islands become a Commonwealth of the United States . . . unless the Congress passes an act, as I am sure it will, conveying these lands to the government of the Northern Mariana Islands . . . . I continue to believe, however, that the source of the Northern Marianas' current title to its submerged lands stems from the Trust Territory Code and Section 505 of the Covenant and not

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[13/] Although the letter referenced CNMI Const. Art. XI, § 1, the quoted language actually appears in Art. XI, § 2. See U.S. Exh. 13 at 19.

from Section 2 of Article XI of their Constitution. That section provides:

> The management and disposition of submerged lands of the coast of the Commonwealth shall be provided by law.

This is hardly a transfer of title in those lands to the Commonwealth. It merely gives the legislature the authority to manage and dispose of the lands if, when, and to the extent that title does attach.

As I pointed out in my earlier [June 29, 1978] memorandum to you, I am persuaded that the Government of the Northen Mariana Islands probably has ownership and exclusive jurisdiction over these submerged lands, at least at this time. However, when the Northern Marianas become a Commonwealth and a territory of the United States the submerged lands will belong to the United States by operation of law, and thereafter it will take an act of Congress, pursuant to its plenary authority under Article IV, Section 3, Clause 2, of the [U.S.] Constitution to convey title in them to the local government. It is a well settled rule that the United States cannot be divested of its title to property except by an Act of Congress.

U.S. Exh. 21 at 1. In light of its timing (less than five months after Mr. Chapman's July 31, 1978 letter), Mr. Yamada's reference to "management of submerged lands to be provided by law" (CNMI Exh. 15 at 1) must be read in the context of Asst. Solicitor's prior statement that such language "is hardly a transfer of title in those lands to the Commonwealth. It merely gives the legislature the authority to manage and dispose of the lands if, when, and to the extent that title does attach." U.S. Exh. 21 at 1. Accordingly, Mr. Yamada's December 11, 1978 letter at most suggests that the CNMI was constitutionally authorized to manage submerged lands if and to the extent that the CNMI had temporary title and jurisdiction over such lands pursuant to Covenant § 505, as Asst Solicitor Chapman had assumed was "probably" the case. Contrary to the CNMI's suggestion, that letter does not reflect a U.S. intent permanently to convey CNMI ownership of oceanic submerged lands.

As stated above, the CNMI also relies on a second TTPI government letter from the same time period in support of its claim to CNMI ownership of oceanic submerged lands. That letter was from High Commissioner Adrian Winkel to Pedro Tenorio, Executive Director of the Marianas Public Lands Corporation, dated August 9, 1979, and stated that the Trust Territory had prepared and enclosed confirmation deeds for surface lands. [14/] It went on to state that the TTPI government was "prepared to

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[14/] The United States has not been able to locate in any of its records the deeds that were reported to be enclosed with Mr. Winkel's August 1978 letter. But it seems clear in context that they pertained to surface lands only, because they were being provided to the Marianas Public Land Corporation, and that Corporation (continued...)

execute a confirmation deed for all lands below the ordinary high watermark as soon as the Commonwealth determines in what manner title should vest therein." [15/] This letter was prompted by Asst. Solicitor Chapman's February 5, 1979 letter opining that the NMI government did not automatically succeed to the property rights of the Trust Territory as a result of Secretarial Order No. 2989, and that an actual transfer of legal title by the Trust Territory government to the Resident was required before title to any property could vest in the Northern Marianas government. (U.S. Exh. 49.) It represented a reversal of TTPI position expressed in Mr. Yamada's December 11, 1978 letter that deeds were not necessary to transfer title to the NMI constitutional government. Given the timing of his August 9, 1979 letter, High Commissioner Winkel's expression of willingness therein to execute a confirmation deed for all lands below the ordinary high watermark must be read in context with Asst. Solicitor's prior statements. Specifically, he stated that: "the real property referred to in Section 801 were fast lands as well as the improvements thereon and not the submerged lands" (U.S. Exh. 19 at 2); that the NMI government "probably has ownership of and exclusive jurisdiction over these submerged lands, at least at this time" (id.); that "this is only a temporary title and jurisdiction" (id.); that "the source of the Northern Marianas' current title to its submerged lands stems from the Trust Territory Code and Section 505 of the Covenant" (U.S. Exh. 21 at 1); and that "when the Northern Marianas become a Commonwealth and a territory of the United States the submerged lands will belong to the United States by operation of law, and thereafter it will take an act of Congress, pursuant to its plenary authority under Article IV, Section 3, Clause 2, of the [U.S.] Constitution to convey title in them to the local government." Id. at 2. In these circumstances, Adrian Winkel's August 9, 1979 letter cannot reasonably be interpreted as an intent to convey to the Commonwealth any permanent interest in oceanic submerged lands. [16/]

[14/](...continued)
lacked the authority under the CNMI Constitution to receive title to submerged lands. Compare CNMI Const. Art. XI, § 3 with id. at § 2; U.S. Exh. 13 at 19.

[15/] The United States has no record of any deed ever being issued to the Commonwealth that conveyed title to "lands below the ordinary high water mark." Nor has the CNMI produced any to date. Even if they do exist, they conveyed at most only a temporary title that dissolved when the sovereignty provisions of Section 101 of the Covenant became effective on November 4, 1986.

[16/] At CNMI 1st Br. 14, the CNMI seeks to find legal significance in a Memorandum of Understanding by and between the Trust Territory Government and the NMI government pursuant to which the NMI (continued...)

II. EVEN IF THE TERM "REAL PROPERTY" COULD BE BROADLY CONSTRUED TO INCLUDE OCEANIC SUBMERGED LANDS, THE CNMI'S CLAIM THAT SECTION 801 REQUIRED THE UNITED STATES TO TRANSFER TITLE TO ANYTHING MORE THAN LANDS UNDERLYING A THREE-MILE BELT OF OCEAN SURROUNDING THE CNMI'S SHORELINES MUST BE REJECTED

As explained above, the United States is not required by Section 801 of the Covenant to convey title to oceanic submerged lands to the Commonwealth. Nor does any such duty arose from the Land Return Policy Statement, Secretarial Order No. 2969, or Secretarial Order No. 2989. But if this Court should decide otherwise, and conclude that title to oceanic submerged lands should be vested in the Commonwealth, then, at most, the CNMI should be entitled to no more than the lands underlying a belt three nautical miles around the CNMI's shorelines. In its December 13 summary judgment memorandum, the United States has already fully explained why, if the CNMI is deemed to own the submerged lands off the coast of the Commonwealth, its title to those lands cannot exceed three miles as determined by baselines measured for traditional (non-archipelagic) baselines. Rather than repeat the analysis here, we incorporate herein pages 41-43 of that memorandum. [17/]

The CNMI's motion for summary judgment seeks a declaratory judgment decreeing that it owns not just lands underlying a three-mile territorial sea, but also lands underlying an additional nine miles (i.e., in the aggregate, all lands underlying a 12-mile territorial sea). CNMI 1st Br. 27-28. The CNMI also claims

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[16/](...continued)
government agreed to assume control of "all matters relating to ongoing Marine Resources programs in the Northern Marianas Islands. Responsibility for enforcing all applicable laws relating to Marine Resources shall be with the NMG." Contrary to the CNMI's wishful thinking, this document implies no conveyance of oceanic submerged lands to the Commonwealth. Instead, it was consistent with the views of Asst. Solicitor Chapman that, until the sovereignty provisions of Covenant § 101 became effective, the CNMI had temporary title and jurisdiction over oceanic submerged lands (U.S. Exh. 19 at 2), that the CNMI had authority under Covenant § 505 to enforce laws of the Trust Territory Government (including marine resources laws such as 45 TTC §§ 1-53) (U.S. Exh. 21 at 1) , and that the Northern Marianas government had authority under Article XIV, § 1 of the CNMI Constitution to administer a marine resources program "in waters off the coast of the Commonwealth over which the Commonwealth now or hereafter may have any jurisdiction under United States law." U.S. Exh. 13 at 23 (emphasis added). Thus, the NMI government's authority to manage marine resources derived from U.S. law and Covenant § 505, and not incidental to any permanent conveyance of title to oceanic submerged lands by the United States.

