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# REPORT TO THE PRESIDENT ON 902 CONSULTATIONS

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**Special Representatives of the United States and the  
Commonwealth of the Northern Mariana Islands**

**January 2017**



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## **About the 902 Consultations Between the United States and the Commonwealth of the Northern Mariana Islands**

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The Covenant to Establish the Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant) governs relations between the United States and the Commonwealth of the Northern Mariana Islands (CNMI).

Section 902 of the Covenant provides that the Government of the United States and the Government of the Northern Mariana Islands “will designate special representatives to meet and consider in good faith such issues affecting the relationship between the Northern Mariana Islands and the United States as may be designated by either Government and to make a report and recommendations with respect thereto.” These intermittent discussions between the United States and the CNMI have become known as 902 Consultations.

Beginning in October 2015, the late CNMI Governor Eloy Inos, followed by Governor Ralph Torres in January 2016, requested U.S. President Barack Obama initiate the 902 Consultations process. In May 2016, President Obama designated Esther Kia’aina, the Assistant Secretary for Insular Areas at the U.S. Department of the Interior, as the Special Representative for the United States for 902 Consultations. Governor Ralph Torres was designated the Special Representative for the CNMI.

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## Letter to the President from Special Representatives with Signatures

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January 10, 2017

The Honorable Barack Obama  
President of the United States  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

Dear Mr. President:

We are pleased to send you this report on Section 902 Consultations between the United States and the Commonwealth of the Northern Mariana Islands (CNMI). This report offers important recommendations on how the Federal Government can help to strengthen the CNMI's economy and balance U.S. national security interests in the western Pacific region.

These recommendations were developed following consultations between the United States and CNMI Special Representatives and their teams; site visits to the Commonwealth by the 902 Federal team; and Federal team discussions with CNMI officials, community leaders, and businesses. Based on these discussions, the Special Representatives identified several areas that require regulatory and Congressional action and developed recommendations that reflect their shared opinions.

Addressing the economic and workforce development interests of the CNMI and working toward policies that treat the jurisdiction in a fair and equitable manner will require action before expiration of the CNMI-Only Transitional Worker program on December 31, 2019. Likewise, a military presence in the CNMI that is welcomed and respected by CNMI officials and the community at large will require an ongoing investment of time, diplomacy, and resources.

We are grateful for your providing the opportunity for 902 Consultations between the United States and the Commonwealth of the Northern Mariana Islands and present these recommendations to you.

Sincerely,



Esther Kia'aina  
U.S. Special Representative



Ralph DLG. Torres  
CNMI Special Representative

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## Part 1: Background on 902 Consultations

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### *The Commonwealth of the Northern Mariana Islands*

The Commonwealth of the Northern Mariana Islands (CNMI) is a U.S. territory located in Micronesia in the western Pacific Ocean. The CNMI is comprised of fourteen of the fifteen islands in the Mariana Islands archipelago; the southernmost island in the archipelago is Guam, another U.S. territory. Less than 50 miles north of Guam is Rota, the most southern island of the CNMI. From there, the archipelago stretches in a northward arc toward Japan spanning 300 miles with a total land area of 183.5 square miles. The principal inhabited islands are Saipan, Rota, and Tinian, in the southern end of the archipelago. The northern, largely uninhabited islands, include Farallon de Medinilla and Pagan.

According to the 2010 U.S. Census, the CNMI has a population of 53,900 people, a 22.2 percent population decline from the previous census in 2000. About 90 percent of residents live on Saipan, the largest island and the CNMI capital.

### *CNMI Covenant and Section 902 Consultations*

After World War II, the Northern Mariana Islands were part of the Trust Territory of the Pacific Islands, administered by the United States on behalf of the United Nations. On February 15, 1975, representatives of the United States and the Marianas Political Status Commission signed the Covenant to Establish the Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant). That same year, the people of the Northern Mariana Islands voted to become a territory of the United States and overwhelmingly supported the Covenant in a plebiscite, with 78.8 percent voting in favor of it. The U.S. Congress subsequently passed the Covenant and President Gerald Ford signed it into law on March 24, 1976, as Public Law 94-241.<sup>1</sup> In accordance with Section 1003 of the Covenant, certain sections became effective in 1976 and in 1978. On November 3, 1986, President Ronald Reagan issued Presidential Proclamation 5564, placing the Covenant into full force and effect establishing the CNMI as a part of the American family.

Section 902 of Article IX of the Covenant provides: “The Government of the United States and the Government of the Northern Mariana Islands will consult regularly on all matters affecting the relationship between them. At the request of either Government, and not less frequently than every ten years, the President of the United States and the Governor of the Northern Mariana Islands will designate Special Representatives to meet and consider in good faith such issues affecting the relationship between the Northern Mariana Islands and the

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<sup>1</sup> See 48 U.S.C. § 1801.

United States as may be designated by either Government and to make a report and recommendations with respect thereto.”

Section 902 provides the CNMI a process allowing for formal discussions on any issue concerning the federal government, upon concurrence by the United States, which culminates in a report to the President. Through the years, 902 Consultations have been used as a means to address issues involving the CNMI and federal laws, regulations, and actions.

### *History of 902 Consultations*

Although either the President or CNMI Governor can request 902 Consultations, to date the CNMI governors have initiated all requests for consultations. Prior to 2016, there were six different individuals designated by the United States as Special Representatives for 902 Consultations, spanning four presidential administrations. These Special Representatives often had other individuals from various federal agencies present at the meetings in order to help address the issues raised by the CNMI. The CNMI often appointed several Special Representatives at a time for a single 902 Consultation and designated one to act as a spokesperson for the group.

The first 902 Consultation began in 1986, during the Reagan Administration. Since then, there have been at least fifteen meetings associated with 902 Consultations. The locations for the meetings have varied, occurring in the CNMI, Washington, D.C., Hawaii, and other locations in the continental United States.

Past 902 Consultations involved a variety of issues, often within a single meeting. Issues have ranged from sovereignty and self-government, Micronesian war claims, submerged lands ownership, fisheries, tariffs, immigration and labor issues, essential air service, banking regulations and laws, and a non-voting delegate for the CNMI.

Compilations of documents from past 902 Consultations indicate that discussions have resulted in U.S. position papers, proposed legislative or regulatory changes, or interagency agreements. However, no official or final report to the President or Congress was ever issued.

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## Part 2: The Current 902 Consultations Process

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### *Appointment of Special Representatives*

On October 2, 2015, CNMI Governor Eloy Inos of the Commonwealth of the Northern Mariana Islands sent a letter to U.S. President Barack Obama. The Governor requested that President Obama initiate consultations pursuant to Section 902 of the Covenant. Upon Governor Inos' passing, the current Governor, Ralph Torres, reasserted this request in a letter to the President of the United States, dated January 4, 2016.

On May 19, 2016, President Obama appointed Esther Kia'aina, the Assistant Secretary for Insular Areas at the U.S. Department of the Interior, as the Special Representative for the United States for Section 902 Consultations. Special Representative Kia'aina is the seventh person to receive this designation. In order to address the CNMI's issues comprehensively, the U.S. Special Representative solicited the support of the U.S. Departments of Defense, Homeland Security, and Labor. Although the U.S. Department of Labor declined to be formally part of the U.S. team, officials agreed to consider issues if they related to the department as part of the 902 process.

The U.S. Departments of Defense and Homeland Security designated high-level officials to work as part of the U.S. team with U.S. Special Representative Kia'aina.

Principals on the U.S. team are Seth Stodder, Assistant Secretary for Border, Immigration, and Trade Policy for the Department of Homeland Security; Mary Giovagnoli, Deputy Assistant Secretary for Immigration Policy for the Department of Homeland Security; and Peter Potochney, Principal Deputy Assistant Secretary of Defense for Energy, Installations, and Environment for the Department of Defense. They, along with Special Representative Kia'aina, engaged in the discussions comprising the 902 Consultations.

Governor Ralph Torres designated himself as the CNMI Special Representative. The principals of the CNMI team were Edith Deleon Guerrero, Secretary of the CNMI Department of Labor, and Marianne Teregeyo, Secretary of the CNMI Department of Public Lands.

### *Summary of Issues*

In their letters to President Obama, Governor Inos and Governor Torres requested 902 Consultations in order to discuss two issues affecting the CNMI. The first issue involved immigration and labor matters affecting the growth potential of the CNMI economy, including the approaching expiration of the CNMI-Only Transitional Worker Program on December 31, 2019. The second issue concerned proposed and ongoing military activities

within the Northern Mariana Islands and their cumulative effect upon CNMI's natural resources, economy, and quality of life for its residents.

At the first meeting at the White House on June 6, 2016, the Special Representatives agreed to focus the efforts of the 902 Consultations on just these two issues.

### *Procedures Governing 902 Consultations*

At the onset of the first 902 Consultations meeting on September 30, 1986, representatives of the United States and the CNMI agreed to procedures to govern the 902 Consultations process. These procedures generally lay out the structure for meetings, the delineation of issues, and the process for creating a report and recommendations that are the final product of any 902 Consultations process.

The report would discuss the issues that are the subject of the consultations and the Special Representatives' recommendations on the resolution of those issues. If the Special Representatives conclude they cannot agree on a recommendation or language for a recommendation, the draft report shall contain the separate views of the parties, which are not subject to approval by the other side.

Once a draft report is complete, the Special Representatives circulate the draft to the CNMI Governor, Legislature, and relevant CNMI agencies, and to any officers or agencies of the Executive Branch of the Federal Government that must approve the report. Once approved, the report is prepared in final form, signed by both parties, and submitted to the President of the United States. As stated earlier, no report to the President from prior 902 Consultations has ever been submitted.

These 902 procedures may be amended at any time by mutual agreement of the parties.

### *Timeline of Consultations*

Over the course of this 902 Consultations process, there were a total of four rounds of meetings between the Special Representatives. The first meeting was held at the White House on June 6, 2016, and consisted of the CNMI team presenting position papers on the two topics of discussion and the attenuating issues and challenges.

