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Agency Position Paper - CJMT: Status of Use Rights, Responsibilities, and Options Commonwealth Ports Authority December 2, 2015

Executive Summary

The combination of leases, applicable laws, and regulations relating to CPA properties on Tinian, including the Covenant itself, raise several questions as to the rights to use and responsibilities over the Tinian International Airport and the Port of Tinian held by CPA and the United States. Careful consideration of these factors is necessary to determine the potential outcomes for CPA property under the possible implementation of MARFORPAC and the Department of the Navy's CJMT plan.

First, CPA has several obligations under federal law and regulation as the operator of the Tinian International Airport, including the responsibility for safety and management of the airport and determination of the layout of the airport. It is important that CPA maintain operational control of the airport in order to fulfill these obligations. Though the United States maintains rights for use of the airport through reservations contained in a lease agreement for the airport property, these reserved uses contain limits, and the United States can likely only use these reservations as authority to take over a level of control of the airport that is something less than "operational responsibility and control."

Similarly, CPA's control of the Port of Tinian is also conditioned on several reserved uses held by the United States for the purposes of supporting the remaining United States-leased property on Tinian. But these reserved uses provide the military less and CPA greater flexibility in controlling how the military uses the port in comparison to the reservations for military use of the airport. The United States likely cannot use the Port of Tinian under these reservations beyond uses that have minimal interference with civilian activity.

Importantly, MARFORPAC and the Department of the Navy do not expressly state in the 2015 CJMT Draft EIS how they will gain the necessary authority over CPA properties to implement CJMT. But the reserved rights to the use of these properties held by the United States, though in some instances quite broad, are insufficient on their own to allow for full implementation of CJMT. Therefore, the next steps CPA must take to address CJMT depend to a great extent on if and how the United States proceeds to acquire the necessary authority over these properties to fully implement CJMT. Federal law requires the military to approach CPA to negotiate acquisition of an interest in CPA property. If CPA agreed to negotiate a lease of CPA property, it would have to address the necessary changes to its obligations under law at its properties. If CPA declined to negotiate a new lease with the United States, the United States would likely pursue

securing the required authority through eminent domain or under the existing reserved uses that it holds - either of which would likely require legal action by CPA to protect its interests.

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The United States has proposed to make use of Commonwealth Ports Authority ("CPA") facilities without explaining, specifically, under what right and authority it intends to use them. The plan for CNMI Joint Military Training ("CJMT") put forward by the United States, specifically by MARFORPAC and the Department of the Navy, in its original draft Environmental Impact Statement (hereinafter "CJMT Draft EIS") depends upon military use of the Tinian International Airport and the Port of Tinian. How the United States proposes the use of these CPA facilities by the United States would be arranged, managed, and controlled is not made clear in the CJMT Draft EIS. This agency position paper discusses the current state of rights to use and responsibilities over these facilities held by CPA and the United States, identifies CPA's interpretation of these rights and responsibilities, and analyzes possible courses of action for CPA based on different manners in which the United States may attempt to reacquire management control of CPA facilities necessary for implementation of CJMT.

I. Airport Discussion

A. CPA's Rights in and Authority Over Tinian International Airport

1) Where does CPA's authority over Tinian International Airport come from?

The foundation of CPA's authority over the Tinian International Airport rests in two sources: (1) 2 CMC § 2122(b);¹ and (2) the Partial Release of Leasehold Interest By and Between the Commonwealth of the Northern Mariana Islands and the United States of America (hereinafter referred to as "1999 Release of Interest").

The 1975 Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (hereinafter referred to as "1975 Covenant") contained a commitment by the newly-formed CNMI government to lease to the United States lands on Tinian (including the site of what was then known as West Field and what is now known as the Tinian International Airport) under the terms as negotiated and agreed upon in an accompanying Technical Agreement² (hereinafter referred to as the "1975 Technical Agreement"). This

¹ "[T]he authority shall have the following powers and duties: ... To have exclusive jurisdiction to...operate and regulate the ports within the Commonwealth." 2 CMC § 2122(b).

² The full name of this agreement is: Technical Agreement Regarding Use of Land to be Leased by the United States in the Northern Mariana Islands.

commitment was formalized in the Tinian Lease Agreement of January 6, 1983 (hereinafter referred to as "1983 Tinian Lease"). The 1999 Release of Interest amended many aspects of the 1983 Tinian Lease, including the following amendment:

The United States and the Commonwealth hereby agree and declare that West Tinian Airport is a civil aviation airport subject to all Federal Aviation Administration applicable laws and regulations that generally apply to civil aviation airports in the United States. As a civil airport, the Commonwealth Ports Authority shall retain all of the rights given it by law to manage, operate, and administer West Tinian Airport.³

The 1999 Release of Interest is the last in a series of amendments to the 1983 Tinian Lease.

2) What Federal Duties does CPA have in Operating the Tinian International Airport?

CPA has several obligations under federal law and regulation in operating the Tinian International Airport. These include duties as the holder of the Airport Operating Certificate and responsibility for the Airport Layout Plan.

a) What are CPA's Duties as Holder of the Airport Operating Certificate?

As the holder of the Airport Operating Certificate for the Tinian International Airport, CPA is responsible for the safety and management of the Tinian International Airport according to Federal Aviation Administration ("FAA") regulation 14 C.F.R. Part 139. This responsibility requires CPA to maintain control and authority over airport facilities and operations. These duties, and the relationships with businesses, local, and federal partners upon which they rely, should not be compromised. The FAA regulation requires all operators of civil airports in "any State of the United States, the District of Columbia, or any territory or possession of the United States"⁵ to have an Airport Operating Certificate.⁶ CPA is responsible for ensuring compliance with all of the requirements placed on the certificate holder regarding safety and management of the airport. This requirement does not apply to:

- (1) "[a]irports operated by the United States;"⁷ or
- (2) the portions of a "joint-use airport"⁸ not operated under civil authority or the portions of a "shared-use airport"⁹ not operated under United States authority.¹⁰

³ 1999 Release of Interest, Article VI.

⁵ 14 CFR § 139.1.

⁶ 14 CFR § 139.101.

⁷ 14 CFR § 139.1(c)(2).

⁸ A "joint-use airport" is "an airport owned by the Department of Defense, at which both military and civilian aircraft make shared use of the airfield." 14 CFR § 139.5.

⁹ A "shared-use airport" is a "U.S. Government-owned airport that is co-located with an airport [requiring an Airport Operating Certificate] and at which portions of the movement areas and safety areas are shared by both parties." 14 CFR § 139.5.

¹⁰ 14 CFR § 139.1(b).

b) What are CPA's Responsibilities regarding the Airport Layout Plan?

CPA has the authority and obligation to determine what structures and facilities are in place at the Tinian International Airport. CPA takes advantage of federal project grants for airport development projects at the Tinian International Airport. In order to qualify and maintain qualification for these federal project grants, CPA is responsible for maintaining a current "airport layout plan" ("ALP") approved by the Secretary of Transportation.¹¹ Failure to do so could cause CPA to lose grants key to operating the airport. Under this requirement, CPA must not "make or allow any alteration in the airport or any of its facilities if the alteration does not comply with the plan the Secretary approves."¹² CPA submitted an updated ALP for the Tinian International Airport to the FAA in 2012.

B. United States Military Rights in and Authority Over Tinian International Airport

1) How does the United States Still Have Rights to Use the Tinian International Airport, Considering it Released its Rights to it in the 1999 Release of Interest?

The United States released its interest in the Tinian International Airport in general in the 1999 Release of Interest, declaring it "surplus" and releasing it back to the Commonwealth.¹³ In so doing, the United States declared the airport is "no longer needed for United States defense purposes and will not be needed by the United States in the future to discharge its defense responsibilities."¹⁴ However, these statements were conditioned as "subject to [] reservations" set forth in the 1999 Release of Interest and agreed upon by the Commonwealth.¹⁵ It is these "reservations" where the United States military locates its rights to its present and future use of Tinian International Airport.¹⁶

2) What are these Reservations? What is CPA's Role in Them?