[17/] At pp. 16-18, supra, we explained why 67 TTC § 2 applies to marine areas in the tidelands zone, and possibly lands underlying internal waters, but does not apply to marine areas underlying the territorial sea. In our December 13 memorandum we similarly argued that the CNMI had no valid claim to lands underlying waters seaward of the low water mark. The argument at pp. 41-43 of that memorandum was an alternative argument that assumed arguendo that 67 TTC § 2 applied to the territorial sea, and went on to explain why, even if it did, the territorial sea limit under 67 TTC § 2 was three nautical miles.

that the boundary between its internal waters and the territorial sea must be demarcated by archipelagic baselines. CNMI 1st Br. 16. These claims must be rejected because they arise from the CNMI's erroneous assumption that its rights to "real property" in the Northern Mariana Islands under Section 801 of the Covenant included all rights acquired by independent sovereign nations under customary international law and U.N. Convention of the Law of the Sea during the period from February 15, 1975 (when the Covenant was signed) to November 4, 1986 (when the Trusteeship Agreement was terminated). As we now explain, if the CNMI is deemed to own the submerged lands off the coast of the Commonwealth at all, that claim of ownership must be limited to the breadth of the territorial sea that was recognized under international law as of March 24, 1976 (when the Covenant was ratified by Congress) -- which was three nautical miles.

A. The CNMI's Arguments That It Is Entitled To Assert Title Interests In Submerged Lands That Accrued Under International Law During The Period After Section 801 Of The Covenant Became Effective But Before The Trusteeship Terminated On November 4, 1986 Are Unsustainable

On the basis of language in Covenant § 801 extending the United States' title transfer obligation to any real property in the NMI "acquired in any manner" by the TTPI government after the signing of the Covenant, the CNMI asserts that it is entitled to ownership of a 12-mile territorial sea (as determined from archipelagic baselines) as well as exclusive jurisdiction over a 200 mile EEZ based on customary international law, codified in the Law of the Sea Convention, as those sources of law continued to develop and expand coastal States' rights in the territorial sea and in an EEZ during the interval between the signing of the Covenant and the termination of the Trusteeship. CNMI 1st Br. 29-31. [18/] As we now explain, these

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[18/] The CNMI also tries to argue that, for the purposes of Section 801 of the Covenant, the Trusteeship Agreement terminated in 1990 when the Security Council first officially recognized the termination. CNMI 1st Br. 28. This argument is directly contradicted by Covenant § 1002, which provides that:

> The President of the United States will issue a Proclamation announcing the termination of the Trusteeship Agreement, or the date on which the Trusteeship Agreement will terminate . . . . Any determination by the President that the Trusteeship Agreement has been terminated or will be terminated on a day certain will be final and will not be subject to review by any authority, judicial or otherwise.

On November 3, 1986, President Reagan issued Proclamation No. 5564, declaring that the U.N. Trusteeship was terminated with respect to the Marshall Islands, the Federated States of Micronesia, and the Northern Mariana Islands, effective at 12:01 a.m. on November 4, 1986. (U.S. Exh. 29; 51 Fed. Reg. 40,399.) Thus, for the purposes of giving effect to Section 801 of the Covenant, the Trusteeship Agreement ended at that time, by statute, the President's proclamation effecting termination must be considered "final and will not be

(continued...)

claims have no merit because the negotiating texts and Law of the Sea Convention on which the claims are based do not grant the Commonwealth, as a territory of the United States that it is subject to U.S. sovereignty and foreign affairs authority, the right to assert those claims, and did not grant the Trust Territory government the right to make those claims, at any time between February 15, 1975 and November 4, 1986.

1. The CNMI is not a "Coastal State" under the Law of the Sea Convention, and thus enjoys none of the rights of a Coastal State under international law

The maritime and ocean resource rights claimed by the CNMI in this case are, under the law of the sea, enjoyed only by political entities that are coastal States. "Under international law, a 'State' is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." 1 American Law Institute, Restatement of the Law (Third): The Foreign Relations Law of the United States, § 201 (1987) ("Restatement") (emphasis added). (U.S. Exh. 79 at [Bates] 980.) A state of the United States is not a "State" under international law because, under the Constitution of the United States, foreign relations are the exclusive responsibility of the Federal Government (U.S. Const., Art. I, § 8; Article II, § 2, cl. 2; Restatement § 201, comment g). Nor may a state of the U.S. make treaties. (U.S. Const., Art. I, § 10, cl. 1).

The CNMI is similarly situated to U.S. states with respect to rights under international law. Under Sections 101 and 104 of the Covenant, the people of the CNMI ceded sovereignty and foreign affairs power of the Federal Government. Construing Covenant § 101, the SBS Analysis unequivocally declared:

> The United States will have sovereignty, that is, ultimate political authority, with respect to the Northen Mariana Islands. The United States has sovereignty with respect to every state, every territory and the Commonwealth of Puerto Rico. United States sovereignty is an essential element of a close and enduring political relationship with the United States,

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[18/](...continued)
subject to review by any authority, judicial or otherwise." Covenant § 1002

Juda v. United States, 13 Ct. Cl. 667 (1987), on which the CNMI relies to show that the Trusteeship terminated later than 1986 is inapposite because it involved the United States' relationship with Palau, which is not defined by the Covenant, and which was not governed by Section 1002 of the Covenant in particular. In contrast, "[t]he Covenant has created a 'unique' relationship between the United States and the CNMI, and its provisions alone define the boundaries of those relations." Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682, 687 (9th Cir.1984). In these circumstances, the CNMI is bound by the President's determination in Proclamation No. 5564.

> whether in the form of a state, in the traditional territorial form, or as a commonwealth.

U.S. Exh. 11 at 7. Covenant § 104 provides that "the United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands" (emphasis added). The CNMI may not make treaties. See Covenant § 501(a). [19/] Accordingly, the CNMI may make not make maritime claims that are not permitted to be made by states of the United States.