On June 16-18, 2016, the U.S. team traveled to the CNMI to conduct 902 site visits on the islands of Saipan and Tinian. On Tinian, the U.S. team met with the Mayor of Tinian and other officials, who described the impacts of the proposed expansion of military training activities to the people and places on the island. The U.S. Department of Defense then informally presented additional information on its proposals and future plans. These discussions were followed by visits to a major casino operation that closed earlier in the year, historical sites from World War II, and other locations that could be impacted by the expansion of military training on the island. On Saipan, the U.S. team toured economic development projects that have been impacted by limitations on the CNMI's foreign worker

population and training facilities to grow the skilled U.S. worker population, and talked to a variety of community stakeholder groups affected by federal immigration policy. These site visits provided critical firsthand information about the economic, environmental, and social challenges facing the CNMI people, private industry, and government.

A second 902 Consultations meeting took place in Hawaii on August 10-11, 2016, in which the U.S. team began the discussion and responded to the CNMI team's position papers.

For the third 902 Consultations meeting, the issues were separated and deliberated on different days. Immigration and labor issues were discussed at the U.S. Department of the Interior in Washington D.C. on Wednesday, September 14, 2016. The U.S. Department of Homeland Security presented its position paper responding to the CNMI's recommendations on the CNMI-Only Transitional Worker (CW) program, related immigration matters, and workforce development issues. On October 1, 2016, the U.S. Department of Defense presented its position paper to the CNMI team on the island of Saipan in the CNMI. This paper outlined its response to the CNMI's positions and proposals.

The day before, on September 30, 2016, the Special Representatives with 902 Federal and CNMI team members participated in an historic site visit to the island of Pagan, where the U.S. Department of Defense has proposed multiple training activities. The visit provided an opportunity to discuss proposed training on Pagan, visit future homesteading sites, and view several cultural and historical sites.

After the third round of meetings were completed, the U.S. Special Representative began writing the report. Once the initial draft was complete, it was distributed to the CNMI Special Representative and to both teams.

On December 1, 2016, there was a fourth round of 902 Consultations. The Special Representatives and the U.S. and CNMI teams had a teleconference to discuss any concerns with the initial draft and offer edits where desired. The Special Representatives settled on mutually agreeable language and, on January 10, 2017, the final report and recommendations were sent to President Barack Obama.

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## Part 3: Immigration & Labor Issues

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### *Background on Immigration and Labor Issues in the CNMI*

On May 8, 2008, Public Law 110-229, the Consolidated Natural Resources Act of 2008 (CNRA), became law, ushering in a significant change in the nature of immigration to the CNMI. Subtitle A of Title VII of the CNRA brought the CNMI under the jurisdiction of U.S. immigration law, removing the CNMI's authority to control its immigration policies and programs as it had done for at least the past twenty years.

The history of CNMI control over its immigration policies began with the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant), approved by Congress and signed into law in 1976, and taking full effect on November 4, 1986.<sup>2</sup> The Covenant contained language in Section 503 that specifically exempted the Northern Mariana Islands (which became the CNMI in 1986) from certain federal laws, including the immigration and naturalization laws of the United States, subject to the authority of the U.S. Congress to apply those laws to the CNMI.

“Section 503. The following laws of the United States, presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement: (a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States;...”

Section 506 of the Covenant identified very limited and specific provisions of the Immigration and Nationality Act (INA) that were applied to the Northern Mariana Islands. These provisions dealt with citizenship and family-based permanent immigration. The CNMI retained jurisdiction and control over all other immigration matters.

In the years that followed the approval of the Covenant and Section 503, the CNMI Government allowed for an influx of foreign guest workers who labored mainly in the tourism sector and in the garment factories which opened in the CNMI in the 1980s. The garment industry was able to flourish in the CNMI by exporting products to other parts of the United States largely quota-free and duty-free.

As a result of bringing in large numbers of foreign laborers, the population increased dramatically. Correspondingly, the amount of foreign-born people as a percentage of the population also increased. According to the U.S. Census Bureau, between 1980 and 2000, the population increased from about 16,800 to 69,200. In the year 2000, there were almost 39,100 foreign-born people in the CNMI constituting 56.5 percent of the territory's

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<sup>2</sup> Public Law 94-241 (48 U.S.C. § 1801 and 1801 note).

population. This is a more than a ten-fold increase from 3,700 foreign-born individuals in 1980, who made up 22.1 percent of the population at that time.

In 2005, quotas on textile exports to the United States expired and the garment factories that had become a bedrock of the CNMI economy began to close. A Household, Income, and Expenditure Survey report issued in April 2008 by the CNMI Department of Commerce found that in the year 2005, the population in the CNMI had already begun to decline, with an estimated population of 65,900 people and that slightly less than half, 49.7 percent, were not U.S. citizens. In terms of the workforce, the report found that about 92 percent of the CNMI workforce was employed. Of those employed, 78 percent were born outside of the United States, illustrating the heavy reliance on foreign guest workers by the CNMI economy.

The CNMI's heavy reliance on foreign labor, the desire for strong worker protections, and growing concerns about national security issues led Congress to enact the CNRA on May 8, 2008. Among other things, the CNRA extended U.S. immigration laws to the CNMI. The decision to extend U.S. immigration laws to the CNMI came after many years of debate in Congress. At the same time, Congress also recognized the Commonwealth's unique economic circumstances, history, and geographic location and thus included special provisions to take into account the unique circumstances of the CNMI to ease the transition to U.S. immigration law.<sup>3</sup>

Central to these special provisions was the establishment of a transition period, extendable in part, that would begin on June 1, 2009, and run through December 31, 2014. During this time, the U.S. Department of Homeland Security (DHS) would establish, administer, and enforce a transition program to regulate immigration in the Commonwealth. Exercising authority provided by the CNRA, U.S. Secretary of Homeland Security Janet Napolitano delayed the start of the transition program in the CNMI until November 28, 2009.

A major part of the transition program, and one of the most critical adaptations from U.S. immigration law for the CNMI, was the establishment of a Commonwealth-Only Transitional Worker (CW) system to ensure an adequate labor supply for the CNMI. This system would ensure employers had access to foreign workers who would not otherwise be eligible for admission under U.S. immigration laws and help minimize adverse economic effects of phasing out the Commonwealth's nonresident contract worker program. As a result of this provision, DHS ultimately established, and currently administers, the CW program. Under the CW program, foreign workers are able to obtain, through their employer, nonimmigrant CW-1 status that allows them to work only in the CNMI. Dependents of CW-1 nonimmigrants (spouses and unmarried children under the age of 18) are eligible for CW-2 status, which is derivative of and dependent on the CW-1 worker's status. In accordance with the CNRA, DHS, through U.S. Citizenship and Immigration Services (USCIS), decreases the

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<sup>3</sup> The legislative intention, as stated in section 701(a) of the CNRA (48 U.S.C. § 1806 note), included ensuring effective border control and properly addressing national and homeland security issues; and minimizing, to the greatest extent practicable, potential adverse economic and fiscal effects of phasing-out the Commonwealth's nonresident contract worker program and maximizing the Commonwealth's potential for future economic and business growth.

amount of CW-1 visas available each fiscal year under the mandate that the number of CW-1 visas reach zero by the end of the transition period.

Other special provisions in the CNRA include establishing a nonimmigrant classification for certain alien investors admitted under the CNMI immigration system (ultimately established as the E-2C investor visa), a five-year ban on asylum claims in the CNMI,<sup>4</sup> and an exemption from the national caps on H category visas for nonimmigrant workers.<sup>5</sup> The exemption from the H visa caps applies to both Guam and the CNMI. In addition, the CNRA established a visa waiver program to facilitate travel to the CNMI, but unlike the other special provisions, the visa waiver program is not time limited. These provisions of the CNRA are modifications to U.S. immigration laws that mitigate adverse effects and smooth the transition to U.S. immigration law. Congress intended that “the Commonwealth be given as much flexibility as possible in maintaining existing businesses and other revenue sources, and developing new economic opportunities,” and the law also stated that the provisions of the CNRA “should be implemented wherever possible to expand tourism and economic development in the Commonwealth.”<sup>6</sup> As a result, when Congress acted to apply U.S. immigration law to the CNMI, it did so with some consideration for the CNMI economy that had been heavily dependent on foreign labor and provided a path for the territory to transition in a way that did not compromise its economic well-being.

In addition to providing several adjustments that recognized the unique situation of the CNMI, the CNRA also recognized that the Commonwealth may need more time to transition from foreign labor and provided the U.S. Secretary of Labor with the authority to extend the transitional worker program for up to five years if such an extension was found “necessary to ensure an adequate number of workers for legitimate businesses in the Commonwealth.”

On June 3, 2014, the U.S. Secretary of Labor, Thomas Perez, exercised the authority provided to him under the CNRA to extend the CW program for five years, through December 31, 2019, because of an “insufficient number of U.S. workers to meet CNMI businesses’ current needs.”<sup>7</sup>

Following that decision, Congress extended the entire transition program through that same date of December 31, 2019, in Public Law 113-235, the Consolidated and Further Continuing Appropriations Act, 2015. In addition to the CW program, the statutory provisions for the E-2C investor visas, the ban on asylum claims, and the exemption of Guam and the CNMI from the national caps for the H-visa categories were all extended through 2019. Notably, Public Law 113-235 also removed the authority of the U.S. Secretary of Labor to extend administratively the CW program beyond 2019.

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<sup>4</sup> Although unable to affirmatively apply for asylum, individuals in the CNMI facing potential removal are eligible to seek protection from removal to a place where they may be persecuted (withholding of removal).

<sup>5</sup> There are caps on the H-2B (temporary or seasonal non-agricultural worker) and H-1B (specialty occupation worker) classifications. The H-2A (agricultural worker) classification does not have a cap.

<sup>6</sup> Section 701(b) of Public Law 110-229, 48 U.S.C. § 1806 note.

<sup>7</sup> 79 Fed. Reg. 106 (June 3, 2014).



## *Context for Recommendations to Extend the CW Program*

By 2009, all of the garment factories had closed and the CNMI was in its sixth year of a contracting economy and shrinking Gross Domestic Product (GDP).<sup>8</sup> Thus, just as the transition to U.S. immigration law began, the CNMI's manufacturing base all but disappeared. Efforts to expand the economy and look for other sources of revenue became critical, however, according to the CNMI Government, because the CNMI had incurred more than \$850 million in financial obligations from compensation payments, judgments, settlements by the government, and pension system payments. With gross budgetary resources amounting to \$203 million in 2016, economic growth and expansion is necessary for the CNMI to meet its financial obligations while continuing to provide critical services to its population.