These reservations include the United States' ability:

¹¹ 49 U.S.C. § 47107(a)(16). *See also* 14 CFR § 151.5(a) ("All airport development under the Federal-aid Airport Program must be done in accordance with an approved airport layout plan. Each airport layout plan, and any change in it, is subject to FAA approval."); 14 CFR § 152, App. D (25) (requiring FAA approval of an ALP and prohibiting changes or alterations in the airport not in conformity with the ALP "if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport.").

¹² 49 U.S.C. § 47107(a)(16).

¹³ 1999 Release of Interest, Art. II.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ The United States may also cite other sources for authority for its use of Tinian International Airport, including FAA Airport Sponsor Assurance C.27 and the 1975 Technical Agreement, but its primary assertion of rights is under the reservations in the 1999 Release of Interest.

1. "...for its military to land its aircraft, to load and unload cargo, to stage equipment and material, and to conduct other military aviation-related activities at West Tinian Airport..."¹⁷
2. "...to temporarily secure and use certain portions of West Tinian Airport...in order to conduct, perform or carry out U.S. military operations and military training exercises..."¹⁸
3. "...to install, operate and maintain fuel and other utility lines in and around West Tinian Airport and adjacent public lands within the Leaseback lands to serve the remaining lands within the U.S. Military Lease area..."¹⁹
4. "...to install, operate and maintain, without charge, such aviation facilities at West Tinian Airport that are needed to assist and serve U.S. military aircraft landing thereon..."²⁰
5. "...to...reasonable use of the roadways made part of the Premises..."²¹

The first four of these "reservations" come with varying conditions on them, some of which provide CPA the authority to impact the use of the airport by the military, as follows:

1. "...for its military to land its aircraft, to load and unload cargo, to stage equipment and material, and to conduct other military aviation-related activities at West Tinian Airport..."
 - a) must be "in common with others"
 - b) must be "military aviation-related activity"²²
2. "...to temporarily secure and use certain portions of West Tinian Airport...in order to conduct, perform or carry out U.S. military operations and military training exercises..."
 - a) limited to being temporary and only in "certain portions" of the airport
 - b) "advance written notice to" CPA required
 - c) must be conducted "in coordination with" CPA
 - d) must be to "conduct, perform or carry out U.S. military operations and military training exercises."
 - e) must be "conducted in a manner that will not unduly disrupt, interfere with, or suspend civil aviation activities and operations at West Tinian Airport."²³

¹⁷ 1999 Release of Interest, Art. IV(1).

¹⁸ *Id.* at Art. IV(2).

¹⁹ *Id.* at Art. IV(3).

²⁰ *Id.* at Art. IV(4).

²¹ *Id.* at Art. IV(5).

²² *Id.* at Art. IV(1).

²³ *Id.* at IV(2).

3. "...to install, operate and maintain fuel and other utility lines in and around West Tinian Airport and adjacent public lands within the Leaseback lands to serve the remaining lands within the U.S. Military Lease area..."
 - a) limited to "fuel and other utility lines" (not storage)
 - b) must "serve the remaining lands" within the lease area
 - c) must coordinate with CPA on installation, operation and maintenance of utility lines in accordance with ALP²⁴

4. "...to install, operate and maintain, without charge, such aviation facilities at West Tinian Airport that are needed to assist and serve U.S. military aircraft landing thereon..."
 - a) needed to assist "landing" only
 - b) airport space needed subject to coordination with and approval by CPA to ensure compliance with ALP²⁵

3) Does MARFORPAC and the Department of the Navy plan to use these Reservations to Implement CJMT?

Though they are not straightforward, there is a possibility. The military does not attempt to find its authority for its CJMT plans for Tinian International Airport beyond these reservations, except briefly discussing the need to "reacquire management control over an estimated 460 acres (186 hectares) at the Tinian International Airport,"²⁶ perhaps through a "long-term real estate agreement[]." ²⁷ In fact the, military seeks to establish a common understanding that these reservations would allow for its CJMT plans without any need for an additional agreement with CPA, instead proposing to "[e]stablish a Letter of Procedure or Joint Use Agreement to accommodate civilian arrivals and departures into the airport."²⁸

4) Does MARFORPAC and the Department of the Navy plan to use Eminent Domain to Implement CJMT?

Though they do not specifically state that they would use eminent domain to implement CJMT, the specter of eminent domain is seen throughout the DJMT Draft EIS. The United States could exercise its power of eminent domain to take over the airport, but that would be a severe action that does not appear to be in the military's current plan. CPA believes such an action would raise the specter of a severe violation of the 1975 Covenant.²⁹

²⁴ *Id.* at IV(3).

²⁵ *Id.* at IV(4).

²⁶ CJMT Draft EIS, p. 4-156.

²⁷ *Id.* The CJMT Draft EIS does not specifically say that the military would attempt to re-lease the required property or specifically how it would intend to "reacquire management control" of the required property.

²⁸ CJMT Draft EIS, p. ES-62 (emphasis added).

²⁹ For example, 1975 Covenant Section 806(a) requires the United States to "follow the policy of seeking to acquire only the minimum area necessary to accomplish the public purpose for which the real property

C. Analysis of the Two Sets of Rights and Authority

1) Who Must Operate the Tinian International Airport?

CPA must maintain operational control of the Tinian International Airport. Its authority to manage the operation, security, and facilities of the Tinian International Airport is derived from the 1999 Release of Interest and its commitment that Tinian International Airport is a civil airport subject to the confines of FAA regulation. Under the rubric of these regulations CPA cannot allow unapproved changes to the facilities of the airport or operations from the airport outside of its control without the threat of violating these regulations. This framework differs substantially from operation of the Tinian International Airport under a "joint use agreement" as proposed by the military, because in order to be a joint-use or shared-use airport under FAA regulations the airport must be owned or operated by the military or the United States government. There is no "hybrid" use of an airport allowed by FAA regulations the other way around, unless the military were to lease the portion of the airport it uses from CPA.

2) Can the United States Take Over Operational Responsibility and Control of the Tinian International Airport through the Reservations in the 1999 Release of Interest?

The uses reserved by the military allowed by the 1999 Release of Interest contain limits. The restrictions range from uses requiring CPA approval to uses "in common with others." These restrictions, taken in total, likely restrict the military from taking over operational responsibility and control of the airport in its entirety, or at the expense of civil operations, under only the authority granted to the military by the 1999 Release of Interest. For example, construction of permanent structures in support of military operations and training, or aviation-related military activities beyond landing of aircraft, or the construction of permanent fuel tanks (as opposed to fuel lines), are examples of where United States authority is uncertain under the reservations in the 1999 Release of Interest - the document does not specifically state whether the United States can or cannot do so. That being said, the reserved uses do provide the military a broad range of contracted rights to use of the Tinian International Airport.

3) What Level of Control of the Tinian International Airport can the United States Take under the Reservations?

is required" and "of seeking only the minimum interest in real property necessary to support such public purpose." *Id.* Further, 1975 Covenant Art. 806(b) provides that, in the exercise of the United States' eminent domain power, "[n]o interest in real property will be acquired unless duly authorized by the Congress of the United States and appropriations are available therefor." *Id.* (emphasis added). The Marianas Political Status Commission highlighted these commitments by the United States as "significant protections against the arbitrary or improper use of the authority of the United States to acquire property within the Commonwealth." Marianas Political Status Commission, *Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands*, 119 (1975).