Although the Law of the Sea Convention provides that certain other entities may also have the rights of States (even though they may lack foreign affairs and treatymaking authority), [20/] the CNMI is not among those entities. Article 305 of the Law of the Sea Convention identifies which political entities may sign the Convention and thereafter become a Party to the Convention. Specifically, they include: 1) all States; 2) Namibia (which is represented by the United Nations Council for Namibia); 3) all self-governing associated States which have chosen that status in an act of self-determination; 4) all self-governing associated States which, in accordance with their respective instruments of association, have competence over the matters governed by the Convention, including the competence to enter into treaties in respect of those matters; 5) all territories which enjoy full internal self-government, recognized as such by the U.N., but that have not attained full independence and which have competence over the matters governed by the Convention, including the competence to enter into treaties in respect of those matters; and 6) international

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[19/] Section 501 of the Covenant made the provisions of Article 1, Section 10, clause 1, of the U.S. Constitution applicable to the NMI transitional government, as though it were a state of the United States, after that government became operational in January 1978. As relevant here, U.S. Const. Art. I, sec. 10, cl. 1 provides: "No state shall enter into any treaty, alliance, or confederation." That constitutional provision goes on to state: "No state shall, without the consent of Congress . . . enter into any agreement or compact with . . . a foreign power." Thus, Section 501 specifically denied the NMI transitional government the authority to conduct foreign relations at any time from that government's inception in January 1978 through the end of the Trusteeship in November 1986. And because the NMI transitional government lacked an essential attribute of an independent sovereign "State" within the meaning of international law, namely, the authority to engage in formal relations with independent sovereign nations, none of the rights that may have accrued to Coastal States (i.e., independent sovereigns) under customary international law or under UNCLOS III became vested in the Commonwealth before the United States sovereignty provisions of Covenant 101 became effective.

[20/] Article 1 of the Convention defines "States Parties" as "States which have consented to be bound by this Convention and for which this Convention is in force." Article 1 of the Convention further provides that the Convention applies "mutatis mutandis" to the entities referred to in article 305 other than States which "become Parties to this Convention in accordance with the conditions relevant to each, and to that extent States Parties refers to those entities."

organizations, in accordance with Annex IX of the Convention. [21/]

It is beyond dispute that the CNMI is neither a State nor an international organization. Self-evidently, it is not Namibia (which is now an independent State, a status the CNMI deliberately rejected). Further, by virtue of Covenant §§ 101 and 104, the CNMI lacks the competence to enter into treaties generally. Therefore the CNMI is not, and may not become, a party to the U.N. Convention on the Law of the Sea.

Because the CNMI cannot be a Party to the Convention, it cannot be a "coastal State" as that term is used in the Convention. Article 2 of the Convention provides that a coastal State has sovereignty over its land territory, internal waters, territorial sea and superjacent airspace. But Section 101 of the Covenant has vested sovereignty over the Northern Mariana Islands in the United States, not the CNMI.

The CNMI's ineligibility for coastal State status under international law disqualifies it from asserting rights in a territorial sea measured from archipelagic baselines. To be sure, Article 2 of the Convention provides that an archipelagic State has sovereignty over its archipelagic waters. However, pursuant to article 46 of the Convention, the CNMI cannot qualify as an archipelagic State because, even though it is in geographic terms an archipelago, it is not an independent mid-oceanic State. In this regard, the CNMI is no different than Hawaii which also is not entitled to recognition as an archipelagic State under the Law of the Sea Convention because the United States does not qualify as an archipelagic State. 2 Restatement § 511 comment i, at 29 (U.S. Exh. 81); Mohamed Munavvar, Ocean States: Archipelagic Regimes in the Law of the Sea 126 (Kluwer 1995) (U.S. Exh. 83); James Crawford, Islands as Sovereign Nations, 38 Int'l & Comp. L.Q. 277, 296-297 (1989) (U.S. Exh. 93). See also Authorities quoted in paragraph 118 of the CNMI's December 13, 2002 Proposed Findings of Fact.

The CNMI's claims to ownership of a twelve-mile territorial sea and to exclusive jurisdiction over a 200-mile EEZ must be rejected for similar reasons. Simply stated, under international law, the right to ownership of a 12-mile territorial sea and to regulate a 200-mile EEZ inures only to "States" and other entities eligible to become parties to the U.N. Convention. As explained, the CNMI is not a "State" as defined by Article 305 of UNCLOS III because it has no foreign affairs or treatymaking authority, and does not otherwise qualify as a party to UNCLOS III.

[21/] See Annex IX of the UNCLOS III (U.S. Exh. 80 at [Bates] 0991), also available at http://www.un.org/Depts/los/index.htm.

Taking a slightly different tack, the CNMI raises what amounts to an alternative argument that, even if the CNMI could not claim the rights of a coastal State between February 15, 1975 (the date on which the Covenant was signed) and the end of the Trusteeship in November 1986, the Trust Territory government enjoyed the status of a coastal State during that period. CNMI 1st Br. 28. According to the CNMI, just before the termination of the trusteeship, "countries had possession of the twelve-mile territorial sea that began at their archipelagic or coastal baseline and internal waters" under international law, and thus "[t]his is what the Trust Territory government held, what it passed to the CNMI, and what the CNMI claimed prior to the termination of the Trust." Id. As we now explain, these assertions are equally groundless.

The Covenant was signed on February 15, 1975, but did not become effective until March 24, 1976. On that date, the CNMI irrevocably agreed to cede its sovereignty to the United States (with only the effective date suspended). Thus, as of March 24, 1976, the United States had a presently vested interest in whatever inured to a mainland State with island components under international law, including whatever expansion may have occurred under international law in the rights to a territorial sea and an EEZ between March 24, 1976 and the end of the Trusteeship. Accordingly, the TTPI government had no trust duty to assert on behalf of the CNMI the rights of a coastal State under international law during that period.

In any event, the CNMI is incorrect in its suggestion (CNMI 1st Br. 28) that the Trust Territory, at any time after the signing of the Covenant, acquired any developing and expanding maritime rights inuring to coastal States under international law. Throughout the Trusteeship, the political status of the Trust Territory Government was sui generis. Gushi Bros. Co. v. Bank of Guam, 28 F.3d 1535, 1541 (9th Cir. 1994); Fleming v. Department of Public Safety, 837 F.2d 401, 404 (9th Cir.), cert. denied, 488 U.S. 889 (1988).[22/] It never rose to the level of an independent sovereign "state," and did not otherwise entitle the TTPI government to assert the rights of a "Coastal State" under UNCLOS III and/or the customary international law of the sea. Like the NMI transitional government (circa 1978 - 1986, i.e., before it became a Commonwealth), [23/] the Trust Territory Government lacked an essential quality of all entities recognized

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[22/] "The political and sovereign status of the Trust Territory and the Trust Territory government puzzled legislators, courts, and commentators from the beginning." Temengil v. Trust Territory of Pacific Islands, 881 F.2d 647, 650 (9th Cir. 1989).