The CNMI economy has found footing in its tourism industry, which in recent years has witnessed a remarkable resurgence in foreign investment. Tourism-related projects are under construction with more in pre-construction stages. The CNMI is mindful of balancing the need to grow its economy, meet its financial obligations, and provide services to its people with the sustainability and protection of its resources and improving the quality of life for its community. However, it is clear that even a portion of the envisioned development will require workforce development resources well beyond the capacity of the local U.S. population.

The Federal Government does not collect standardized population or employment data in the CNMI aside from the decennial census. The most recent numbers are from the 2010 Census, which found almost 53,900 people present in the CNMI at that time. Of that amount, almost 24,200, or 44.9 percent, were not U.S. citizens. Of the population age 16 or older, roughly the CNMI labor force, the Census found there were almost 38,700 people. From that group of people, more than 24,800 were employed, 10,700 were not a part of the labor force, and only 3,100 were categorized as unemployed. The Census states that the "Not in Labor Force" category largely consists of students, homemakers, retired workers, seasonal workers in an off-season, institutionalized people, and people doing unpaid family work. Thus, in 2010, there were roughly 3,100 people unemployed and looking for work in the CNMI.

Calculation of the current unemployment rate is hampered, however, by the lack of any monthly or annual federal estimates for the CNMI. Instead, the CNMI relies on data derived from calculating the number of unemployed individuals who are participating in certain government programs or surveys, creating a range of roughly 500 to 3,000 unemployed U.S. citizen residents of the CNMI. Specifically, the CNMI estimates its unemployment rate by looking at the number of individuals actively seeking employment who are enrolled in the CNMI Nutrition Assistance Program (545 as of September 2015), as well as with the CNMI Department of Labor's Workforce Investment Agency (936 in FY 2015). In addition, the calculation takes into account data derived from the 2016 CNMI Behavioral Health Survey

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<sup>8</sup> U.S. Department of Commerce's Bureau of Economic Analysis, "The BEA releases Estimates of Gross Domestic Product for the Commonwealth of the Northern Mariana Islands." Press release, July 12, 2011.

which contains questions aimed at measuring the extent of unemployment in the CNMI. The data gathered through the survey suggests that at the time of the survey, 2,370 people were in the process of seeking employment.

This number is far below the CNMI workforce need based on projections over the next five years. Developers propose adding 5,000 hotel rooms to the current inventory of 3,600 rooms by the end of 2021, resulting in increases for construction and trade workers during the development phase, as well as long-term direct employment increases. In 2016 alone, the CNMI estimates a need for 7,000 workers to support this expansion. By the time the 5,000 proposed hotel rooms are completed, the direct labor need is estimated at 11,613 workers.

Given this growing demand for workers, the CNMI works to encourage and grow available U.S.-eligible labor resources on island in order to lessen the reliance on foreign labor. In addition to requiring businesses to use at least 30% local hires,<sup>9</sup> the CNMI also funds the Northern Marianas Trades Institute and the Northern Marianas College, in their efforts to provide local residents the opportunities to learn vocational and career skills. These activities are funded in part by a \$150 supplemental fee levied on employers for each CW-1 worker, specifically for ongoing vocational education curricula and program development. In addition, the CNMI Governor is supporting legislation in the CNMI Legislature to increase the CNMI minimum wage up to the federal standard of \$7.25/hour to help attract a U.S. workforce and provide more for families in the CNMI. The CNMI minimum wage reached \$6.55/hour on September 30, 2016, and is not scheduled to reach the federal minimum wage before 2018.

Businesses also attempt to recruit U.S. workers to Saipan, but find that the geographical distance and remoteness of the CNMI from Hawaii and the U.S. mainland make it difficult to recruit and retain workers. During the site visits in Saipan, the U.S. 902 Consultations team talked to representatives from one company that spent more than \$1 million (in 2014-15) to recruit U.S. workers. These efforts resulted in only 120 U.S. workers relocating to Saipan. Shortly after, Typhoon Soudelor hit Saipan on August 2, 2015, and one-half of the workers left the CNMI in a matter of weeks. Another business went as far afield as Puerto Rico in an attempt to find U.S. workers, but was unsuccessful.

Despite these efforts to grow the U.S. workforce in the CNMI, the available number of local hires cannot keep up with the demands of the private sector. Under current growth projections, if the CNMI had full employment of all U.S. citizens, under even the most conservative estimates of the unemployment rate, this would comprise less than 15 percent of the total labor demand projected within the next five years.

Exacerbating the workforce shortage is competition from Guam, another U.S. territory just south of the CNMI, for similar types of labor. This competition is already evident in the construction fields as well as the health professions, with both Guam and the CNMI pulling from the same pool of doctors and nurses willing to relocate to the region. Each jurisdiction

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<sup>9</sup> However, a waiver of this requirement is available and has been granted by the CNMI Government.

has health facilities affected by a shortage of qualified health professionals.<sup>10</sup> In addition, sometime after January 2017, construction will begin to accommodate the relocation to Guam from Okinawa of 5,000 U.S. Marines. This work is expected to intensify the regional competition for workers in the construction trades.

In this context, the role of the CW visa becomes particularly important to the CNMI’s continued growth and in its successful transition to life under the INA. Under the terms of the CNRA, as amended, the initial visa allocation of 22,417 must be reduced annually in order to reach zero visas as of December 31, 2019. Until FY 2016, the number of available CW visas was more than sufficient to meet demand, and many workers who had been in the CNMI for years, and their employers, continued to rely on the CW visa as the means for maintaining status.

Table 1. CW-1 Caps Announced by USCIS

<b>Fiscal Year</b>	<b>Cap</b>	<b>Details</b>
2011	22,417	Based on the CNMI’s estimate of the number of workers at the time the CNRA was enacted; because the effective date of rule turned out to be very early in FY 2012, this number was not actually in effect.
2012	22,416	Status quo as of FY 2011 for the start of the program; reduction by one satisfies the regulatory requirement that there must be a yearly reduction.
2013	15,000	Based on actual usage in FY 2012, plus some cushion for economic growth; because the CNMI estimate of 22,000+ turned out to be very high compared to actual CW demand, this is not as big an actual reduction as it may seem. The cap for FY 2013 was not reached.
2014	14,000	Based on actual usage in FY 2013, plus some cushion for economic growth; DHS tried to make it a somewhat meaningful reduction in light of the statutory mandate to eventually zero out. The cap for FY 2014 was not reached.
2015	13,999	U.S. Department of Labor had just extended the program – and thus the time horizon for eventual zero-out was extended for another five years, so DHS made only a minimal reduction. The cap for FY 2015 was not reached.
2016	12,999	Congress had just taken away U.S. Department of Labor’s extension authority, so now there was a hard sunset for the first time; given that, DHS deemed it necessary to make a meaningful reduction of 1,000. The 12,999 cap for FY 2016 was met five months before the end of the fiscal year.

<sup>10</sup> In adjudicating CW-1 petitions, USCIS has regularly granted discretionary waivers of the ground of inadmissibility in section 212(a)(5)(C) of the INA (8 U.S.C. § 1182(a)(5)(C)) pertaining to nurses who lack sufficient professional credentials for admission to the United States, in order to allow health care facilities in the CNMI to retain personnel.

2017	12,998	On September 2, 2016, DHS announced a nominal reduction for FY 2017 of only one number, to 12,998, in light of the effect of the recent cap closure on the CNMI. Despite this nominal reduction, it was fully expected that the FY 2017 cap would be reached and that this would be earlier in the fiscal year than in any previous year. The 12,998 cap for FY 2017 was met on October 14, 2016, only two weeks into the fiscal year.
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For the first time, however, on May 5, 2016, the CW-1 cap of 12,999 visas was exhausted, five months before the end of the fiscal year. As a result, those CW workers whose status expired in the latter half of the year but had not yet applied for their extension were left with no opportunity for renewal within the FY 2016 CW cap. This came as a surprise to the CW-1 workers and their families who would be required to leave the CNMI within ten days of the visa expiring, forcing families to make decisions about uprooting children or incurring an illegal immigration status.

The FY 2017 CW-1 cap of 12,998 visas was also reached on October 14, 2016, two weeks into the new fiscal year. This development further exacerbated the humanitarian circumstances that arose following the exhaustion of the FY 2016 cap.

In addition to the continued need for foreign labor, the CNMI wants and needs to use its allocation of the foreign workforce under the CW visa more efficiently. There is a growing recognition within the CNMI that many of the CW visas are currently sought by companies that could potentially recruit workers under other visa categories. The CNMI would like to increase its tools for targeting the use of CW visas for those workers in greatest need of the program, particularly those with ties to the CNMI and the United States, such as workers who have resided in the CNMI for years and have U.S. citizen family members.

*Short-Term Proposals by the CNMI*

Although the 902 process is an opportunity for high-level discussions between the CNMI and the United States on longer-term issues, the first 902 meeting, held on June 6, 2016, occurred one month after the CW cap had been hit for the first time. As a result, discussion of the issues surrounding the CW program gave rise to several short-term proposals for immediate consideration that focused on providing a lawful status to certain CW workers who were not going to be able to obtain a renewal before the expiration of their current visa. These are described here as it will also give context to the recommendations from the Special Representatives.

## **“Cap-Gap” Relief, Humanitarian Parole, Recalculation of the 2016 Cap, and Additional Time for CW-1 Departures**

The CNMI delegation essentially requested that DHS facilitate the ability of CW workers to remain in the CNMI upon expiration of their visas through the exercise of certain discretionary or administrative tools. For example, the CNMI asked that DHS utilize “cap-gap” relief, a mechanism used to help transition foreign students who, upon graduation, need time to transition from a student F-1 visa to a work category visa such as H-1B. The delegation also asked DHS to exercise its authority to “parole” a noncitizen for “urgent humanitarian reasons” under section 212(d)(5)(A) of the INA (8 U.S.C. § 1182(d)(5)(A)). The delegation also asked DHS to consider adjusting the current FY 2016 cap from 12,999 to 13,998, the largest increase allowed by law. At the very least, the CNMI asked that CW workers and their families be granted additional time to prepare to leave the CNMI, arguing that the 10 days permitted by regulation were insufficient, especially for individuals who had resided in the CNMI for many years.