The United States can only take over a level of control of the Tinian International Airport that is something less than "operational responsibility and control." The reserved uses in the 1999 Release of Interest differ substantially from the uses originally planned for in the 1975 Technical Agreement. So, the level of control the United States can take under the 1999 Release of Interest reservations can be measured against the level of control the United States planned to take under the 1975 Technical Agreement - "operational responsibility and control."³⁰

The 1975 Technical Agreement agreement sets forth plans for a "joint-use" airport where the military would "permanently take over operation of West Field,"³¹ "take[] over control and management of the field,"³² establish "an operational military airfield,"³³ and have "future base facilities."³⁴ In the event these circumstances occurred, the airport would be a military-operated airport, leased by the United States, through which civilian use would be allowed by "joint use agreements." Several additional obligations to the Commonwealth from the United States would also be triggered.³⁵ However, the execution of such "joint use agreements" (and the corresponding commitments) were held in abeyance (meaning put on hold) by the 1983 Tinian Lease "until such time a need therefor [*sic*] is established."³⁶ Comparing the scope of control of the airport between the two plans, CJMT and the 1975 Technical Agreement, provides a measuring stick to provide definition to what terms such as "temporary," "in common with

³⁰ 1975 Technical Agreement, Part II(2)(A), specifies that there would be a time period before permanent military takeover of West Field when the airport would be of joint use between civilian and military authorities. *Id.* The section then lays out the level of control the United States would have over West Field during the periods of military use of West Field during this pre-permanent military takeover time period - labeling it "operational responsibility and control:"

For aviation purposes the Government of the Northern Mariana Islands and the civilian community of Tinian will have continuous joint use of West Field with exceptions for safety of flight and priority military operations. The Government of the Northern Mariana Islands will have operational responsibility for West Field, except during periods of military use, until the United States assumes permanent operational responsibility. During such periods the Department of Defense will assume operational responsibility and control.

Id.

³¹ 1975 Technical Agreement, Part II(2)(G).

³² *Id.* at Part II(2)(C).

³³ *Id.* at Part II(2)(F).

³⁴ *Id.* at Part II(2)(D).

³⁵ *Id.* at Part II(2). Additional obligations to the Commonwealth that would be triggered under the 1975 Technical Agreement, upon the military taking over operational control and management of the airfield, include the supply of "standard military aviation fuels and oils" on a cost basis to the CNMI "for civil and compatible commercial aviation needs on Tinian" (*Id.* at Part II(2)(C)), provision of ARFF services by the United States at the airport for a user fee (*Id.* at Part II(2)(F)), the charging of minimum landing fees by the military for civilian landings (*Id.* at Part II(2)(G)), and limitation of Commonwealth responsibilities for maintenance and development to civilian terminal facilities (*see Id.* at Part II(2)(B)). According to the terms of the 1975 Technical Agreement, CPA asserts that these commitments are not included in the ones "held in abeyance" by the 1983 Tinian Lease. *See Id.* at Part III (providing authority for duly-authorized representatives of the United States and the CNMI to modify by mutual agreement the provisions of Part III).

³⁶ 1983 Tinian Lease, Art. 12(a).

others," and "in coordination with" mean in the 1999 Lease Agreement, indicating they mean something less than "operational responsibility and control."³⁷

II. Seaport Discussion

A. CPA's Rights in and Authority Over Port of Tinian

1) Where does CPA's authority over the Port of Tinian come from?

The foundation of CPA's authority over the Port of Tinian rests in two sources: (1) 2 CMC § 2122(b);³⁸ and (2) the Leaseback Disposal Agreement between the Commonwealth of the Northern Mariana Islands and the United States of America Made Pursuant to the Covenant to Establish a Commonwealth of the Northern Mariana Islands in political Union with the United States of America (hereinafter referred to as "1994 Harbor Interest Purchase"). In the 1994 Harbor Interest Purchase, the United States agreed to sell back to the Commonwealth its leasehold interest in a certain part of the areas leased to the United States in the 1983 Tinian Lease, including the area constituting the Port of Tinian.³⁹ The purpose for this purchase was to secure the port for economic development purposes that "would not be compatible with the military purpose of the [1983 Tinian] Lease."⁴⁰ The Commonwealth paid the price according for the acquisition of the United States interest, completing the transfer. The port now falls under the authority of CPA per 2 CMC § 2122(b).

2) What is the Current Status of the Port of Tinian?

The Port of Tinian currently requires improvements to make it fully functional to serve the purposes of increased development on Tinian - be it private or military development. The United States Coast Guard has registered concerns about the port's current condition. The military also is aware of the port's current condition due to Operation Gieger Fury.

The current Tinian Harbor Master Plan dates back to 1997.⁴¹ Beyond the needed harbor facility repairs and improvements,⁴² a chief concern is the condition of the breakwater. A harbor study is currently proceeding forward to quantify its reduced effectiveness and to develop repair or replacement options, including costs.⁴³ Additionally, CPA has worked with lessees of Port of Tinian property, specifically Bridge Investment Group, to secure new port facilities for common

³⁷ See 1975 Technical Agreement, Part II(2)(A).

³⁸ "[T]he authority shall have the following powers and duties: ... To have exclusive jurisdiction to...operate and regulate the ports within the Commonwealth." 2 CMC § 2122(b).

³⁹ 1994 Harbor Interest Purchase, Art. 3(D) & Exhibit B.

⁴⁰ *Id.* at Art. 3(A).

⁴¹ JUAN C. TENORIO & ASSOCS, INC. ET AL., TINIAN HARBOR MASTER PLAN (1997).

⁴² See generally CJMT Draft EIS, p. 3-226-27 (discussing current state of Port of Tinian and needed improvements).

⁴³ MILTON YOSHIMOTO, LETTER FROM CORPS OF ENGINEERS TO CPA REGARDING PLANNING FOR THE TINIAN HARBOR ASSESSMENT STUDY (AND ENCLOSURES) (2014).

use without cost to CPA.⁴⁴ However, the expense of fully renovating and improving the Port of Tinian from its current state of disrepair is likely outside of the means of CPA alone.

B. United States Military Rights in and Authority Over Port of Tinian

1) How does the United States Still Have Rights to Use the Port of Tinian, Considering it Sold its Rights to it in the 1994 Harbor Interest Purchase?

The United States sold its interest to the Port of Tinian in general in the 1994 Harbor Interest Purchase. Again, the United States declared this area to be surplus:

The United States has reviewed its requirements for future use of this area and has determined that it no longer needs to be retained in the [1983 Tinian] Lease Agreement in order for the United States to discharge its defense responsibilities, and therefore may be declared surplus to the United States.⁴⁵

However, this general sale was conditioned on certain reservations that are the source of the United States' rights to use the Port of Tinian.

2) What are these Reservations? What is CPA's Role in Them?

As with the declaration of surplus of the airport in the 1999 Release of Interest, the declaration of surplus and disposal of leasehold interest in the 1994 Harbor Interest Purchase was conditioned on the reservation of certain rights to the property by the United States "in support for its use of the remaining leased premises":

1. "...The right...to moor vessels, handle cargo, stage equipment and materiel, and conduct other port-related activities at San Jose Harbor;"⁴⁶
2. "...The right to temporarily secure and use portions of the surplus area...to conduct, or perform activities in support of, military training exercises;"⁴⁷
3. "...The right to install, operate, and maintain fuel and utility lines from San Jose Harbor over lands owned by the Commonwealth."⁴⁸

However, these "reservations" come with varying conditions on them, some of which provide CPA the authority to impact the use of the Port of Tinian by the military, as follows:

⁴⁴ COMMONWEALTH PORTS AUTHORITY AND BRIDGE INVESTMENT GROUP, LLC, LEASE AGREEMENT 30-31 (2014).

⁴⁵ 1994 Harbor Interest Purchase, Art. 3(B).

⁴⁶ *Id.* at Art. 3(B)(1).