[23/] The period between March 24, 1976 (when the Covenant was ratified by the U.S. Congress) and November 4, 1986 was simply a transition period. In a September 12, 1974 prepared statement for Congress (five months before the Covenant was signed), U.S. Representative Williams explained the status of the NMI (continued...)

as "States" under international law – the capacity to engage in formal relations with independent sovereign nations. Indeed, such diplomatic authority was expressly withheld by President Kennedy when he delegated the civil administrative authority over all TTPI districts to the Department of the Interior, and expressly required that "all relations between departments or agencies of the [United States] Government and appropriate organs of the United Nations with respect to the Trust Territory shall be conducted through the Secretary of State." Executive Order No. 10265, 16 Fed. Reg. 6419 (1951) (U.S. Exh. 74); see also Secretarial Order No. 2658 ("Communications of the Government of the Trust Territory with foreign governments shall be cleared through the Department of the Interior for transmittal by the Department of State, unless some other procedure is approved by the Secretary of the Interior") (U.S. Exh. 75). In these circumstances, the Trust Territory government did not acquire as "real property" within the meaning of Section 801 of the Covenant the right enjoyed by coastal States under international law to a 12-mile territorial sea as measured from archipelagic baselines.

2. The CNMI cannot rely on rights enunciated in a draft provision of an early negotiating text that was ultimately excluded from the Law of the Sea Convention

The CNMI nonetheless goes on to argue that, despite its non-State status, it is entitled to assert ownership of submerged lands and to demarcate inland waters from an asserted twelve mile territorial sea on the basis of straight archipelagic baselines. In support, the CNMI cites the Revised Informal Composite Negotiating Text ("revised ICNT") of the Third United Nations Conference on the Law of the Sea ("UNCLOS III"), which the CNMI characterizes as "represent[ing] generally accepted principles and practices of customary international law." See CNMI 1st Br. at 18-20; CNMI Proposed Finding of Fact

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[23/](...continued)
government during this period thusly:

> [f]ollowing final approval of the new commonwealth agreement and the new Marianas' constitution, which might occur as early as July 1976, and before the Trusteeship officially ends, the new government of the Northern Marianas would be installed on a transitional basis. It would function on a permanent basis except for those features which might be incompatible with the continuation of the Trusteeship. Included in the latter category are U.S. sovereignty, U.S. citizenship and the application of certain federal laws.

U.S. Exh. 77.

("PPF") No. 128-30. [24/] As we now explain, this argument cannot withstand analysis.

The CNMI's reliance on the revised ICNT is misplaced because it was never formally adopted as a convention of the law of the sea. During the brief period that it was under consideration by UNCLOS III, a draft proposed Article 136, on which the CNMI purports to rely, provided as follows:

> The rights recognized or established by the present Convention to the resources of a territory whose people have not attained either full independence or some other self-governing status recognized by the United Nations, or a territory under foreign occupation or colonial domination, or a United Nations Trust Territory, or a territory administered by the United Nations, shall be vested in the inhabitants of that territory, to be exercised by them for their own benefit and in accordance with their own needs and requirements.

U.S. Exh. 60 at [Bates] 0859-0860. According to the University of Virginia Commentary accompanying the Law of the Sea Convention, the ICNT was highly controversial, and had a long and troubled history during UNCLOS III. Draft Article 136 encountered "strong opposition" when originally presented. Due to this opposition and because it implicated international law issues that were beyond the scope of the law of the sea, the revised ICNT quoted above was removed as an article, redesignated as a "Transitional Provision," and placed at the end of the articles, i.e., placed in a location that it "would not in any way imply that the matters dealt with in the provision are permanent and immutable in nature." (U.S. Exh. 60 at 0860.) And because it remained "extremely contentious" after removal as an article, the revised ICNT language quoted above did not survive even as a "transitional provision" in the Convention. Id. To the contrary, it was ultimately abandoned by the Conference in favor of a resolution that contained no recognition of property rights on the part of Trust Territory inhabitants:

> In the case of a territory whose people have not attained full independence or other self-governing status recognized by the [U.N.] . . . , provisions concerning rights and interests under the Convention shall be implemented for the benefit of the territory with a view to promoting their well-being and development. [25/]

U.S. Exh. 60 at [Bates] 857. Thus, contrary to the draft of the revised ICNT, the resolution as reformulated did not purport to vest any "rights recognized or established by the present Convention to the resources of

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[24/] The original ICNT was issued on July 15, 1977 as U.N. document A/CONF.62/WP.10.

[25/] As the U.N. convention historians explained, by adopting a resolution deleting recognition of property rights vested in the inhabitants of non-self-governing territories, such "a highly divisive issue, which at one time threatened to wreck the Conference, was settled, probably to the satisfaction of no one." (U.S. Exh. 60 at [Bates] 0855.

a territory" in the inhabitants of a trust territory. Instead, the substitute resolution imposed a duty, analogous to Article 6(2) of the Trusteeship Agreement, requiring U.N. Trustees to act for the benefit of Trust Territory inhabitants and to promote their well-being.

Given the controversial history of the revised ICNT, the CNMI's contention that it "represented customary international law" rings hollow. [26/] Because the CNMI is not a "State" under international law, and because the draft revised ICNT did not vest in the CNMI any rights to a territorial sea (as measured from straight archipelagic baselines) and a 200-mile EEZ, it is within the exclusive province of the United States, of which the CNMI is a subordinate part, to exercise the rights and responsibilities set forth in the U.N. Convention on the Law of the Sea with respect to the territorial sea and the EEZ adjacent to the Commonwealth.

3. The United States Did Not Breach A Trust Responsibility By Not Asserting Archipelagic Status for the NMI

The CNMI nonetheless alleges that, by failing to claim a twelve-mile territorial sea as measured from straight archipelagic status on behalf of the CNMI, the United States has breached its duty as trustee to protect the people of the CNMI against the loss of their lands and natural resources. CNMI 1st Br. 16. This assertion cannot be sustained because the United States had no trust obligation to assert archipelagic status and a twelve mile territorial sea for the Northern Mariana Islands at any time before or after the Covenant became effective.

As threshold matter, the United States did not have a trust obligation to decide for the Marianas people what form of political relationship they should have with the United States and other countries after termination of the Trusteeship. Rather, the Marianas people were free, as a matter of political self-determination, to choose to become independent from the U.S., just as other TTPI districts subsequently

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[26/] "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Rest. 3d Foreign Relations § 102. (U.S. Exh. 79 at [Bates] 0978-79.) "Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might become "particular customary law" for the participating states." Id. "A principle of customary law is not binding on a state that declares its dissent from the principle during its development." Id. The ICNT was an informal work-in-progress and not the final text adopted by the Conference. Revision 2 of the ICNT was superceded by three later texts (the informal text of the Draft Convention, A/CONF.62/WP.10/Rev.3, Aug. 27, 1980; the Draft Convention, A/CONF.62/L.78, Aug 28, 1981; and the Convention as finally adopted by the Conference, A/CONF.62/122, Oct. 7, 1982). The United States voted against the adoption of the draft convention on April 30, 1982. (U.S. Exh. 78).

elected to do, or to become a territory "in political union with and under the sovereignty of the United States," as the NMI people did in Section 101 of the Covenant. Throughout the arm's-length Covenant negotiations between the United States and the Marianas people, the NMI district was represented by sophisticated and distinguished U.S. counsel, Howard Willens and Deanne Siemer, both partners of the preeminent Washington, D.C. law firm, Wilmer, Cutler & Pickering. During those negotiations, the CNMI could have elected to become a freely associated state and retained its sovereignty and ownership of its territorial sea (as other TTPI districts subsequently have done). The United States' trust responsibility, however, did not require the U.S. to force that status on the NMI inhabitants. [27/]