In response to these proposals, DHS explained that parole authority is restricted to individuals who have not been admitted to the United States. As a result, all those who were granted CW status and present in the CNMI were statutorily ineligible for parole. Additionally, cap-gap relief and increasing the departure period to more than 10 days would all require changes to existing regulations, a lengthy and time-intensive process that would certainly not have been completed before the end of FY 2016 and would therefore offer no assistance to CW-1 workers facing an expiring visa. Recalculating the FY 2016 cap would have been administratively impracticable and provided extremely limited relief.

Given the extenuating circumstances faced by many CW-1 visa holders, however, following exhaustion of the FY 2016 allocation, USCIS announced a short-term solution that could be implemented without regulatory changes. On August 29, 2016, USCIS announced the ability for certain CW-1 workers to apply for deferred action, a discretionary determination to defer temporarily a removal action of an individual. An individual who has received deferred action is authorized to be present in the CNMI during the time period approved by the deferred action, does not incur unlawful presence that could be grounds for future inadmissibility, and can apply for a discretionary grant of work authorization. As of December 13, 2016, 372 individuals had applied for deferred action.

This deferred action, in conjunction with a previously announced regulatory change including CW-1 workers as eligible for the so-called 240-day rule, effectively provides qualifying employees with benefits similar to the “cap-gap” relief as proposed by the CNMI. The 240-day rule for CW-1 workers, which became effective on February 16, 2016, allows approved CW-1 nonimmigrants up to 240 days of continued employment authorization past their visa expiration date as long as they have an extension pending with USCIS for continued employment with the same employer.<sup>11</sup>

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<sup>11</sup> See 8 C.F.R. § 274a.12(b)(20).

## *Long-Term Proposals by the CNMI*

The CNMI also submitted several proposals to improve the process for CW-1 applications and eliminate any advantage new CW-1 petitions might have over current and long-time CW-1 workers in terms of the specific time periods during which their petitions may be filed. These proposals have a long-term focus on targeting the CW program so that the CNMI community and economy are transformed in a balanced manner while trying to acquire the tools the CNMI needs to become more reliant on a U.S. workforce before the expiration of the CW program in 2019.

### **Proposals that Require Congress to Amend Existing Law**

#### **(1) Extend the Transition Period and Raise the CW Cap**

The CNMI proposes extending the transition period by ten years to December 31, 2029, and allowing the U.S. Secretary of Labor to administratively grant a five-year extension in addition to the ten years should it prove necessary after a review of relevant economic data. In addition, the CNMI proposes increasing the numerical limit of CW-1 visas from 12,998 to 18,000 per fiscal year. This is about 5,000 visas higher than the current cap -- recognizing the difficulties of limited available labor while achieving economic growth -- but 4,400 fewer than at the start of the CW program, acknowledging the need to decrease foreign labor.

Just before Congress passed the CNRA to apply U.S. immigration law to the CNMI, the U.S. Senate noted in Report 110-324 that all previous bills to reform the CNMI immigration system provided for a ten-year transition period and found it unlikely that the CNMI would be able to forgo its foreign workforce in five years. The Senate expected that there would be “at least one, and probably more than one” five-year extension. However, Public Law 113-235 repealed the Executive Branch’s authority to extend the transition period beyond 2019, leaving Congress as the only authority that can extend the foreign transitional workforce in the CNMI.

The final demise of the garment factories in 2009 left the CNMI in an economic recession, and the more than 22,400 CW-1 visas that were available at the start of the CW program were not needed. As a result, the number of available visas was significantly reduced in accordance with the intent of the CNRA. Now, with the CNMI GDP showing positive growth over the last few years and several opportunities to grow the tourism industry, the CNMI finds itself unable to obtain an adequate workforce to continue the development needed to put its economy on a more stable footing for future years. Given the planned economic development in the CNMI, with parallel development occurring on Guam with the future relocation of Marines, and the difficulty in attracting U.S. labor to the region, the CNMI will be unable to wean itself from foreign labor by the current deadline of December 31, 2019. The CNMI contends that ending the CW program in 2019 will only serve to cripple the CNMI economy and dramatically and irrevocably derail necessary economic development.

After the initiation of 902 Consultations, these ideas were introduced as legislation in Congress by Congressman Gregorio Kilili Camacho Sablan on July 14, 2016. The bill, H.R. 5888, was referred to the House Natural Resources Committee but was not considered before the 114<sup>th</sup> Congress adjourned sine die. Although Congress did not consider legislation to extend the transition period beyond 2019, on September 13, 2016, the House Natural Resources Subcommittee on Indian, Insular, and Alaska Native Affairs held an oversight hearing on the CW program and its economic impacts on the CNMI. In addition, Congressman Sablan also introduced H.R. 6401, the Northern Mariana Islands Economic Expansion Act, on November 29, 2016. This legislation would have: (1) increased the supplemental fee levied on employers for each CW-1 worker from \$150 to \$200; (2) made construction occupations ineligible for the CW-1 visa except for a renewal of a visa issued before October 1, 2015; and (3) increased the CW-1 cap for fiscal year 2017 from 12,998 to 15,000. H.R. 6401 passed the House of Representatives on December 8, 2016, but failed to pass the Senate before sine die adjournment.

DHS does not oppose these proposals to extend the transitional worker program or increase the CW cap. Additionally, during the 902 Consultations, the Special Representatives spoke about the importance of reinstating administrative authority to the U.S. Secretary of Labor or the U.S. Secretary of Homeland Security to extend the transition period and its viability for immediate consideration.

## **(2) Extend Other Provisions of the Transition Period**

Although the CW program is critical to the transition program, there are three other immigration provisions that are a part of the transition that were also extended by Congress in 2014. These three provisions are the continuation of the E-2C investor visa for the CNMI, a ban on all asylum claims in the CNMI, and the exemption for Guam and the CNMI from the national caps on H-visas. The CNMI supports an extension of these provisions in addition to an extension of the CW program.

Of these provisions, continuing to waive the H category nonimmigrant workers entering the CNMI and Guam from the national cap was intended to be extended along with any extension of the transition period<sup>12</sup> and is critical to ensuring these jurisdictions do not face further limitations in obtaining a workforce for their construction sites, hospitals, medical facilities, and other businesses.

Although DHS does not oppose an extension of the CW program and most of the provisions of the transition period, DHS does have serious concerns about extending the prohibition on the ability to apply for asylum in the CNMI. The CNMI believes that removing the prohibition could affect visa-free travel to the CNMI, especially from the People's Republic of China (China). Although DHS understands this concern, it believes the general goal of the CNRA is to apply U.S. immigration law fully to the CNMI, including important humanitarian protections such as asylum.

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<sup>12</sup> Senate Committee Report 110-324 accompanying H.R. 3079, a bill to apply U.S. immigration laws to the CNMI, whose language was ultimately included in the CNRA.

### **(3) Provide Permanent Status for Long-Term Guest Workers in the CNMI**

Another CNMI proposal requiring Congressional action is to give long-time guest workers in the CNMI the ability to call the CNMI their home permanently by providing them a path to lawful permanent residence. The long-term guest workers, through their continued presence and contributions to the CNMI, are intertwined with the economic development and growth of the Commonwealth. Allowing these individuals a path to lawful permanent residence would recognize their important contributions to a place many of them consider home, in some cases for more than 20 years.

The CNRA provided for the U.S. Department of the Interior, in consultation with DHS, to make recommendations as it deemed appropriate to Congress about “permitting lawfully admitted guest workers lawfully residing in the Commonwealth on [May 8, 2008] to apply for long-term status under the immigration and nationality laws of the United States.”<sup>13</sup> In 2010, U.S. Secretary of the Interior Kenneth Salazar issued a report recommending that Congress consider exploring five options for alien workers who have lawfully resided in the CNMI for a minimum of five years. Congress could confer: (1) citizenship, (2) permanent resident status leading to U.S. citizenship with the five-year minimum residence spent anywhere in the United States or its territories, (3) permanent resident status leading to U.S. citizenship with the five-year minimum residence spent in the CNMI, (4) nonimmigrant status like that negotiated for citizens of the freely associated states (the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau) and the worker could live and work in the United States and its territories, and (5) nonimmigrant status like that negotiated for citizens of the freely associated states and the worker must live and work in the CNMI.

In an attempt to address the status of the CNMI’s long-term guest workers, section 2019 in S. 744, the final version of the comprehensive immigration reform bill considered by the Senate in the 113<sup>th</sup> Congress, would have conferred a CNMI-Only resident status to four groups of people in the CNMI. Two of the four groups, specifically persons born in the CNMI between January 1, 1974, and January 9, 1978, and persons who have been permanent residents under CNMI law, would have been able to adjust to lawful permanent residence after five years. This measure passed the Senate on June 27, 2013, but was not considered by the House before adjournment sine die of the 113<sup>th</sup> Congress.

DHS agrees that Congress should seriously consider options for a more permanent status for workers and their families with significant equities in the CNMI. DHS could have technical and/or substantive concerns with the details of any proposal, including that CNMI-specific immigration statuses can be difficult to administer as work and medical reasons to travel outside of the CNMI arise. Moreover, eligibility criteria that depend on prior CNMI immigration statuses are particularly difficult to implement because access to comprehensive records is not guaranteed.

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<sup>13</sup> 48 U.S.C. § 1806(h)(5).



#### **(4) Provide Federal Assistance and Resources to Extend the Earned Income Tax Credit to CNMI Taxpayers**

The Earned Income Tax Credit (EITC) is a refundable tax credit that encourages people to enter the labor force and reduce the need for social services. The CNMI proposes to implement the EITC in its jurisdiction in order to incentivize more people to work and requests an MOU with the Internal Revenue Service of the U.S. Department of the Treasury in order to obtain technical assistance and financial resources for implementing the EITC in the CNMI. The CNMI patterned this proposal after the implementation of the Additional Child Tax Credit in the CNMI, which was achieved by an MOU between the Internal Revenue Service and the CNMI Department of Revenue and Taxation in 2000.