⁴⁷ *Id.* at Art. 3(B)(2).

⁴⁸ *Id.* at Art. 3(B)(3).

1. "...The right...to moor vessels, handle cargo, stage equipment and materiel, and conduct other port-related activities at San Jose Harbor"
 - a) must be exercised "in common with others."⁴⁹

2. "...The right to temporarily secure and use portions of the surplus area...to conduct, or perform activities in support of, military training exercises"
 - a) must be "temporary"
 - b) must be only "portions of the surplus area"
 - c) can only be done "on a not-to-interfere basis as approved by the Commonwealth or its designee."⁵⁰

3. "...The right to install, operate, and maintain fuel and utility lines from San Jose Harbor over lands owned by the Commonwealth."
 - a) must be exercised "to serve the remaining areas included in the leased premises."⁵¹

3) Does MARFORPAC and the Department of the Navy plan to use these Reservations to Implement CJMT?

Of concern is the fact that the military does not attempt to find its authority for its CJMT plans for the Port of Tinian beyond these reservations,⁵² except briefly discussing the need to "reacquire management control over... 7 acres (3 hectares) of land (parcels) at the Port of Tinian,"⁵³ perhaps through a long-term real estate agreement.⁵⁴

4) Does MARFORPAC and the Department of the Navy plan to use Eminent Domain to Implement CJMT?

Again, the federal government could exercise its power of eminent domain to take over the Port of Tinian, but that would be a severe action that does not appear to be in the military's current plan. However, though not stated directly in the CMT Draft EIS, it is an evident option throughout the document. CPA believes such an action would raise the specter of a severe violation of the 1975 Covenant.⁵⁵

⁴⁹ *Id.* at Art. 3(B)(1).

⁵⁰ *Id.* at. 3(B)(2) (emphasis added). It is not specified if CPA is the official Commonwealth designee for the purpose of exercising this power of approval.

⁵¹ *Id.* at Art. 3(B)(3).

⁵² *See* CJMT Draft EIS, p. 3-89.

⁵³ CJMT Draft EIS, p. 4-156

⁵⁴ *Id.* The CJMT Draft EIS does not specifically say that the military would attempt to re-lease the required property or specifically how it would intend to "reacquire management control" of the required property.

⁵⁵ *See supra* n. 28.

C. Analysis of the Two Sets of Rights and Authority

1) Would CPA Maintain Operational Responsibility and Control Over the Port of Tinian under CJMT?

CPA is in a strong position to maintain operational responsibility and control over the Port of Tinian, its property and facilities under the existing agreements between the CNMI and the United States. Unlike the situation with the Tinian International Airport, the CJMT plan proposed by the military does not so much threaten to impinge on CPA's operational responsibility and control over the Port of Tinian as attempt to displace plans for the port in favor of its planned use of the facilities.⁵⁶ While CPA has federal responsibilities regarding port safety and security as the owner and operator of the Port of Tinian,⁵⁷ the proposed military uses put forward in CJMT would likely have to readily conform to those requirements and other strictures put in place by CPA.

2) How Much Operational Responsibility and Control of the Port of Tinian can the United States take over from CPA through the Reservations in the 1994 Harbor Interest Purchase?

The reserved military uses set forth in the 1994 Harbor Interest Purchase provide the military less and CPA greater flexibility in controlling how the military uses the port in comparison to the 1999 Release of Interest reservations and military use of the airport. Beyond its right to install fuel lines⁵⁸ and other utility lines, none of the Port of Tinian reserved rights are exclusive-use rights free of CPA authority. The military's right to use of the port for mooring of vessels, handling cargo, staging equipment and material, and other port-related activities must be done "in common with others." More importantly, CPA has the power to veto any proposed temporary securing and use of any area within the port by the military. With the exception of its rights to install fuel and utility lines, *any* non-temporary structures or non-temporary occupation of port structures, lands, or facilities⁵⁹ would have to be accomplished either through a long-term real estate agreement negotiated with CPA or by the federal government's exercise of eminent domain.

3) How much can MARFORPAC and the Department of the Navy use the Port of Tinian under the 1994 Harbor Interest Purchase Reservations?

⁵⁶ For example, CPA's comments on the CJMT Draft EIS discussed how its proposed site of military facilities is situated in the same location as the construction of the new CPA warehouse and office included in the contract with the Lease for the Tinian Ocean View Resort. CPA Comments on Draft EIS, p. 4 n. 7.

⁵⁷ See, e.g. 33 CFR § 105.200.

⁵⁸ The CJMT plan for Tinian Harbor includes areas for bulk fuel storage. One issue that would arise under the plan and the reservations is whether the reservation for "fuel lines" would include such fuel storage, or if the military must secure different authority to install bulk fuel storage facilities. CJMT Draft EIS p. ES-33, Figure ES-9.

⁵⁹ As depicted in CJMT Draft EIS Figure ES-9. *Id.*

The United States cannot use the Port of Tinian under the 1994 Harbor Interest Purchase reservations beyond uses that have minimal interference with civilian activity. CPA raised this issue in its comments on the CJMT Draft EIS.⁶⁰ Resolution of this issue hinges largely on the interpretation of the phrase "in common with others" contained in the reservation of Article 3(B)(1) of the 1994 Harbor Interest Purchase. By comparison, the 1975 Technical Agreement discussed the formation of "joint control arrangements" for the Port of Tinian if the military were to "implement plans for an operational joint service base on Tinian," a form of military presence beyond what the military proposes under CJMT.⁶¹ The 1975 Technical Agreement stated these "joint control arrangements" would attempt to adopt "standards which will permit uninterrupted commercial shipping operations during fuel transfer operations...so as to minimize the possible interference with civilian activity." Based on this correlation between control of use and right of use, and since the military is proposing something less than "joint control" under the CJMT, CPA believes that the phrase "in common with others" under Article 3(B)(1) allows nothing more than operations that have minimal interference with civilian activity.

III. Scenarios and CPA Policy Alternatives

Following the next round of comments after the release of the updated draft EIS for CJMT, the next steps CPA will take to address CJMT depend to a great extent on how the United States proceeds to "reacquire management control" of the properties currently controlled by CPA that it needs to implement the CJMT plan. The following are the possible methods the United States could employ to reacquire the necessary management control from CPA. Each scenario provides CPA with options, some of which actually benefit CPA.

A. Lease/Long-Term Real Estate Agreement for CPA Property

1) What would the United States have to do to gain the necessary property management control via Lease/Long-Term Real Estate Agreement?

Federal law requires the military to approach CPA to negotiate acquisition of an interest in CPA property.⁶² The military gives indication this is the path it would take to secure the necessary property rights it needs, though it does not directly state so in the CJMT Draft. Such action would be an attempt by the United States to gain additional property rights in the CNMI for a public purpose. So in addition to coming to lease/agreement terms with CPA, the United States

⁶⁰ "Previous military exercises on Tinian consisting of mobilization of 600-800 military personnel caused significant, though tolerable, hardship to port activities, including taking up as much as 85% of available port space for cargo staging during periods of disembarkation and loading. Such use would prevent any other large vessel from docking and unloading at the port. In addition, these areas would be guarded and off-limits, further restricting non-military port operations. Previous use by the military also caused destruction of maintained seaport grounds due to flooding from water used to wash down equipment near the port and accompanying soil erosion, mud, and debris flowing into the port from heavy equipment activities. The plan proposed by the draft EIS would go further than these previous exercises, with port usage increased to support 3000 military personnel at any one time." CPA Comments on Draft EIS, p. 5.

⁶¹ 1975 Technical Agreement, Part II(1).