In any event, the United States had no trust obligation to assert claims to archipelagic status and archipelagic straight baselines for the Northern Mariana Islands at any time before or after the Covenant became effective. The United States could not lawfully have asserted archipelagic status for the Commonwealth before the Covenant became effective in March 1976, because claims to archipelagic baselines, even those pressed by independent sovereign island States, were not at that time permitted under international law. Likewise, the United States was not under any trust obligation, in its continued role as U.N. Trustee after the Covenant became effective in March 1976, to assert archipelagic status for the Northern Mariana Islands. By then, the CNMI had irrevocably ceded sovereignty to the U.S. (to become effective upon termination of the Trusteeship). Moreover, as of March 24, 1976, the United States' future paramount interest in waters seaward of the Commonwealth's low-water mark had already become vested. Finally, by March 1976, the CNMI had already agreed (backed by overwhelming popular support in a June 1975 plebiscite) to become an island component of a sovereign mainland State, i.e., a status under international law that (as explained below) does not permit archipelagic baselines to be drawn. Once those events had occurred, the CNMI relinquished any interests it may otherwise have been entitled to assert in the territorial sea, archipelagic baselines, and an EEZ, to the United States, and had no standing to assert the rights of a coastal State in these marine areas under customary international law. In these circumstances, the United States trust responsibility for the Marianas inhabitants under Article 6(2) of the Trusteeship

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[27/] Unlike the other TTPI districts, the Northern Marianas insisted on becoming part of the United States and in so doing exercised its sovereign right to self-determination as contemplated by the Trusteeship Agreement. Granting the Northern Marianas their right to make this choice constituted a "fulfillment of [the United States'] legal obligation under the terms of the United Nations Trusteeship Agreement." Senate Comm. On Interior & Insular Affairs, Hearing on S.J. Res. 107, 94th Cong., 1st Sess. 356-496, at 44 (1975). U.S. Exh. 96 at [Bates] 1117 .

Agreement was not implicated by any developments in the international law of the sea that post-dated March 24, 1976, the effective date of the Covenant.

Furthermore, in evaluating the CNMI's breach of trust claim, it is important to bear in mind that a trend toward international acceptance of the drawing of archipelagic baselines by island States was still emerging during the late 1970s and early 1980s, and the process for U.S. recognition of archipelagic baselines by coastal States did not begin until 1983. Prior to 1982, the United States formally objected to the claims by Fiji, Cape Verde, Sao Tome and Principe, the Solomon Islands, and the Philippines, that they are archipelagic States. II Cumulative Digest of United States Practice in International Law 1981-1988, at 2063-2068 (1994) (U.S. Exh. 82) ("Cumulative Digest"). A change in U.S. policy concerning archipelagic baselines for island States began to develop on March 10, 1983, when the President of the United States announced that "the United States is prepared to accept and act in accordance with the balance of interests relating to the traditional uses of the oceans" and to "recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states." President's Oceans Policy Statement, 2 Public Papers of the Presidents: Ronald Reagan 1982, at 911-912. (U.S. Exh. 84 at [Bates] 1019-1020). Following that announcement, Indonesia became the first archipelagic State to be recognized by the United States, first conditionally in 1986 and 1988, and then formally on November 30, 1990. Cumulative Digest, at 2060-2063.

Despite its relatively recent recognition of the right of sovereign island "States" to adopt archipelagic baselines, the United States has never recognized mainland States with island components as "archipelagic States" under the Law of the Sea Convention. Thus, in 1986, the United States formally protested a claim asserted by Portugal of the right to draw archipelagic straight baselines around the Azores and Madeira Islands, because those islands were merely components of a mainland State ("Portugal"). Id. at 2068-2069. Consistent with that view, the United States considers itself a mainland State with island components and has not asserted a right to draw archipelagic baselines for any of its island states or territories, including the CNMI. In these circumstances, the CNMI's claim to a demarcation of inland waters from the territorial sea based on archipelagic baselines is contrary to the international law that mainland states with island components are not archipelagic States, and flies in the face of the United States' sovereignty and exclusive authority to determine the boundary of the territorial sea and EEZ of its island components in accordance

with the law of the sea.

Finally, the CNMI suggests that the United States' failure to assert archipelagic status for the Commonwealth violated the United States' U.N. trust obligation to the Marianas people because it was motivated by U. S. opposition during the 1970s to adoption of a 12-nautical mile territorial sea in a Convention of the Law of the Sea. See CNMI 1st Br. 16. Nothing could be further from the truth. Before the Covenant became effective in March 1976, the United States had no occasion to claim archipelagic status for the NMI because, as explained above, archipelagic baselines were not, at that time, permitted by international law. By the same token, the United States did not, during that same period, have any justification for claiming a twelve-mile territorial sea or a 200-mile EEZ for the NMI district because the international community had not yet agreed on a legal regime for the law of the sea that fairly balanced the rights of all States. Given that unsettled legal environment, and bearing in mind that the United States was in the midst of very difficult and lengthy international law of the sea negotiations throughout the 1970s, any U.S. claim to these expanded maritime zones on behalf of entities that were not States and were not otherwise entitled to them under then existing international law would, to say the least, have undermined the U.S. negotiating positions on all law of the sea issues, to the detriment of U.S. national security.

In sum, the United States' positions throughout the 1970s with respect to breadth of the territorial sea and the right of island States to draw archipelagic baselines was consistent with international law in force at that time, and did not violate any trust obligation owed to the NMI inhabitants.

B. The CNMI's Reliance on the Practices of New Zealand and the United Kingdom is Misplaced

The CNMI also contends that it must be entitled to its own 12-mile territorial sea and 200-mile EEZ because "other Nation States have recognized that their territories possess ownership rights." CNMI 1st Br. 40. Specifically, the CNMI cites New Zealand as "a sovereign nation that recognizes that its dependencies, the Cook Islands, Niue, and Tokelau are legally and political [sic] capable of owning their territorial seas as well as exercising jurisdiction over their respective EEZs." Id. The CNMI goes on to assert that "[t]he British government has a similar relationship with the Falklands." CNMI 1st Br. 41. As explained below, these claims are likewise spurious.

Contrary to the CNMI's assertions, it is wholly irrelevant that some other nation States have recognized that their territories possess ownership rights in offshore areas; the United States has not done

the same regarding the various maritime zones around the Northern Mariana Islands. The rights to maritime zones by a territory is a result of the political and legal relationship between the national State and the particular territory. The fact that some other Nation State may grant offshore rights greater than the United States grants to its states and territories does not create property rights in the Commonwealth.

In any event, there are important distinctions between the United States' relationship with the Commonwealth, and the dependent areas of other Nation States. To be sure, New Zealand has three dependent areas: Cook Islands, Niue and Tokelau. But each of these dependent areas has a political arrangement with New Zealand that is fundamentally different than that between the CNMI and the United States. The Cook Islands and Niue are in free association with New Zealand, and thus are more akin to the Marshall Islands, Republic of Micronesia and Palau. Tokelau is in the process of exercising its right of self-determination. In each case, with the approval of New Zealand, it was entirely appropriate for the international community to recognize, through international agreements, the resource rights of these entities. The CNMI is not similarly situated.