On October 19, 2016, U.S. Special Representative Kia'aina met with U.S. Treasury Assistant Secretary for Tax Policy Mark Mazur and Janet McCubbin, Director of the Individual Taxation Division. According to the U.S. Department of the Treasury, the Additional Child Tax Credit is conditional on Social Security tax liability under the alternative calculation for three or more children. While CNMI residents do not have U.S. income tax liability, they do pay Social Security taxes. For this reason, the Internal Revenue Service is able to refund that part of the tax credit back to the territories. However, the EITC is not conditioned on Social Security tax liability. The U.S. Department of the Treasury states it does not have the authority to pay an EITC for the territories, and a statutory change would be required in order to provide the CNMI with funding to implement the credit.

Seven bills were introduced in the 114<sup>th</sup> Congress to extend the EITC to one or more territories. Two of the bills would have extended the EITC to the CNMI. H.R. 4309, introduced by Congressman Sablan on December 18, 2015, would have made the necessary statutory changes to extend the EITC to the CNMI. H.R. 5163, introduced by Congresswoman Stacey Plaskett on April 29, 2016, also proposed to provide aid to territories that implement the EITC. These bills were not considered before the 114<sup>th</sup> Congress adjourned sine die.

Moreover, the Obama Administration proposed extending the EITC to Puerto Rico as part of a legislative response to the financial crisis in Puerto Rico. During the consideration of the EITC provision, there were conversations between the Obama Administration and the Congressional committees on the inclusion of the smaller territories in any extension of the EITC.

#### **(5) Include the CNMI as Eligible for Workforce Development Programs**

Some of the most successful federal programs to encourage workforce development are not available to the CNMI. Programs such as Wagner-Peyser, Job Corps, and Trade Adjustment Assistance have the potential to increase the CNMI's ability to train and employ a U.S. workforce and prepare for the end of the immigration transition period.

On September 16, 2016, U.S. Special Representative Kia'aina met with U.S. Department of Labor's Assistant Secretary for Congressional and Intergovernmental Affairs Adri Jayaratne, as well as others from the department, to discuss the extension of workforce development programs to the CNMI.

Currently, the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the U.S. Virgin Islands are eligible for the employment services authorized under the Wagner-Peyser Act. Extending this program to the CNMI (and American Samoa) would ensure all the territories are treated equally, but would likely require a statutory change. Similarly, extending eligibility for Trade Adjustment Assistance or establishing a Job Corps training center in the CNMI would require an Act of Congress.

In the case of the Job Corps, it would also require Congress to appropriate funding for the construction of a new center. Although federal money from another department could potentially be used to build a Job Corps Center, since residents of the CNMI are eligible to train at other Job Corps Center locations such as Hawaii, finding ways to facilitate sending CNMI youths to other Job Corps Center locations may be a more cost-effective and timesaving process.

### **Proposals that Require Regulatory Changes**

Through the 902 Consultations process, the CNMI raised several issues regarding the implementation of the transition period and the CW program in the CNMI. These concerns gave rise to proposals that would make the CW program more targeted and effective for the CNMI's economic purposes.

#### **(6) Prioritize Renewals over New CW Applications**

The first regulatory proposal by the CNMI is to change the "first-come, first-served" application system for CW-1 visas into one that prioritizes the approval of current CW-1 workers, particularly long-term guest workers whose presence in the CNMI predates the transition to the U.S. immigration system.

USCIS has a policy, exercised for all of its nonimmigrant status programs that involve a cap, where it generally accepts and processes applications in the order in which they were received. This provides a fair and equitable process for applicants. For the CNMI, this also posed no problem at the outset of the CW program when the cap on CW-1 visas was never reached.

With demand for a CW-1 visa now far exceeding the cap and a "first-come, first-served" system in place, the date on which an employer is allowed to submit an application becomes extremely important. The CW cap runs concurrent with the federal fiscal year. Prospective employers of new CW-1 workers can apply for a visa up to six months before their projected start date. So an employer could pick a start date of October 1, 2016, the first day of the fiscal year, and submit an application up to six months before that, on April 1, 2016, ensuring the

application will be accepted and considered under the FY 2017 cap. In contrast, current CW-1 workers have generally been limited to applying for an extension up to six months before their current status expires. For workers whose status expires in the latter half of FY 2017, this means the CW cap for FY 2017 was reached before many could apply for an extension. The result is a displacement of current and long-time CW-1 workers by new workers.

Prioritizing CW-1 renewals over new applications would ensure that at least some portion of the workers with a long-term presence in the CNMI, who have built significant equities in the community, are allowed to remain in the place they call home. For years, these workers have been the core of the CNMI workforce and have developed roots and families that help make up the CNMI community of today. A prioritization or separate renewal process for these applications will help the CNMI retain an essential component of its existing economy while transitioning into its new one.

DHS is open to this proposal but has determined that prioritizing CW-1 renewals would require DHS to amend the regulations for the CW program. DHS made it clear that although regulatory changes can be accomplished, the rulemaking process is not simple or quick and must be done in accordance with all applicable laws such as the Administrative Procedure Act.

DHS pointed out that this could be a particularly controversial proposal because the CNRA specifically provides for workers coming from abroad. DHS also noted its responsibility to justify the proposed regulatory preference by explaining its economic benefit, a difficult proposition when the new workers are directly contributing to essential economic development. Lastly, DHS suggested the desire to keep the established CW workers argues more for a legislative solution for permanent residence, rather than a preference system, particularly since the transitional worker program is set up to phase out in time and provides no expectation that a worker will be able to continue in his or her employment, regardless how established are his or her ties to the Commonwealth.<sup>14</sup>

#### **(7) Establish a Numerical Allocation for Long-Term CW-1 Workers**

The second regulatory proposal has a similar goal of protecting the long-time guest workers who have built families, homes, and lives in the CNMI. The CNMI proposes a new allocation for long-term CW-1 workers to be set every year, just as the total number of available CW-1 visas is set each year by USCIS. In addition, further allocations could be set for large employers or businesses to ensure that the CW cap does not unintentionally favor one specific industry, business, or occupation. An allocation system would promote diversity, growth, and prosperity in more than one sector of the CNMI economy.

The CNMI believes that the large majority of new CW-1 applications are for construction workers, new applicants to the CW program who are entering the CNMI in order to help build one of the upcoming hotels or enterprises. Although necessary, construction workers are

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<sup>14</sup> Employers are required to make good faith efforts to fill a position with a U.S. worker before applying to extend the stay of a CW worker, and whether to apply at all for a worker is at the employer's discretion.

applying to the point where the longer-time CW workers, who may have an application date later in the year, are being crowded out by new workers who can apply at any time, and who could theoretically apply for an H-2B visa. Through the 902 Consultations process, the CNMI discussed how a CW system heavy in construction permits has the ability to destroy its service sector, which is also a critical component of its economy.

DHS responded to the CNMI's proposal by observing that such changes would require amendments to current regulations and that the administration of any cap is labor intensive and a significant administrative burden. Creating subcaps within the CW program would make it that much more difficult to administer and sustain.

### **(8) Partnership with the CNMI on the Distribution and Allocation of Available Permits**

The CNMI proposes to use the systems and processes of the CNMI Department of Labor to help DHS determine what employers should be deemed eligible for foreign labor workers. This is another mechanism to ensure a wide dispersal of CW-1 visas across industries, businesses, and occupations.

In addition to requiring changes to current regulations for the CW program to allow a greater role for the CNMI Department of Labor, DHS notes an intent of the CNRA was to place adjudicatory functions squarely within the Federal system and the proposed sharing of responsibilities would seem to hinder that goal, but DHS strongly favors a constructive relationship with the CNMI Department of Labor.

### **Proposals that Recommend Future Actions by DHS**

#### **(9) Federal-CNMI Cooperation and Data Sharing**

In recent years, the CNMI Department of Labor has filed Freedom of Information Act requests in order to obtain information regarding the approved CW-1 visa holders and would like an easier process for obtaining data from USCIS on the CW program. For its part, DHS is willing to make statistical data accessible to the CNMI Department of Labor when the information is reasonably available. Since FY 2015, USCIS has expanded its use of job codes for all approved CW-1 applications, which should help provide the CNMI more of the specific job classification data it wishes to see. However, USCIS notes that its classification system remains quite general and is unlikely to provide the level of detail desired.

In an effort to help the CNMI gather the job classification data it needs to help direct workforce development resources, the U.S. Department of the Interior's Office of Insular Affairs awarded the CNMI Department of Labor \$200,000 in September 2016 in order to develop its own system to track foreign workers in the CNMI and to build capacity for keeping the system current. This project is expected to supplement efforts between DHS and the CNMI to share and exchange information relating to the foreign workforce.

**(10) Allow Chinese Nationals to Submit H-2B Petitions**

Another CNMI proposal is an amendment to the H-2B program that would help the CW program run more efficiently for the CNMI. The CNMI suggests making nationals from China eligible for an H-2B visa for work performed in the CNMI. As described earlier, many of the newer CW-1 applications are for construction workers, many of whom are coming from China in increasing numbers. Had the construction workers who received CW-1 visas received H-2B visas instead, this would have freed up visas for other workers who are only eligible for the CW program.

There are multiple reasons why employers seek a CW-1 visa over an H-2B visa for a construction worker. The process for obtaining a CW-1 visa is easier and does not require temporary labor certification by the U.S. Department of Labor, unlike the H-2B visa. Further, unlike the CW-1 program, employers seeking H-2B workers must establish that their need is temporary or seasonal and cannot use the program for successive, year-round need lasting longer than three years. In addition, the H-2B visa requires the employee to be paid prevailing wages, which may be higher than the CNMI minimum wage, meaning there can be a cost advantage to the CW program over the H-visa.

The CNMI is taking action to eliminate the advantages the CW program has over the H program by supporting efforts to increase the minimum wage in the CNMI. However, the CNMI proposes administrative actions to further reduce the advantages of the CW program. Currently, there is a list of H-2B eligible countries, and China is not on that list. By including China, the CNMI contends that employers may be more likely to apply for an H-visa.