⁶² 1975 Covenant Section 806(b); 10 U.S.C. § 2663(f)(1)(B)(ii).

would also have to comply with the restrictions of 1975 Covenant Section 806(a) & (b), which include: (1) "seeking only the minimum interest in real property necessary to support such public purpose;"⁶³ and (2) due authorization for the acquisition by the Congress of the United States.⁶⁴

2) What are the benefits for CPA should it enter into negotiations with the United States for a Lease/Long-Term Real Estate Agreement?

Should the United States approach CPA to negotiate a lease for the property required for CJMT, CPA would first choose whether or not to enter into those negotiations. If CPA agreed to negotiate a lease, it would have to address the necessary changes to the ALP, security, and management of the airport as required by FAA regulations, and similar regulatory requirements for the port. It would also be in a position to negotiate into the lease favorable terms regarding facility improvements based on facility needs identified by the United States (including such things as wharf repair, an instrument landing system, and an air traffic control tower) that are or may be necessary for the appropriate co-use of the facilities by CPA and the military. Most importantly, CPA would be in the position to negotiate the scope of operational responsibility and control of the ports to its satisfaction, including joint use agreements as envisioned by the 1975 Technical Agreement. These negotiations could also result in triggering the United States' commitments as set forth in Part II of the 1975 Technical Agreement.⁶⁵

3) What are the consequences for CPA should it decline to enter into negotiations with the United States for a Lease/Long-Term Real Estate Agreement?

If CPA declined to negotiate a new lease with the United States for the required properties for CJMT, the United States would likely pursue one of the following options to attempt to reacquire its necessary management control. CPA would respond to the action taken by the United States in order to protect its property interest, authority, and responsibilities under the law.

B. Eminent Domain to Acquire CPA Property

1) What would the United States have to do to gain the necessary property management control via Eminent Domain?

Should CPA decline to enter into negotiations for a lease and the United States decline to proceed solely under the reservations in the 1999 Release of Interest and the 1994 Harbor Interest Purchase, the United States could attempt to reacquire the necessary management control by acquiring the necessary property through eminent domain. To this point the military has not given an indication that it would take this path to secure the property rights it needs. Using eminent domain would be an attempt by the United States to gain additional property rights in the CNMI for a public purpose, so along with complying with all of the requirements for

⁶³ *Id.* at Section 806(a).

⁶⁴ *Id.* at Section 806(b) (this also requires a corresponding appropriation for the acquisition).

⁶⁵ *See infra* Section III.B.7.

acquisition of property via eminent domain, it would also have to comply with the restrictions of 1975 Covenant Section 806(a) & (b).

2) What is the Process the United States must go through to Acquire its Necessary Property Management Control via Eminent Domain?

The total requirements for the United States to exercise its power of eminent domain in the CNMI are:

- (1) Provide notice to the CNMI of its intent to acquire property;
- (2) Receive Congressional authority to do so and an appropriation to pay for it;
- (3) Attempt to negotiate a voluntary acquisition of its required property interest and be denied by the property holder;
- (4) Comply with applicable federal law pertaining to eminent domain; and
- (5) Acquire from the property holder the minimum area and minimum interest in the property required to fulfill its public purpose.

Should the United States pursue acquisition by eminent domain, CPA would challenge such action in federal court to ensure that each of these steps is followed and to halt the acquisition if they were not. In the event of an eminent domain acquisition, the United States would compensate CPA for the property interest it acquired.

3) What Eminent Domain Requirements does the 1975 Covenant Mandate?

The United States would have to comply with the restriction of the 1975 Covenant. It allows for the United States to exercise its power of eminent domain as it is applied in the many states of the Union and in compliance with applicable United States law and the due process requirements of the United States Constitution.⁶⁶ The 1975 Covenant also includes the additional requirement that "[t]he United States will in all cases attempt to acquire any interest in real property for public purposes by voluntary means under this Subsection before exercising the power of eminent domain."⁶⁷

4) Are there any Additional Restrictions Contained in the 1975 Covenant?

Perhaps. As stated, the United States has to comply with the restriction of the 1975 Covenant. Should the United States begin an eminent domain acquisition, CPA may be able to successfully challenge the United States' exercise of its eminent domain power to acquire property interests in the Tinian International Airport and the Port of Tinian because such action would violate commitments made to the CNMI by the United States in the 1975 Covenant to support economic development and tourism in the new CNMI.

⁶⁶ 1975 Covenant, Section 806(c).

⁶⁷ *Id.* at Section 806(b).

The 1975 Covenant enshrined three pillars to support local economic growth in the Northern Mariana Islands beyond direct financial assistance:

- (1) The lease of land to the United States for a potential military base complex;⁶⁸
- (2) Establishment of competitive business advantages in the Northern Mariana Islands through local control of governmental tools such as customs,⁶⁹ immigration,⁷⁰ and the minimum wage;⁷¹ and
- (3) Promotion of tourism in the CNMI.⁷²

Two of these pillars have already been weakened or eliminated by the United States. No military base was established on Tinian after assurances for its establishment as it was conceived during

⁶⁸ *Id.* at Sections 802 & 803(c), 1975 Technical Agreement. *See also* Edward DLG Pangelinan and Franklin Haydn Williams, *Joint Communique* 9, 12-13 (December 19, 1973), available at http://nmhcdigitalarchive.org/histdoc1960_1977/1973/1973%20December/1973%2012%2019,%20Joint%20Communique,%20Pangelinan,%20Edward%20and%20William,%20Franklin%20004755.pdf ("Not included in any of the foregoing would be the indirect economic benefits to the economy as a whole, resulting from the establishment and maintenance of a U.S. military base complex in the Marianas. Though the exact amount is difficult to determine, the benefits both to the Marianas; Treasury and the people are likely to be very substantial in the United State's view."); *Notes from Economic Discussion* (March 1974) (discussing the United States' estimate of the Military base's financial impact when completed:

	"IMPACT -\$MILLIONS
1. U.S. military salary \$28=6 million (assume" 20% average income tax payment	5.6
2. U.S. military local hire salaries (620 X\$4400 average annual salary)	2.75
3. Estimate U.S. military personnel local spendings (assume 15% of salary)	4.5
4. Construction materials purchases locally annually.	2.25
5. Construction workers local expenditures	.20
Total	15.30").

⁶⁹ *See generally* 1975 Covenant, Sections 603 & 604. *See also* Edward DLG Pangelinan and Franklin Haydn Williams, *Joint Communique* (December 19, 1973), available at http://nmhcdigitalarchive.org/histdoc1960_1977/1973/1973%20December/1973%2012%2019,%20Joint%20Communique,%20Pangelinan,%20Edward%20and%20William,%20Franklin%20004755.pdf.

⁷⁰ 1975 Covenant, Section 503(a).

⁷¹ *Id.* at Section 503(c).

⁷² *Id.* at Section 904(b). *See also The Impact of Potential Japanese Economic Activity in the Mariana Islands on the Status and Land Negotiations* (March 23, 1973), available at http://nmhcdigitalarchive.org/histdoc1960_1977/1973/1973%20March/1973%2003%2023,%20Dcoument%20File,%20The%20Impact%20of%20Potential%20Japanese%20Economic%20Activity,%20No%20Author,%20003095.pdf ("The Marianas political leadership is well aware that their islands have a considerable potential for the development of tourism and agriculture. Saipan already attracts more tourists than the rest of Micronesia and further heavy investment in hotel construction is soon to come.... The Mayor of Tinian has publicly discussed plans for the construction of a four hundred room hotel on that island which would hardly square with Department of Defense plans for the utilization of Tinian").

the 1975 Covenant negotiations were withdrawn at the 11th hour by the United States.⁷³ Changes in federal law have also taken away many of the CNMI's competitive business advantages negotiated into the 1975 Covenant. Over the last number of years, the CNMI in general and Tinian in particular has turned to building its economy based on the third pillar - tourism. Many entities, including CPA, have documented in comments on the first CJMT Draft EIS the negative impact CJMT would have on the tourism industry⁷⁴ and the economies of Tinian⁷⁵ and the CNMI. Inadequate analysis of the impact on the Tinian economy and tourism were among CPA's concerns in requesting a new draft of the CJMT EIS.