In 1980, the United States entered into a Treaty with the Cook Islands on friendship and delimitation of the maritime boundary. 35 UST 2061; TIAS 10774; 1676 UNTS 223; see also U.S. Exh. 87. Since 1965, the Cook Islands has been in free association with New Zealand, internally self-governing with the right to unilaterally declare its independence from New Zealand at any time. The Cook Islands exercise foreign affairs competence in conjunction with New Zealand. The United States obtained assurances from New Zealand that the Cook Islands had the competence to enter into this treaty and that New Zealand had no objection to its doing so. Sen. Ex. P, 96th Cong., 2d Sess., at v-vi; Sen. Exec. Rep. 98-7; U.S. Exh. 87. [28/]

In 1997, the United States and Niue entered into a treaty on delimitation of a maritime boundary between American Samoa and Niue. Since 1974, Niue has been in free association with New Zealand, self-governing on internal matters while conducting its foreign affairs in conjunction with New Zealand. The Government of New Zealand provided the United States with assurances that Niue was competent to enter into this treaty. Sen. Treaty Doc. 105-53; Sen. Exec. Rep. 107-5. (U.S. Exh. 88) [29/]

In 1980, the United States also entered into a treaty with New Zealand for the delimitation of the

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[28/] This document is available at http://thomas.loc.gov/home/treaties/treaties.htm.

[29/] This document is available at http://thomas.loc.gov/home/treaties/treaties.htm.

maritime boundary between Tokelau and the United States. Sen. Treaty Doc. 97-5.(U.S. Exh. 85). [30/] That treaty entered into force on September 3, 1983. 35 U.S.T. 2073, T.I.A.S. 10775. Article V of that treaty provides that the sovereignty over Tokelau "is vested in the people of Tokelau and is exercised on their behalf by the Government of New Zealand pending an act of self-determination in accordance with the Charter of the United Nations." At that time Tokelau was a non-self-governing dependency of New Zealand. Sen. Exec. Rep. 98-8, at 2. (U.S. Exh. 85 at [Bates] 1037). Today, Tokelau is a self-administering territory of New Zealand that is in the process of drafting a constitution, developing institutions and patterns of self-government as it moves toward free association with New Zealand. CIA, The World Factbook 2002. (U.S. Exh. 86). [31/]

The conclusion that the CNMI is not comparable to Cook and Nuie with respect to benefits of the Law of the Sea Convention is further supported by the fact the CNMI is not listed by the U.N. as a State or entity eligible to consent to be bound by the Convention. On the other hand, the UN lists Cook Islands as a party to the Law of the Sea Convention and Niue as a signatory, along with fellow-parties the Federated States of Micronesia, the Marshall Islands, and Palau. [32/] The CNMI is not entitled to the benefits of the provisions of the Law of the Sea Convention because, unlike the other three Trust Territories, the CNMI elected to come under the sovereignty of the United States and thereby renounce those rights. To decide otherwise would be to award the CNMI the best of both worlds, and break its bargain with the United States.

The CNMI has also mischaracterized the situation with regard to the Falkland Islands. See CNMI 1st Br. 41. Sovereignty over the Falklands is claimed by both the United Kingdom and Argentina. The U.K. considers the Falklands as one of its overseas territories. Rather than an EEZ (relating to the living and non-living natural resources of the water column and of the seabed and subsoil within the zone), the United Kingdom, in conjunction with the Falkland Islands Government, has claimed a 150-nautical mile Falkland Islands Conservation Zone around the islands; and an Outer Zone in which there is a total ban on fishing. The practical effect today is a 200 nautical mile fishing zone around the islands. Clive Symmons, The

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[30/] This document is available at available at: http://thomas.loc.gov/home/treaties/treaties.htm.

[31/] This document is available at http://www.cia.gov/cia/publications/factbook/print/tl.html.

[32/] Beside the CNMI, the U.N. does not list the Falkland Islands or the French overseas departments as a State or entity entitled to join the Convention. (U.S. Exh. 94). See also Table of Parties to the Convention at: http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm.

Maritime Zones Around the Falkland Islands, 37 Int'l & Comp. L.Q. 283, 288 (1988) (U.S. Exh. 89); UK Foreign and Commonwealth Office Press Release No. 240, Nov. 27, 1990, excerpted in 61 Brit. YB Int'l L. 1990, at 586-587 (1991) (U.S. Exh. 90); Malcolm Evans, The Restoration of Diplomatic Relations Between Argentina and the United Kingdom, 40 Int'l & Comp. L.Q. 473, 480-481 (1991) (U.S. Exh. 91); 65 Br. Y.B. Int'l L. 1994, at 655-658 (1995) (U.S. Exh. 92).

Finally, as the CNMI correctly observes, France has not granted maritime zonal rights to its overseas territories. CNMI 1st Br. 42. The CNMI nonetheless seeks to distinguish itself from the overseas territories of France on the ground that those territories enjoy "full representation in the French government," while the CNMI lacks comparable representation at the national level in the U.S. The CNMI lacks full representation in Washington because sections 901 and 902 of the Covenant specify a different form of political relationship between the Commonwealth and the United States. That was the will of the people of the Northern Mariana Islands, and agreed to by the U.S. Congress. Nothing in Section 901 and 902 of the Covenant translates into a requirement that the United States transfer its sovereign rights in the territorial sea and EEZ to the Commonwealth.

C. The United States' Foreign Relations and National Defense Interests Counsel Against Permitting a Commonwealth of the United States To Claim Archipelagic Status

Although the United States may have authority, as a matter of international law, to enter upon a political relationship with the CNMI analogous to New Zealand's relationship with the Cook Islands, Nuie, and Tokelau, these are matters committed to the discretion of the United States as part of its foreign policy. As we now explain, to date, there have been sound reasons why the United States has not entered upon similar relationships with any of its states and territories.

For more than 100 years, the United States has deemed its international interests best served by minimizing national claims of maritime sovereignty. As a naval power and international trader, it has sought to maximize the ability of all vessels to sail the oceans without interference from coastal nations. That interference often begins with liberal interpretations of principles for delimitation of inland waters, typically in the form of radical applications of straight baseline systems. "As a maritime nation, the United States' national security depends on a stable legal regime assuring freedom of navigation on, and overflight of, international waters." Roach, United States Responses to Excessive Maritime Claims, at 4 (1996). (U.S. Exh. 84). The United States has been the world's preeminent advocate of conservative delimitation

principles, discouraging excessive maritime claims primarily through diplomacy but also, where necessary, through military action. Id. at 4-11. "Even though the United States may have the military power to operate where and in the manner it believes it has the right to, any exercise of that power is significantly less costly if it is generally accepted as being lawful." Id. at 8.

The United States has identified claims of more than 80 nations whose illegal maritime claims "threaten the rights of other States to use the oceans." Id. at 15. Additionally, the historic trend points to further diminishment of commonly shared rights to free navigation. Id. at 4. Many of the excessive maritime claims at which those efforts are directed result from coastal nations stretching inland water delimitation principles much as the CNMI has done here. The CNMI's efforts to claim archipelagic status are no different than those by Portugal to claim archipelagic status for some of its offshore islands. Such claims diminish the areas of international waters where all nations have high seas freedoms "of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines." Law of the Sea Convention, Article 58.1. (U.S. Exh. 80 at [Bates] 988).