DHS acknowledges that employers using the CW-1 program for construction workers rather than H-2B is a legitimate concern. DHS also explained that there is an annual process of considering countries for removal from or inclusion in the H-2B country list based on a number of factors. On October 26, 2016, DHS announced the H-2B country list for 2017, which does not include China.<sup>15</sup> However, DHS confirmed that employers can still request an H-2B worker from a country NOT on that list. If an employer shows that it is in the U.S. interest to grant the H-2B status, DHS has the authority to exercise discretion and grant the petition.<sup>16</sup>

As development continues to rise in the CNMI, demand for construction workers is likely to come at the detriment of small and existing businesses who are competing for fewer and fewer permits.

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<sup>15</sup> 81 Fed. Reg. 74,468 (Oct. 26, 2016).

<sup>16</sup> See 8 C.F.R. § 214.2(h)(6)(i)(E).

**(11) Minimal Future Cap Reductions**

Given the CNMI's efforts to extend the transition period and its need for an adequate workforce to achieve economic growth and development, the CNMI is proposing minimal future annual reductions to the CW-1 cap. The CNMI states this will allow businesses to remain open, increase economic growth, and allow for the CNMI economy, businesses, and CW families to achieve a level of stability necessary for a productive society.

On September 2, 2016, DHS announced that the CW cap would be reduced by one visa for FY 2017, from 12,999 to 12,998. Given the statutory and regulatory requirement to reduce the CW cap on an annual basis, this is the highest number of CW-1 visas that could have been provided for FY 2017. As the CW cap is evaluated every year, DHS is not in a position to make specific promises or representations about the cap number in future years. However, DHS will continue to consider in good faith the recommendation of the CNMI Government before setting the CW cap number for the following fiscal year.

## *Recommendations by the Special Representatives*

### **RECOMMENDATION #1 – Extend the CW Program Beyond 2019 and Other Amendments**

The Special Representatives support statutory changes to extend the CW program, restore the Executive Branch's authority to extend the CW program immediately, and raise the CW cap to 18,000. These recommended changes require legislative action by Congress. The Special Representatives believe these changes are necessary and critical to the continued development and sustainability of the CNMI economy.

In addition to supporting an extension of the CW program, if the Congress restores the Executive Branch's ability to extend the program, whether for a set or unlimited number of times, the Special Representatives agree that DHS, which oversees the CW program, has the best federal institutional knowledge on immigration-related matters in the CNMI, and would be in the best position to decide whether the CW program should be extended. Any decision would be reached in consultation with the U.S. Secretaries of Labor, the Interior, and Defense, and the CNMI Governor, and determined after considering the necessity for continuing the CW program administratively. To provide only a statutory extension avenue leaves vulnerable the long-term economic planning and needs of the CNMI Government and its private sector.

The Special Representatives also support the extension of other immigration provisions that make up the transition period. In addition to the CW program, these include an extension of the E-2C investor visa category and an exemption from the national caps for the H-visa category for the CNMI and Guam. The Special Representatives note that another provision that has been included in the transition period, a ban on asylum claims in the CNMI, must be carefully analyzed and considered. Additionally, interested stakeholders, such as the CNMI and DHS, should be given the opportunity to comment before a decision is made by Congress on whether to extend the provision.

### **RECOMMENDATION #2 – Provide Permanent Status for Long-Term Guest Workers**

The Special Representatives support Congressional action to make long-term guest workers and their families with significant equities in the CNMI eligible for lawful permanent resident status with a path to citizenship. This could be done as part of comprehensive immigration reform or given the unique nature of the CNMI and its immigration transition, as part of stand-alone legislation dealing with CNMI specific immigration issues.

### **RECOMMENDATION #3 – Solicit Suggested Regulatory Changes to the CW Program**

The Special Representatives recommend that DHS publish a Request for Information as a preliminary step to collect input and information from stakeholders and other interested parties. This Request for Information should be broad and cover a multitude of issues that have been identified as problematic by the CNMI and can potentially be addressed by

regulatory changes to the CW system, including, but not limited to, prioritizing CW-1 renewals, allocating a set amount of CW-1 visas for long-time guest workers, allocating set amounts of permits among industries, obtaining approval from the U.S. Department of Labor or the CNMI Department of Labor, including a prevailing wage requirement, and modifying the process for setting the CW cap. The goal of the Request for Information is to provide DHS with more information to make a determination in the next Administration on whether regulatory changes to the CW program should be pursued and, if so, of what nature.

#### **RECOMMENDATION #4 – Consideration of Immigration Policies to Address Regional Labor Shortages**

The Special Representatives support Congress' consideration of extending and expanding existing immigration policies or developing new policies to address systemic regional workforce challenges currently being experienced in both Guam and the CNMI.

The Special Representatives note that Congress recognized the need for a regional approach by including in the CNRA three provisions specifically focused on Guam and the CNMI. The first provision is an exception from the numerical limitations set in Section 214(g) of the INA, or the H-visa category. Although this provision helps meet the anticipated labor demands of the planned U.S. military buildup in Guam, the practical need for such an exception is grounded in much more long-term and innate characteristics of the region.

A second provision in the CNRA recognizing the unique circumstances and needs of the area is Section 702(c), which allows the Governors of Guam and the CNMI to request that the Secretary of Homeland Security study the feasibility of establishing additional Guam- or CNMI-only nonimmigrant visas that are not provided for under current immigration law. Although this provision excludes employment purposes, it recognizes that the special needs of the region give rise to unique circumstances that may need to be accommodated.

The third provision is the establishment of a Guam and CNMI Visa Waiver Program, which is separate from, though similar to, the Visa Waiver Program for the rest of the United States.<sup>17</sup> The maximum stay for visitors under the program is 45 days and includes other countries that provide the region with significant economic benefit. This is a further reminder of the CNMI's geographic distance from Hawaii and the U.S. continent, its location in the Asia-Pacific region, and its unique needs and challenges given these factors.

#### **RECOMMENDATION #5 – Extend Eligibility for Workforce Development Programs**

The Special Representatives recommend that the U.S. Department of the Interior's Office of Insular Affairs should work cooperatively with the U.S. Department of Labor to extend Wagner-Peyser to the CNMI.

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<sup>17</sup> This provision built on the preexisting Guam Visa Waiver Program by integrating the CNMI into it when the CNMI was included under U.S. immigration law.



The Special Representatives also support Congressional action to make the CNMI eligible for the Earned Income Tax Credit and Trade Adjustment Assistance. The EITC in particular will incentivize recipients of social services to enter the labor force and help reduce the CNMI's reliance on CW workers.

**RECOMMENDATION #6 – Cooperative Relationship between DHS and the CNMI**

The Special Representatives recommend that the U.S. Department of Homeland Security and the CNMI work cooperatively to exchange information and continue existing efforts to educate employers about applying for alternative nonimmigrant visas in place of the CW-1 visa when appropriate.

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## Part 4: Proposed Military Activities in the CNMI

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### *Introduction*

#### **The Mariana Islands' Strategic Location In the Asia-Pacific Region**

The Mariana Islands (Guam and the Commonwealth of the Northern Mariana Islands) are situated in the far western Pacific and play a critical role in the U.S. Rebalance to the Asia-Pacific region (Rebalance). Stability in the Asia-Pacific region is crucial to America's future, and the Rebalance is a U.S. Government-wide strategy to enhance economic, diplomatic, and security ties in the region. Objectives of the Rebalance include protecting the homeland from threats emanating in the region, shaping the security environment for peace and prosperity, and ensuring that the international order is preserved. For the U.S. Department of Defense (DoD), the Rebalance involves three lines of effort: modernizing and strengthening alliances; optimizing U.S. military posture and presence by deploying the most capable assets; and investing in new technologies to ensure we deter potential conflicts and prevail in existing ones. The Mariana Islands, as the western-most U.S. territories in the Asia-Pacific region, provide an invaluable regional location to achieve these critical objectives.

### *History Regarding Military Activities in the CNMI*

#### **U.S. Presence in the Mariana Islands from the 1890s**

The U.S. military has been present in the western Pacific since at least the Spanish-American War of 1898, after which the Philippines and Guam came under U.S. administration. Following the war, the U.S. Government used these new Pacific territories to ensure fueling and resupply stations, which were central to advancing U.S. economic and national security interests in the region.

Unlike Guam, Spain sold the Northern Mariana Islands to Germany after the Spanish-American War. This began the period of separated political administration between Guam and the Northern Mariana Islands.

During World War I, Japan declared war on Germany and subsequently invaded the Northern Mariana Islands. Following Germany's defeat in World War I, the League of Nations awarded all of Germany's islands in the northern Pacific Ocean, including the Northern Mariana Islands, under mandate to Japan. The Japanese administered the Northern Mariana Islands under the South Pacific Mandate until World War II.

On December 8, 1941, Japanese forces invaded Guam. Japanese forces were also stationed on the islands of Rota, Saipan, Tinian, and Pagan in the Northern Marianas. After a 31-month Japanese occupation of Guam, U.S. military forces, led by the U.S. Marine Corps, captured

Saipan on July 9, 1944, Guam on July 21, 1944, and Tinian on August 1, 1944. Following these successful operations, the Northern Mariana Islands continued to play a pivotal role in the war effort including the basing of the Enola Gay and Bock's Car before their missions to Hiroshima and Nagasaki in Japan.

### **The Trust Territory of the Pacific Islands: U.S. Administration Following World War II**

Following World War II campaigns in the Pacific Theater, the United States administered the Northern Mariana Islands, the Caroline Islands, and the Marshall Islands as United Nations Trust Territories (known as the Trust Territory of the Pacific Islands (TTPI)). The United States withdrew most of its military forces from the Northern Mariana Islands shortly following the war, centering the bulk of U.S. military activity in Guam, the southernmost island in the Mariana Islands chain, and the only island with both a protected harbor and land for major air installations. The U.S. Navy initially had responsibility for civil administration of the TTPI, until the U.S. Department of the Interior assumed those responsibilities in 1951.

In 1951, when authority was transferred from the Navy to the Department of the Interior, the Secretary of the Interior exercised broad administrative authority in all insular areas. Chief executives of the insular governments were appointees of the U.S. President or the Secretary of the Interior. While the CNMI elected to become a territory of the United States, the remaining TTPI entities chose to become independent sovereign nations in free association with the United States (the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau).