Three sections of the 1975 Covenant commit the United States to support economic development and tourism in the CNMI. These sections are as follows:

Section 603(d)

The Government of the United States will seek to obtain from foreign countries favorable treatment for exports from the Northern Mariana Islands and will encourage other countries to consider the Northern Mariana Islands a developing territory.

Section 701

The Government of the United States will assist the Government of the Northern Mariana Islands in its efforts to achieve a progressively higher standard of living for its people as part of the American economic community and to develop the economic resources needed to meet the financial responsibilities of local self-government. To this end, the United States will provide direct multi-year financial support to the Government of the Northern Mariana Islands for local government operations, for capital improvement programs and for economic development.

Section 904(b)

The United States will assist and facilitate the establishment by the Northern Mariana Islands of offices in the United States and abroad to promote local tourism and other economic or cultural interests of the Northern Mariana Islands.⁷⁶

These commitments, like other sections of the 1975 Covenant, are a part of the sole source of authority of the United States over the CNMI⁷⁷ and are federal law.⁷⁸ The strongest of these commitments in use against the military's implementation of CJMT is the commitments in Section 701.⁷⁹ With appropriate demonstration of the negative impacts on the standard of living

⁷³ Howard P. Willens & Deanne C. Siemer, *An Honorable Accord: The Covenant Between the Northern Mariana Islands and the United States*, 197-98 (University of Hawai'i Press 2002).

⁷⁴ See CPA Comments on Draft EIS, Adverse Impact #1.

⁷⁵ See *id.* at Adverse Impact #4: Economic Impact.

⁷⁶ 1975 Covenant, Sections 603(d), 701, & 904(b).

⁷⁷ *Hillblom v. United States*, 896 F.2d 426, 429 (9th Cir.1990).

⁷⁸ The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant"), Pub.L. No. 94-241, 90 Stat. 263 (1976), reprinted in 48 U.S.C.A. Sec. 1681 note (1987).

⁷⁹ This commitment was a matter of great concern, negotiation, and compromise during the negotiation of

for the people of Tinian and the ability of CPA and the CNMI to meet the financial responsibilities of local self-government, CPA could argue that implementation of CJMT by the military alone, without explicit congressional action overriding Section 701,⁸⁰ would violate the 1975 Covenant, federal law, and federal separation of powers. A similar argument could be made with Section 603(d), as the implementation of CJMT would likely discourage rather than encourage other countries to consider the CNMI a developing territory, as development of economic resources and investments on Tinian would be supplanted by United States property use that would damage Tinian properties and prevent economic development.⁸¹

5) Are there any Additional Federal Military Seizure Requirements?

Yes. Along with the requirements imposed on the United States' exercise of its eminent domain power by the 1975 Covenant, the military would also have to comply with federal statutory and administrative requirements before it could acquire any interest in land by condemnation, eminent domain, or seizure for even temporary use.⁸² Chief among these is 10 U.S.C § 2663(f)(1)(A), which requires the Secretary of the military department concerned to:

the 1975 Covenant. *See, e.g.,* Edward DLG Pangelinan and Franklin Haydn Williams, *Joint Communique* 5-6 (June 4, 1973), available at http://nmhcdigitalarchive.org/histdoc1960_1977/1973/1973%20June/1973%2006%2004,%20Document%20File,%20Joint%20Communique,%20Pangelinan,%20Edward,%20DlG.%20003529.pdf.

1. The objectives of a long-term economic development program for the Marianas should be:

- a. to facilitate an orderly transition to the new political status;
- b. to build toward an adequate social and economic infrastructure;
- c. to provide necessary public services and programs; and
- d. to encourage and to promote the future economic development of the Marianas.

The United States is agreed in principle to assist the Marianas in the attainment of these objectives in order to achieve the ultimate goals of raising significantly the per capita income of the people of the Marianas and moving the Marianas progressively toward economic Self-sufficiency.

Id. However, the qualifying second sentence of Section 701 may limit the assistance the United States is required to give to only "direct, multi-year financial support," leaving it the quixotic ability to actually harm the progression towards a higher standard of living for the CNMI people and the CNMI's ability to develop economic resources. Whether Section 701 is only a commitment by the United States to provide direct financial support to the CNMI, or if the first sentence of Section 701 actually places a form of "do no harm" limit on the powers of the United State within the CNMI is not directly addressed by the comments in the Covenant Analysis. Marianas Political Status Commission, *Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands*, 85-86 (1975).

⁸⁰ Per the 1975 Covenant, Section 701 may be modified by the federal government without the consent of the CNMI. 1975 Covenant, Section 105.

⁸¹ Unfortunately, this economic development-based theory is as of yet untested in federal court and there is scant case law to guide on the interpretation of these sections of the 1975 Covenant.

⁸² 10 U.S.C. § 2663(f)(1).

[P]ursue, to the maximum extent practicable, all other available options for the acquisition or use of the land, such as the purchase of an easement or the execution of a land exchange.⁸³

Additional statutory requirements placed on military seizures of land include:

- (1) Negotiations with the owner of the land;
- (2) An offer of payment for the fair market value of the interest sought in the land;
- (3) Consideration of other approaches for acquiring use of the land and reasons why those alternative acquisition strategies were inadequate.⁸⁴

Properly following these procedures would require the military to at least approach CPA to negotiate a use agreement of the CPA properties it needs.⁸⁵ If the military failed to negotiate, offer to pay, or consider a use agreement, CPA would seek an injunction against a seizure of a CPA property interest for the military's failure to properly follow the requirements of this statute.

6) Are there any Issues with the Compensation Required for an Eminent Domain Taking?

Yes. Seizure via the federal government's eminent domain power of the CPA property necessary to accomplish CJMT may also result in a violation of the takings clause of the Fifth Amendment of the Constitution of the United States.⁸⁶ This clause requires the United States to provide "just compensation" for any property it takes for public use. This includes takings that are temporary and outside of the property actually seized, so long as the damage caused by the taking is "the product of a direct invasion" of the rights of the property holder.⁸⁷ The United States Supreme Court has stated that "a taking need not be permanent to be compensable" and that a temporary taking claim against the United States can be made "when the government action occurring outside the property gave rise to "a direct and immediate interference with the enjoyment and use of the land."⁸⁸ The relevant factors used to determine whether a taking outside the property actually seized by the United States has occurred include: (1) interference with private property; (2) the length of time of the interference; (3) the degree of foreseeability of the interference; (4) the character of the land; and (5) the landowner's reasonable investment-backed expectation" regarding the use of the land."⁸⁹

Whether a taking by the United States would produce another temporary taking of CPA's property along these lines would depend on the breadth of the property actually taken by the United States. Yet implementation of the plan analyzed in the CJMT Draft EIS would have adverse impacts on property outside of the military lease area that may result in a taking under temporary takings law. Normally the remedy that can be received by the victim of such an

⁸³ 10 U.S.C. § 2663(f)(1)(A).

⁸⁴ 10 U.S.C. § 2663(f)(1)(B)(ii) & (iii).

⁸⁵ See *infra* Section III.D.3.

⁸⁶ "...nor shall private property be taken for public use, without just compensation." U.S. Const. Amend V.

⁸⁷ *U.S. v. Cosby*, 328 U.S. 256 (1946).

⁸⁸ *Arkansas Game and Fish Commission v. U.S.*, 133 S. Ct. 511 (2012).