If the Court were to endorse the CNMI's approach, the United States' efforts to discourage excessive claims would be seriously undermined. Once unleashed from the status of an "exceptional" claim, the claim of a subordinate political body to archipelagic State status contrary to international law would seriously undermine the United States' credibility and its effectiveness in preserving its national mobility interests and its rule of law stability interests. If the CNMI's claim to archipelagic State status is upheld, nothing would stand in the way of the States of Hawaii and Alaska making a similar claim. The CNMI's claim to archipelagic status would likewise compromise the United States' protest of Portugal's claim of archipelagic status for its island components, the Azores and Madeira Islands. The possibilities for foreign and domestic claims is vast. In each instance, the claimant might point to the Court's decision in this case as justification for the extravagant claim. Stability in oceans law is promoted by the withdrawal of excessive claims, as consistently urged by the U.N. General Assembly, most recently in its Resolution A/57/141, Dec. 12, 2002, para. 3 (see U.S. Exh. 95), [33/] and not by endorsing claims that are inconsistent with the terms of the Convention.

[33/] This document is available at: http://www.un.org/Depts/los/general assembly/general assembly_resolutions.htm.

III. THE CNMI'S CLAIM THAT IT OWNS THE TERRITORIAL SEA AND THE LANDS SITUATED THEREUNDER BASED ON AN HISTORICAL CLAIM OF ABORIGINAL TITLE IS EQUALLY INSUBSTANTIAL

The CNMI also seeks summary judgment in favor of its claim to ownership of oceanic submerged lands on the ground that the "inhabitants of the Marianas have a claim far superior to (and earlier than) any other administration" because for thousands of years Chamorro and Carolinian master mariners and fishermen exercised complete dominion and ownership over the sea as well as the submerged lands beneath." CNMI 1st Br. 22. As we now explain, this claim is equally unfounded.

As a threshold matter, the CNMI lacks standing to assert ownership of oceanic submerged lands on behalf of the Marianas people on the basis of an historical claim. In essence, the CNMI's "historical claim" of ownership of submerged lands is based on the doctrine of aboriginal title. As the Ninth Circuit recognized in rejecting a similar claim of ownership by the government of Guam, "[a]boriginal title refers to the right of original inhabitants of the United States to use and occupy their aboriginal territory." Government of Guam, ex rel. Guam Economic Development Authority v. U.S., 179 F.3d 630, 640-41 (9th Cir. 1999) ("Government of Guam") (citing Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334, 341 (9th Cir.1996)). In Government of Guam, the Ninth Circuit ruled that "the right to aboriginal title belongs only to tribes and, in some circumstances, to individual members of tribes." Because the government of Guam is neither a tribe nor a tribal member, the Ninth Circuit ruled that the Guamanian government "qua government cannot claim any aboriginal right to use or occupy tribal land." [34/] The NMI government, just like the government of Guam, is neither a tribe nor a tribal member. It therefore is not a proper party to assert historical claims to aboriginal title.

Apart from the CNMI's lack of standing to raise its "historical claim"to aboriginal title to oceanic submerged lands, the claim has no merit. As the CNMI concedes (1st Br. 5), before it became a Commonwealth, it had been the subject to domination by occupying nations for more than 400 years. This 400 year period in which sovereignty over the Northern Mariana Islands shifted from Spain to Germany to

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[34/] In Government of Guam, the Ninth Circuit went on to reject Guam's argument that had it a right to control the land at issue as a "trustee" for the "aboriginal inhabitants of Guam." As the Court found, the "Constitution, however, gives Congress that power" and aboriginal rights "became the exclusive province of federal law" when Guam became a U.S. territory. Although the Government of Guam Court acknowledged that "Congress can delegate its authority over aboriginal land rights," neither the Covenant nor any other federal law delegates Congress' authority over the aboriginal rights of the Marianas people to the government of the Commonwealth of the Northern Mariana Islands.

Japan was more than enough of a period of interruption to extinguish historical claims to a territorial sea and beyond based on aboriginal title. And, even if that 400 year period were not long enough to extinguish the CNMI's alleged aboriginal title claim, that claim is, in ant event, trumped by the federal paramountcy doctrine. Indeed, the Ninth Circuit has already made clear that claims of aboriginal title to submerged lands cannot prevail over the United States' superior right to lands underlying territorial waters. More specifically, in Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1096-1097 (9th Cir. 1998), the Ninth Circuit rejected arguments nearly identical to the arguments presented by the CNMI here that certain Indian tribes were "entitled to exclusive use of the OCS because they have hunted and fished in the sea for thousands of years prior to the founding of the United States." As the Ninth Circuit explained:

> While we respect the history of the Native Villages and appreciate the importance of the OCS to them, the Supreme Court was likewise cognizant of the history of the coastal states in California, Louisiana, Texas and Maine. This did not, however, convince the Court to put the ocean and its resources at the disposal of the states. Whatever interests the states might have had in the OCS and marginal sea prior to statehood were lost upon ascension to the Union. The Constitution allotted to the federal government jurisdiction over foreign commerce, foreign affairs, and national defense so that as attributes of these external sovereign powers, it has paramount rights in the contested areas of the sea. This principle applies with equal force to all entities claiming rights to the ocean: whether they be the Native Villages, the State of Oregon, or the Township of Parsippany. "National interests, national responsibilities, national concerns are involved" in all these cases. The Native Villages' claim to complete control over the OCS is contrary to these national interests and inconsistent with their position as a subordinate entity within our constitutional scheme. We therefore hold that the Native Villages are barred from asserting exclusive rights to the use and occupancy of the OCS based on unextinguished aboriginal title.

154 F.3d at 1096 (citations omitted). In these circumstances, whatever historical claim the CNMI might have had was extinguished no later than November 4, 1986 when the United States' sovereignty over the Commonwealth became effective.

IV. THE CNMI'S REMAINING ARGUMENTS HAVE NO MERIT

In its summary judgment memorandum, the CNMI raises a miscellany of other arguments that are likewise insufficient to support its claim to ownership of oceanic submerged lands. Initially, the CNMI seeks to argue that the federal paramountcy doctrine, as established by United States v. California, 332 U.S. 19 (1947) and its progeny, does not apply to the CNMI because, according to the CNMI, the Commonwealth is not the political equal of any state of the U.S. States, and did not enter into a political relationship with

the United States on an "equal footing" with other states. At pp. 31-32 of the United States' initial summary judgment brief, we fully explained why the "equal footing doctrine" does not bar the application of the federal paramountcy doctrine to the CNMI's claim of ownership to oceanic submerged lands. Rather than repeat that analysis here, we incorporate it by reference. In addition, Guam, the Virgin Islands, American Samoa, and Puerto Rico, did not enter upon a political relationship with the United States on equal footing with the states of the United States, yet the federal paramountcy doctrine necessitated that specific U.S. legislation -- in the form of the Territorial Submerged Lands Act of 1974, 48 U.S.C. § 1705(a) -- be enacted to convey ownership of oceanic submerged lands abutting those U.S. territories. See also "Rights Of Abutting Upland Property Owners To Claim Title To Reclaimed Land Produced by Filling On Tidelands And Submerged Lands Adjacent To The Territory Of Guam," 65 Int. Dec. 193 (1958). (U.S. Exh. 44.)