The Northern Mariana Islands' transition from trusteeship status to a commonwealth relationship with the United States began in 1972, with the establishment of the Marianas Political Status Commission (MPSC). The MPSC negotiated the terms of the Northern Mariana Islands' relationship with a delegation from the United States. Military land use terms were primarily addressed in a subordinate Joint Land Committee, also composed of representatives from the Northern Mariana Islands and the United States.

Those negotiations resulted in the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (Covenant) and a contemporaneous Technical Agreement Regarding Use of Land to Be Leased by the United States in the Northern Mariana Islands (Technical Agreement), both of which were signed by members of the MPSC on February 15, 1975. The U.S. Congress subsequently passed the Covenant, and President Gerald Ford signed it into law on March 24, 1976, as Public Law 94-241.

### **Terms of the Covenant, Technical Agreement, and 1983 Lease Agreement**

There are specific provisions of the Covenant, Technical Agreement, and 1983 Lease Agreement that are relevant to military activities in the CNMI. Several are identified here:

## *The Covenant*

1. Section 102 of the Covenant states the Covenant, “together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.”
2. Section 104 states that “[t]he United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands.”
3. Section 802(a) provides that 17,799 acres on the island of Tinian and the waters immediately adjacent thereto, 177 acres on the island of Saipan, and the entire island of Farallon de Medinilla and the waters immediately adjacent thereto, will be made available to the United States for lease “to carry out its defense responsibilities.”
4. Section 802(b) states that the United States, in carrying out its defense responsibilities, has “no present need for or present intention to acquire any greater interest in property...or to acquire any property in addition to” the leased acreage set forth in Section 802(a).
5. Section 803(c) specifies that the Technical Agreement will govern the terms of the CNMI’s lease of land to the military and will also contain terms relating to the leaseback of property by the United States to the CNMI, joint use arrangements for San Jose Harbor and West Field on Tinian, and the “social structure relations between the United States military and the Northern Mariana Islands civil authorities.”
6. Section 806(a) recites that “[t]he United States will continue to recognize and respect the scarcity and special importance of land in the Northern Mariana Islands.” In that context, section 806(a) further provides that if the United States must acquire any interest in property in addition to the leaseholds specifically identified in the Covenant, it will follow the policy of seeking to acquire the minimum area and minimum interest necessary to accomplish the public purpose for which the property is required and seeking first to acquire an interest in public lands rather than private property.
7. Section 806(b) provides that the United States may acquire for public purposes in accordance with federal law any interests in real property under such terms and conditions as may be negotiated by the parties; the United States will attempt to acquire a real property interest by voluntary means before exercising eminent domain; and no interest in real property will be acquired unless duly authorized by Congress and appropriations are made available therefor.
8. Section 806(c) provides that if it is not possible to obtain an interest in real property by voluntary means, the United States may exercise the power of eminent domain to the same extent and in the same manner as it can in any State, but the power of eminent domain will be exercised within the CNMI only to the extent necessary and in compliance with applicable U.S. laws, and with full recognition of the due process required by the U.S. Constitution.

### ***The Technical Agreement***

1. Part I (2) of the Technical Agreement states that the United States may enjoy full and unrestricted use of the land immediately upon making payment.
2. Part I (4) provides that if the land leased to the United States by the CNMI should become surplus, the CNMI would be given first opportunity to acquire that surplus property.
3. Part II, *Joint Use*, and Part III, *Social and Civil Infrastructure Arrangements*, of the Technical Agreement contain a number of provisions designed to facilitate cooperation between the U.S. military and the Government of the Northern Mariana Islands. Those provisions address joint administration of San Jose Harbor “if a decision is made by the Department of Defense to implement plans for an operational joint service base on Tinian” (Part II(1)); the United States assuming permanent operational responsibility for West Tinian airfield (Part II(2)); establishment of a Civil-Military Advisory Council for social and civil infrastructure arrangements (Part III); the right for the United States to close access for fishing and shoreline access on the northern two thirds of Tinian if necessary (Part III (2)); the rights of CNMI citizens to have the same access to local beaches as military personnel and their dependents subject to closure during times of military maneuvers, operations, or related activity (Part III(3)); provision of potable water by the CNMI to the military base at a mutually agreed cost (Part III(5)); provision of emergency medical care if military health facilities were constructed (Part III(6)); a mutual fire protection aid agreement between the military facility and the local community when military firefighting facilities become necessary (Part III(7)); terms prohibiting Tinian residents from purchasing commodities at the base exchange and commissary at such time as an operating base is established, but guaranteeing their right to watch movies at on-base theaters as guests (Part III(8)); development of an integrated local school system to serve Tinian residents and military dependents prior to the arrival of significant numbers of school age dependents of military personnel (Part III(9)); and a general policy pledging that the United States “will consider sympathetically all bona fide requests from the community or its residents for materials or technical assistance, from resources on the base” (Part III(10)).
4. Part IV, *Implementation*, contemplates the execution of a separate lease agreement at a later date. The parties did, in fact, execute a Lease Agreement on January 6, 1983.

### ***1983 Lease Agreement***

1. Articles 2 and 3 of the 1983 Lease Agreement specify a lease term of 50 years and provides the United States the option of renewing the Lease Agreement for an additional 50 years at the end of the first term.
2. Article 4 states the premises are leased and may be used for “any purpose required to carry out the defense responsibilities of the United States.”

3. Article 5 lists the rent amounts to be paid in full settlement of the lease, including the second fifty-year term if exercised. The rent amounts are listed as \$17,500,000 for the property on Tinian, \$2,000,000 for the property on Saipan, and \$20,600 for Farallon de Medinilla. These amounts were adjusted by the United States so that the total paid for the United States' lease payment on the effective date of the lease agreement in 1983 was \$33,000,000.

4. Article 9(a) states the United States "shall during the term of this Lease Agreement have the right ... to construct, place, erect, or install such building, structures, equipment and facilities as may be necessary for the United States' use of the Premises pursuant to this Lease Agreement."

5. Article 9(b) recognizes that military activities may result in damage to the leased land and states that on Tinian "the United States will correct the damage, including removal of unexploded ordnance and exploded ordnance fragments introduced or uncovered by the United States" during the lease term.

6. With regard to Farallon de Medinilla, Article 9(b) requires that "upon identification by [CNMI] of a project for use of a specific area ... the United States shall, to the extent practicable, remove all unexploded ordnance and exploded ordnance fragments from that area."

7. Article 12(c) provides that public access to Farallon de Medinilla and the waters of the Commonwealth immediately adjacent thereto shall be permanently restricted.

### ***1988/1994/1999 Lease Amendments***

The parties amended the 1983 lease numerous times to, among other things, lease back to the CNMI additional land on Tinian, return the San Jose harbor to the CNMI, and return West Tinian airport to the CNMI.

### **Original Military Plans for the Island of Tinian**

In 1972, just as the MPSC was formed, the United States proposed constructing "a B-52 reflex capability, a cargo aircraft throughput capability, a logistics complex, a port complex and the development of a maneuver area" on Tinian.<sup>18</sup> However, towards the end of Covenant negotiations in December 1974, DoD's original plans for Tinian changed.

The CNMI position is that the change in plans did not cancel all base construction plans for Tinian. Instead, it created a two-phase land use arrangement: (1) in the long term, the United States might choose to exercise its option to develop a joint service base that would be compatible with and a source of economic support for the community, but (2) until that time, the United States would use only a portion of its leased land for maneuvers, leasing back the

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<sup>18</sup> Secretary of Defense Memorandum to the Military Department Secretaries and Chairman, Joint Chiefs of Staff, *U.S. Military Base Complex in the Marianas Islands* (Jun 1972).

remainder so that economic, cultural, and recreational uses by Tinian residents could continue.

In support of this position, the CNMI references a 1974 MPSC Position Paper containing the following statement: “[the MPSC] recognizes that the United States may eventually decide to build the joint service base as originally proposed and therefore require the full 17,800 acres [of land on Tinian]. We are prepared to provide the necessary assurances in the Covenant that this can be accomplished at the necessary time.” The CNMI also references two Pacific Command History Statements: the Covenant “would hold two-thirds of Tinian for base and exercise rights,”<sup>19</sup> and the “support facilities in the TTPI are a hedge against the loss of other U.S. bases.”<sup>20</sup> Finally, the CNMI references statements by Howard Willens, who served as MPSC counsel in 1974, that “[United States Ambassador] Williams stated that the changed circumstances did not affect the extent of U.S. military requirements on Tinian but only the schedule for implementing the full development plan.”<sup>21</sup>

In the CNMI’s view, the numerous sections of the Technical Agreement addressing joint planning and the provision of services from a possible military facility on Tinian to the surrounding community, combined with the historical statements regarding plans for Tinian, is evidence that the United States intended to construct a base at some point in the future.

DoD does not dispute that it intended at some point to construct a “joint base” on Tinian and that the Technical Agreement contains provisions designed to facilitate cooperation between the military and civilian populations and facilitate an economic benefit for the CNMI. However, DoD’s position is that, in 1974, the United States changed its plans to build a permanent base on Tinian and reached agreement with the officials from the Northern Mariana Islands to provide additional compensation for this modification. In support of this position, DoD references the 1974 MPSC Position Paper, which notes the “deep concern prompted by the recent announcement by the U.S. of its sharply curtailed plans for military activity on Tinian,” and further notes Northern Mariana Islands’ request for an additional \$1 million per year for seven years in “compensatory economic support” as “both a mechanism and the necessary funds to compensate the people for the loss in economic opportunity and income resulting directly from the decision of the United States not to build a base on Tinian within the foreseeable future.”<sup>22</sup> This was to be in addition to the \$14 million per year already negotiated for economic support. The Northern Mariana Islands ultimately accepted an additional \$500,000 per year “to compensate for the change in the military’s plans for Tinian.”<sup>23</sup>

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<sup>19</sup> 1977 Pacific Command History Statement.

<sup>20</sup> 1975 Pacific Command History Statement.

<sup>21</sup> Willens and Siemer, *An Honorable Accord* (University of Hawaii, 2002) at 206.