⁸⁹ *Id.*

unlawful taking by the United States is only monetary compensation, not a halt of the taking. But remembering 1975 Covenant Section 806(b), the United States Congress would have to appropriate funds for all of the takings of any property interest the United States were to take by eminent domain *before* such taking were to occur, including the measure of compensation for any temporary takings that may result from CJMT. This may be actionable in court to prevent any taking by the military for CJMT until such time Congress appropriated the money for any and all takings that may result from the United States' exercise of eminent domain.

7) Would an Eminent Domain Taking Trigger any Commitments in the 1975 Technical Agreement?

Yes. An eminent domain seizure of the Tinian International Airport would likely result in the United States taking over operational responsibility and control of the facility, triggering at least some of the commitments in the 1975 Technical Agreement.⁹⁰ Should the United States pursue a seizure of CPA property via eminent domain for the purposes of implementing CJMT, CPA would act to hold the United States to its commitments in the 1975 Technical Agreement and their corresponding benefits to the CNMI.

The interest that the United States would attempt to seize may be the same interest it sold to the CNMI in the 1999 Release of Interest, per the restrictions of 1975 Covenant Section 806(a). By federal law this lease interest and its terms must be in accordance with the terms of the 1975 Technical Agreement.⁹¹ The issues would be: (1) as to Part II of the 1975 Technical Agreement, whether the military presence on Tinian under CJMT constitutes an "operational joint service base,"⁹² a "base,"⁹³ an established "military airfield"⁹⁴ or other such description used for the Tinian military presence in the 1975 Technical Agreement; and (2) as to Part III of the 1975 Technical Agreement, whether the need can be established for the joint use agreements and other arrangements it contains, per the 1983 Tinian Lease.

⁹⁰ The 1975 Technical Agreement contains language allowing representatives of the United States and the CNMI to modify its terms only in its Part III. 1975 Technical Agreement, Part III ("The following provisions, unless modified in writing by mutual agreement of the duly authorized representatives of the United States and the Government of the Northern Mariana Islands, will govern the future relations between the United States military forces in the Northern Mariana Islands and the civil authorities thereof."). No such language is included to allow modification of Parts I, II, and IV. Thus, under 1975 Covenant Section 803(c), any suspension of the implementation of joint use agreements and other arrangements by the abeyance section of the 1983 Tinian Lease would potentially violate federal law and federal separation of powers, as it is not federal law, and any commitments agreed upon in those Parts would likely be triggered by occurrence of the events called for in those Parts themselves.

⁹¹ According to the 1975 Covenant, "the terms of the lease to the United States will be in accordance with this Section and with the terms of the Technical Agreement." 1975 Covenant, Section 803(c).

⁹² 1975 Technical Agreement, Part II (1).

⁹³ *Id.* at Part II (2)(D).

⁹⁴ *Id.* at Part II (2)(F).

Some of the commitments in the 1975 Technical Agreement that may be triggered would likely include negotiated joint-use agreements on access to aviation fuels and oils at cost for civilian use,⁹⁵ charging of the minimum-allowable landing fees for commercial traffic,⁹⁶ and the availability of "[s]ufficient land...at nominal cost adjacent to the...runway for civilian terminal facilities, including aprons, aircraft parking, terminal building(s), automobile parking, and roadways."⁹⁷ Additional commitments by the United States triggered if it was determined the military presence on Tinian constituted the appropriate form of "base" include a joint-control agreement of the harbor and ARFF services.⁹⁸ Lastly, the military has already indicated there may be a need for parts of Part III of the 1975 Technical Agreement to come out of abeyance so it can enforce its right to potable water made available to it by the CNMI.⁹⁹ Such establishment may lead to the establishment of the need for the other commitments of Part III to come out of abeyance, most notably the establishment of a joint civil-military advisory council,¹⁰⁰ commitments on civilian and fisherman access to shorelines and beaches,¹⁰¹ and access to military health facilities by residents.¹⁰²

C. Existing U.S. Rights to CPA Property under 1994 Harbor Interest Purchase and 1999 Release of Interest

1) Will the United States Attempt to Implement CJMT on CPA Property based Solely on the Rights it Currently Holds?

Perhaps.¹⁰³ The United States may attempt to reacquire the necessary management control by asserting its rights to use of the properties under the 1994 Harbor Interest Purchase, the 1999 Release of Interest, and other agreements and regulations (such as FAA Airport Sponsor Assurance C.27). The military gives indication that this would be a path it may take to secure the necessary management control it needs, though it does not directly state so in the CJMT Draft. Importantly, the United States would not see this as an attempt to gain additional property rights in the CNMI for a public purpose, so the United States would likely not comply with the restrictions of 1975 Covenant Section 806(a) & (b). Depending on the breadth of the military activities, however, such an action may amount to a taking in violation of the just compensation and substantive due process clauses of the 5th Amendment to the Constitution of the United States.

⁹⁵ *Id.* at Part II (2)(C).

⁹⁶ *Id.* at Part II (2)(G).

⁹⁷ *Id.* at Part I (5)(A)(6).

⁹⁸ *See generally Id.* at Part II.

⁹⁹ *Id.* at Part III(5).

¹⁰⁰ *Id.* at Part III.

¹⁰¹ *Id.* at Part III(2) & (3).

¹⁰² *Id.* at Part III(6).

¹⁰³ *See supra* Sections I.B.3 and II.B.3.

2) Can the United States Implement CJMT at the Tinian International Airport based Solely on the Rights it Currently Holds?

As discussed in Sections I.C.2 & 3, above, the collection of reservations (and their corresponding conditions) that provide the military certain rights to the use of the Tinian International Airport fall short of providing it the necessary management control it needs. If the military were to proceed under the authority of these reservations in an attempt to implement CJMT, CPA would take the military to court under a contract theory and for a violation of procedural due process to enforce its rights under the 1999 Release of Interest.

Moreover, how the military would attempt to assert its existing rights in the Tinian International Airport would dictate the additional legal measures CPA could use in response to the military's actions, as detailed below:

a) What if Military Use was Not in Compliance with the ALP?

Should the military attempt to assert its rights to the airport in a manner that would not be compliant with the current ALP, CPA would be obligated to enforce the ALP and seek an injunction against the military's activities in federal court pursuant to its obligations under federal statute and FAA regulation.¹⁰⁴ This action would be taken under CPA's statutory and regulatory authority to enforce the ALP and under a contract theory for the military's violation of CPA's rights under the 1999 Release of Interest. Additionally, should the military attempt to force a new ALP to be approved by the Secretary of Transportation and the FAA, CPA would be obligated to assert its responsibilities as owner and operator and sponsor of the airport under federal statute and FAA regulations to maintain the current ALP for the airport. This could be done through an injunction preventing the military from filing an ALP for the airport or a writ of mandamus¹⁰⁵ ordering the Secretary to not accept an ALP from the military on the theory that CPA is the proper owner/operator/sponsor of the Tinian International Airport (according to its rights under the 1999 Release of Interest) and therefore only CPA can properly file an ALP for the airport.

b) What if Military Use was in Compliance with the ALP?

Should the military attempt to assert its rights to the airport in a manner that would somehow be in compliance with the current ALP, CPA still has the regulatory obligation as the holder of the Airport Operating Certificate to ensure compliance with applicable FAA regulations. CPA would have to follow a similar path of seeking an injunction against the military's activities if they would violate the requirements placed on certificate holders for airport safety and management. This action would be taken under CPA's regulatory authority as the holder of the Airport Operating Certificate and under a contract theory for the military's violation of CPA's rights under the 1999 Release of Interest.

¹⁰⁴ See *supra* Section I.A.2.

¹⁰⁵ A writ of mandamus is an order from a court to a government official to properly fulfill his or her official duties.

3) Can the United States Implement CJMT at the Port of Tinian based Solely on the Rights it Currently Holds?