Next, the CNMI argues that the Commonwealth's Submerged Lands Act of 1979 and its Marine Sovereignty Act of 1980 "authoritatively combine to assert the CNMI's ownership of submerged lands." CNMI 1st Br. 35. The CNMI goes on to assert that this local legislation was a legitimate exercise of the Commonwealth's "local self-government" authority under Section 103 of the Covenant. Id. At pp. 29-30 of its first brief, the United States has already demonstrated why the CNMI's argument that the NMI's people's right to local self-government includes ownership of submerged lands is without substance. In addition, at pp. 44-47 of its first brief, the United States fully explained why the Commonwealth's Submerged Lands Act and its Marine Sovereignty Act must be declared null and void under the Supremacy Clause of the U.S. Constitution, sections 101 and 102 of the Covenant, and Article XI, § 1, and Article XIV, § 1, of the CNMI Constitution. Rather than repeat those analyses, which fully expose the fallacies underlying the CNMI's reliance on its Covenant § 103 and CNMI local legislation to assert ownership claims to oceanic submerged lands, we incorporate them by reference here.

At CNMI 1st Br. 43, the CNMI goes on to assert that the United States should be "equitably estopped" from "divesting the CNMI" of its asserted ownership rights in the submerged lands underlying the territorial sea because "the United States and the CNMI never bargained for, much less arrived at, an agreement concerning the transfer over the submerged lands." The United States no doubt "never bargained for, much less arrived at, an agreement concerning the transfer over the submerged lands" with the people of California (before it became a U.S. state), or with the Native Village of Eyak, et al., (before Alaska

became a U.S. state), yet that did not preclude the Supreme Court and Ninth Circuit, respectively, from applying the federal paramountcy doctrine to defeat the State of California's and the Native Villages' claims to oceanic submerged lands in United States v. California, 332 U.S. 19, 32-33 (1947) and Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1096-1097 (9th Cir. 1998).

In any event, the United States did put the Marianas people on notice that title to submerged lands would vest in the future Northern Marianas government in the same way as states of the United States and other U.S. territories when, on May 10, 1973, U.S. Deputy Representative James M. Wilson informed the Marianas Political Status Commission that:

> So far as submerged lands are concerned, we feel that these should vest in the future Marianas government as in the case of the states of the United States and other territories.

U.S. Exh. 2 at 7. According to the Declaration of F. Haydn Williams (U.S. Exh. 97), "no member of the Marianas Political Status Commission, or its legal counsel, raised questions, discussed, or objected to" that statement about how title to submerged lands should vest in the Northern Mariana Islands "at any time during the Northern Mariana Islands Covenant negotiations with representatives of the United States, or during the Covenant's approval by the people of the Northern Mariana Islands and by the Congress of the United States." Id. at 3.

Furthermore, in 1974, the U.S. Congress enacted legislation conveying three miles of submerged lands to Guam. Given the close affinity between the Guamanians and the Marianas people, [35/] it defies credulity to think that the Marianas representatives would have been unaware that submerged lands underlying territorial waters would not, absent express words in the Covenant or in separate U.S. legislation, belong to the United States as an incident of external sovereignty. The CNMI Constitution strongly

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35/ In Sablan v. Tenorio, 1996 WL 33364333, *18 (N. Mariana Islands), the court stated:

> In 1969, a few years prior to the commencement of Covenant negotiations, the people of the NMI expressed their desire to seek political union with Guam, claiming extensive ties of culture, religion and kinship. This desire was first expressed as early as 1950 in a petition from the Rota Council to the United Nations visiting mission. It had been a consistent goal for many people of the NMI until rejected by the people of Guam. Even after rejection by Guamanians, more Northern Mariana islanders voted for reunification with Guam than for any other choice of status.
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> (Citations omitted.)

suggests that the Marianas representatives were aware that the United States, as sovereign, was the owner of submerged lands, see U.S. Exh. 13 at 19, and that is why they recognized that any CNMI claim to oceanic submerged lands would be governed by United States law. Id.; see also U.S. Exh. 15 at 144.

Finally, as this Court has already acknowledged (presciently, it seems):

> Covenant Sections 101 and 105 mean what they say. The CNMI is not an equal sovereign with the United States. It surrendered primary sovereignty to the United States when the indigenous people of the Northern Mariana Islands exercised their sovereign right of self-determination and voted by a 78.8% majority on June 15, 1975 to adopt Covenant § 101, creating the CNMI "in political union with and under the sovereignty of the United States of America." Thus, the CNMI retains only a sovereignty similar to, but less than, that of the States . . . . In sum, the CNMI is not a sovereign nation, nor is it a sovereign freely associated state. Those choices were available to the CNMI, but resoundingly rejected. The CNMI freely and voluntarily, in the exercise of the self- determination of its people by a 78.8% vote on June 17, 1975, ceded their sovereignty to the United States of America in Covenant § 101, effective November 3, 1986. To assert otherwise is revisionism.

U.S. ex rel. Richards v. De Leon Guerrero, 1992 WL 321010, * 34 (D.N.M.I. 1992). Because the Northern Marianas people rejected "free association" with the United States in favor of a Commonwealth relationship, they also rejected a legal status that would have allowed them independent sovereignty and paramount rights lands underlying a territorial sea. If, as this Court has already determined, Covenant Section 101 "means what it says," then the federal paramountcy doctrine compels the legal conclusion that the United States owns the submerged lands seaward of the Commonwealth's low water mark. See United States v. California, 332 U.S. 19, 32-33 (1947).

CONCLUSION

For the foregoing reasons, the Commonwealth's December 13, 2002 motion for summary judgment should be denied, the CNMI's complaint seeking to quiet title in the Commonwealth to submerged lands seaward of the low-water mark should be dismissed with prejudice, and the United States' counterclaim for a declaratory judgment, decreeing that: 1) the United States possesses "paramount rights in and powers over the waters extending seaward of the ordinary low water mark on the Commonwealth coast and the lands, minerals, and other things of value underlying such waters;" and 2) the CNMI Marine Sovereignty Act and Submerged Lands Act are preempted by federal law, should be granted.

Respectfully submitted,

Dated: January 29, 2003

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U.S. Department of State

CERTIFICATE OF SERVICE

I hereby certify that a copy of the UNITED STATES' MEMORANDUM IN OPPOSITION TO PLAINTIFF COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS' MOTION FOR SUMMARY JUDGMENT, THE UNITED STATES' STATEMENT OF GENUINE ISSUES, AND VOLUME IV OF EXHIBITS IN SUPPORT, was served upon:

JOSEPH TAIJERON
OFFICE OF THE ATTORNEY GENERAL
Commonwealth of the Northern Mariana Islands
Civil Division — Capitol Hill
2nd Floor, Administration Building
Caller Box 1007
Saipan, MP 96950

by Federal Express on this 29th day of January, 2003.

Edward S. Geldermann
Senior Trial Attorney

U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
Washington, D.C.