As discussed in Sections II.C.2 & 3, above, CPA is in a strong position to maintain operational responsibility and control over the Port of Tinian, its property and facilities despite the collection of reservations allowing the military certain rights to the property in the 1994 Harbor Interest Purchase. These reservations (and their corresponding conditions) fall short of providing the military the necessary management control it needs.

4) How can CPA assert its Interpretation of its Rights, in Comparison to the Rights Reserved by the United States, at the Port of Tinian?

CPA is in a strong enough position that it could proactively assert its interpretation of what pieces, if any, of the CJMT plan the reservations held by the United States under the 1994 Harbor Interest Purchase allow. Specifically, CPA could notify the military that its interpretation of Article 3(B)(3) of the 1994 Harbor Interest Purchase allows for fuel utility lines to be installed over CPA property to serve the remaining military leased lands, and not for fuel storage facilities as proposed in CJMT. Similarly, CPA could assert the term "in common with others" as used in Article 3(B)(1) means use allowing nothing more than operations that have minimal interference with civilian activity based on definitions in the 1975 Technical Agreement. Third, CPA could notify the military that any military activity that is not a port-related activity at San Jose Harbor on the surplus land secured in the 1994 Harbor Interest Purchase requires prior authorization from CPA, and then could assert parameters on the definition of "port-related activity."

By setting these markers, and beginning to operate the Port of Tinian under a more rigorous interpretation of these reservations when the military uses the port in the meantime, CPA would inform the military in advance of potential conflicts to come if it proceeds based solely on its reserved rights and begin building its case to assert these definitions later in court. These notices could be made in CPA comments to the upcoming updated draft EIS for CJMT.

5) What if the United States attempts to Implement CJMT based Solely on its Reserved Rights under the 1994 Harbor Interest Purchase contrary to CPA's Interpretation of those Rights?

Should the military proceed with attempting to implement its CJMT plans at the Port of Tinian based solely on the reservations in the 1994 Harbor Interest Purchase, CPA would attempt to prevent this implementation by filing for an injunction against the military based on CPA's contract rights contained in the 1994 Harbor Interest Purchase.

6) Are there any Applicable Restrictions Contained in the 1975 Covenant Mandate?

As discussed in Section III.B.2, above, the 1975 Covenant contains clauses with commitments by the United States to support CNMI economic development. As with an eminent domain action, these clauses may provide CPA a defense against military implementation of CJMT

based solely on its reserved rights in the 1994 Harbor Interest Purchase and the 1999 Release of Interest due to the harm such implementation would do to CNMI economic development.

7) Would an Eminent Domain Taking Trigger any Commitments in the 1975 Technical Agreement?

Again, as discussed in Section III.B.5, if the military moved to implement CJMT based solely on its reserved rights in the 1994 Harbor Interest Purchase and the 1999 Release of Interest, CPA believes that such action would trigger some, if not all, of the commitments enshrined in the 1975 Technical Agreement.

D. Negotiated Use of CPA Properties

1) What Shape could a Negotiated Alternative Take?

The United States could reacquire the necessary management control to implement the necessary elements of its CJMT plan by working with CPA to proactively construct use agreements allowing the military to use CPA facilities while maintaining CPA's authority over the facilities. This is the purpose of the *CPA Military Exercise Ground Operations Plan and Implementation Plan*, which sets forth the parameters under which CPA would approve a military exercise on CPA property. Such action would not be an attempt by the United States to gain additional property rights in the CNMI for a public purpose, so it would not have to comply with the restrictions of 1975 Covenant Section 806(a) & (b).

2) What are the Benefits of a Negotiated Alternative?

Should the military choose to work along these parameters, CPA would be able to have influence on every military exercise's scope of work, helping structure them to have both minimal impact on and reasonable benefit to CPA facilities. This could also be done in full recognition of the reserved rights of the military in the 1994 Harbor Interest Purchase and the 1999 Release of Interest, and could even provide further definition of these rights through negotiated memorandums of understanding. Further, this option would likely remove the potential of any implementation of the commitments contained in the 1975 Technical Agreement, as the military would not be acquiring the operational responsibility and control, or establishing the base, necessary to trigger those commitments. The necessary military operations may also require upgrades to CPA facilities (such as ILS landing, control tower, wharf improvements, etc.), the funding, planning, and construction of which could be negotiated as part of the implementation plan process.

The most important outcome of this option would be that CPA would retain authority over CPA properties. It would maintain its responsibilities for safety and management of the airport as the holder of the Airport Operating Certificate, its ALP responsibilities, and its authority under 2 CMC § 2122(b).

3) Is a Negotiated Alternative Possible?

Yes. The military is required to enter into negotiations with CPA regarding the acquisition of any property it may require for CJMT and to consider options for use of the required land short of acquiring an additional interest in the property.¹⁰⁶ Yet CPA would likely have to incentivize the military to pursue this use-agreement policy option as it would provide the military the least flexibility. Such incentive measures could include pro-active notice and aggressive enforcement of CPA's interpretations of the limits of the reservations contained in the 1994 Harbor Purchase Agreement and the 1999 Release of Interest, pursuit of implementation of the commitments in the 1975 Technical Agreement should the military act under its eminent domain or reserved rights alone, continued opposition to CJMT based on its environmental impact, and continued openness to negotiation based on the premise of temporary, reasonable, and low-impact usage coordinated with CPA and the people of the CNMI.

IV. Additional Policy Considerations

1) How Should CPA Consider the Different Interests in play in CPA's Consideration of CJMT?

It is important to recognize the difference between CPA's interests in the potential impact of CJMT on CPA property and CPA's interests in the potential impact of CJMT on the rest of Tinian and the CNMI in general. CPA has the responsibility to operate the ports of the Commonwealth, ports that require facility improvements that may come with increased military activity on Tinian that would allow CPA to further its mission. However, CPA has to this point acted as both an advocate for its interests¹⁰⁷ and for the interests of those "outside the fence" of CPA property.¹⁰⁸ CPA has tools available to it, such as control and responsibility for the Tinian International Airport ALP, to influence the process of the military's implementation of CJMT that community members and other government agencies do not. Meanwhile, many of the negative impacts of the CJMT plan "outside the fence" do not directly impact CPA as much as they do Tinian and the CNMI in general. These negative impacts include closure of natural areas of Tinian to local use, solid waste and wastewater concerns, noise impacts, impacts on the natural environment, and the cultural impacts that may result due to raised tensions between the residents of Tinian and the military presence brought by CJMT. Moving forward, and keeping in mind CPA's mission, CPA will continually re-evaluate this position of joint advocacy for both "inside the fence" and "outside the fence" interests, where the focus of CPA's advocacy should be centered, and the appropriate level of compromise CPA is willing to accept as to both the negative impacts of CJMT on CPA and its negative impacts on Tinian and the CNMI in general.

V. Conclusion

¹⁰⁶ See 10 U.S.C. § 2663(f)(1)(A).

¹⁰⁷ See, e.g., *CPA Comments on Draft EIS*, Adverse Impacts #1-3, 5.

¹⁰⁸ See, e.g. *id.* at Adverse Impacts #4, 6, 7.

This White Paper discusses the current state of rights to use and responsibilities over the Tinian International Airport and the Port of Tinian held by CPA and the United States in relation to the United States' CJMT plan. The reserved rights to the use of these properties held by the United States, though in some instances quite broad, are insufficient to fully implement CJMT. How CPA must proceed will depend in large part on how the United States attempts to "reacquire management control" of these properties that is necessary to implement CJMT. Though the initial CJMT Draft EIS is unclear on this issue, hopefully the United States will begin by seeking to negotiate an agreement with CPA to achieve the management control it desires. However, the next step in the process remains the release of a revised draft EIS sometime next year. Perhaps this document will provide additional clarity on the intentions of the United States, allowing CPA to proceed accordingly.



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