<sup>22</sup> *Id.*

<sup>23</sup> *MPSC Position Paper*, Dec. 17, 1974.

The parties' divergent opinions on this issue inform their positions on whether the CJMT is consistent with the Covenant, Technical Agreement, and 1983 Lease Agreement, a topic that is addressed in detail in the *Issues and Positions* section.

## ***Military Activities in the CNMI***

### **The Rebalance to the Asia-Pacific Region**

In November 2011, President Obama “made a deliberate and strategic decision [that], as a Pacific nation, the United States will play a larger and long-term role in shaping [the Asia Pacific] region and its future by upholding core principles and in close partnership with our allies and friends.”<sup>24</sup> The President's goal was to ensure that “international law and norms are respected, commerce and freedom of navigation are not impeded and that emerging powers build trust with their neighbors and that disagreements are resolved peacefully without threats or coercion.”<sup>25</sup>

Making up nearly one-half of the world's population and economy, and home to emerging powers China, India, and Indonesia, the dynamic Asia-Pacific region today will be a center of international attention in the 21st century. Recognizing this seemingly inevitable trend, and seeking to reinforce U.S. relevance as a Pacific Power, the Administration announced the strategic Rebalance to Asia (Rebalance) as a keystone policy initiative to enhance economic, diplomatic, and security ties in the region. Stability in the Asia-Pacific region is critical to the United States' future.

As stated earlier, for DoD, the Rebalance involves three lines of effort: modernizing and strengthening alliances; optimizing U.S. military posture and presence by deploying the most capable assets; and investing in cutting edge technologies to ensure we deter potential conflicts and prevail where engaged. The Mariana Islands (Guam and the Commonwealth of the Northern Mariana Islands) play a critical role in providing a platform to achieve these objectives. Realigning U.S. forces to Guam will make the U.S. regional force posture more geographically distributed, operationally resilient, and politically sustainable, helping to reinforce the U.S. alliance with Japan and bolster regional security and capability.

More specifically, in recent years DoD has proposed four significant projects: the Guam and CNMI Military Relocation Project, the Mariana Islands Training and Testing Project, the Divert Activities and Exercises Project, and the CNMI Joint Military Training Project.

### **Guam and the CNMI Military Relocation Project**

On May 1, 2006, the U.S. Secretaries of State and Defense and their Japanese counterparts announced the United States-Japan Roadmap for Realignment Implementation. The Roadmap called for, in part, the relocation of approximately 8,000 Marines and their 9,000

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<sup>24</sup> Tom Donilon, National Security Advisor, 2011.

<sup>25</sup> *Id.*



dependents from Okinawa to Guam. On February 17, 2009, the United States and Japan entered into a binding International Agreement: the “Agreement Between the Government of Japan and the Government of the United States of America Concerning the Implementation of the Relocation of III Marine Expeditionary Force Personnel and Their Dependents from Okinawa to Guam,” which called for Japan to make cash contributions up to \$2.8 billion in support of this relocation. The original proposal included establishing individual and small unit-level training using six live-fire ranges on Guam and four live-fire ranges for small unit-level training on Tinian. In 2010, the Department of the Navy (DoN) issued a decision on the Guam relocation that included construction of the four live-fire ranges on Tinian.

In 2012, Japan and the United States revised their International Agreement for the Relocation Project. These revisions resulted in a smaller relocation and, in 2015, the DoN issued a revised decision to construct and operate a main base, family housing area, six live-fire training ranges, and associated infrastructure on Guam to support the relocation of 5,000 Marines and their 1,300 dependents from Okinawa to Guam. This 2015 decision did not address the four live-fire training ranges on Tinian. Instead, the DoN deferred implementation of the four Tinian training ranges pending the outcome of the CNMI Joint Military Training analysis of environmental impacts.

### **Mariana Islands Training and Testing Project**

The Navy’s Mariana Islands Training and Testing Project (MITT) is a continuation of military readiness training and testing activities conducted in the Marianas. The Record of Decision was signed in 2015. As relevant here, the MITT project assessed the Navy’s continued at-sea training and testing and continued military training activities that occur on Guam, Rota, Tinian, Saipan, and Farallon de Medinilla.

### **Divert Airfield Activities and Exercises Project**

The Air Force’s Divert Activities and Exercises Project (Divert) was originally proposed in September 2011, and after considerable consultations, the North side of the Tinian International Airport was selected as the location for this initiative. The Divert project was initially conceived to support fighter and tanker aircraft on either Saipan or Tinian. In response to CNMI concerns, however, the Air Force subsequently limited consideration to only the Tinian International Airport and improvements to support 12 tanker aircraft and support personnel for up to 30 days of operations, for periodic exercises (up to 8 weeks per year), and for divert operations including weather contingencies on Guam, humanitarian assistance, and disaster relief in the western Pacific. The proposed Divert capability would significantly improve the Air Force’s ability to conduct strategic airlift operations to provide humanitarian assistance and disaster relief in response to natural disasters like Typhoon Soudelor in 2015. Divert is also consistent with the Air Force’s commitment to maintain a significant forward presence in the Asia-Pacific region, providing ready air and space power to promote U.S. interests during peacetime, through crises, and in war.

## **CNMI Joint Military Training Project**

The increasing economic importance of the Asia-Pacific region and the influence of regional powers on freedom of navigation necessitate a relevant, responsive, ready, and resilient U.S. military presence. The DoN's CNMI Joint Military Training Project (CJMT) was proposed in 2010 and is proceeding through the National Environmental Policy Act (NEPA) process. DoD has stated that the CJMT would ensure the ability of current and future U.S. Pacific Command (USPACOM) forces to meet their statutory requirements to maintain, equip, and train combat and humanitarian forces in the Asia-Pacific region, and fulfill U.S. requirements pursuant to international agreements. The ability to train on U.S. territory within the Asia-Pacific region, particularly in the western Pacific, is critical to mitigating the risks posed by reliance on other countries to provide adequate training venues. DoD has also noted that the CJMT would address existing training deficiencies for all USPACOM Service Components and provide crucial training opportunities with regional partners necessary to maintaining peace and prosperity in the Asia-Pacific region.<sup>26</sup>

The CJMT proposes to correct training deficiencies by establishing live-fire unit-level training on the island of Tinian and live-fire combined-level training on the island of Pagan. The CJMT includes up to 20 weeks per year of military activities on Tinian and up to 16 weeks per year of military training on Pagan. The training scenarios contemplated as part of the CJMT also involve bringing personnel from outside the Mariana Islands to the CNMI for training. To implement the portion of the project proposed for Pagan, the CJMT DEIS indicates the Navy would need to acquire a property interest in the entirety of that island.

### ***Issues and Positions***

As an initial matter, it should be noted that the parties approached these Section 902 consultations respectfully and professionally; the consultations contributed to relationship building that will support future discussions. The parties discussed a wide variety of concerns arising from the factual circumstances outlined above. Those concerns include (1) potential inconsistencies between the CJMT and the Covenant, Technical Agreement, and Lease Agreement; (2) potential impacts of the CJMT on the CNMI's economic self-sufficiency; (3) the desire of the CNMI to participate in decision-making affecting the Commonwealth; and (4) appropriate compensation for military activity on the island of Farallon de Medinilla.

#### **(1) Potential Inconsistencies Between the CJMT and the Covenant, the Technical Agreement, and the Lease Agreement.**

The Covenant "establish[ed] a self-governing commonwealth for the [Northern Mariana Islands] within the American political system and ... define[d] the future relationship between

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<sup>26</sup> These training deficiencies were documented in the 2009 Institute for Defense Analyses' *Department of Defense Training in the Pacific Study*, the *Quadrennial Defense Review Report* (Department of Defense 2010); the *Training Needs Assessment* (Department of Navy (DoN) 2013a); and the *Commonwealth of the Northern Mariana Islands Joint Military Training Requirements and Siting Study* (DoN 2013b).

[Northern Mariana Islands] and the United States.”<sup>27</sup> As part of that relationship and recognizing the U.S. role as a Pacific power and more specifically its defense responsibilities regarding the Commonwealth under Section 104 of the Covenant<sup>28</sup> both the Covenant and Technical Agreement reserved certain Commonwealth lands for use by the U.S. military for a period of up to 100 years. The Covenant, together with those provisions of the Constitution, treaties, and laws of the United States applicable to the Northern Mariana Islands, governs the relationship between the CNMI and the United States.

The CNMI has expressed significant concerns about the relationship between the CJMT, on one hand, and the Covenant, Technical Agreement, and 1983 Lease Agreement, on the other. Those concerns can be grouped into three categories.

First, the CNMI asserts that the CJMT is fundamentally contrary to the land use arrangements, understandings, and intent memorialized in the Covenant, Technical Agreement, and 1983 Lease Agreement. The CNMI's position is based on the following points:

- As noted above, Covenant Section 806 requires the United States to "respect the scarcity and special importance of land in the Mariana Islands." This importance arises from a combination of three unique aspects of the culture, geography, and history of the CNMI. First, in the native Chamorro and Carolinian cultures of the CNMI, land is not merely "property" in the Western sense — it is also a spiritual matter, a place to commune with ancestors, a place where plants with unique healing properties can be gathered, a place to pass along traditions from generation to generation. Second, the total land mass of the CNMI's 13 islands is extremely limited — less than one-quarter the size of the State of Rhode Island. Third, the CNMI has already provided approximately two-thirds of the island of Tinian and the entire island of Farallon de Medinilla for military training, and has also allowed the military use of certain property on the islands of Saipan and Rota.
- The Covenant also provides that the United States will follow the policy of seeking to acquire the minimum area and minimum interest necessary to achieve the purpose for which the property is sought and attempt to acquire property by voluntary means before exercising eminent domain. The CNMI's position is that the CJMT, as originally proposed, would involve acquisition of the entire island of Pagan, for military purposes, against the stated wishes of the people of the CNMI, and without adequate consideration of alternatives outside the CNMI, including other nations. The CNMI submits that such a proposal is not respectful of the scarcity and special importance of land in the Northern Mariana Islands.

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<sup>27</sup> Covenant, Preamble.

<sup>28</sup> “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.” Covenant, Section 104.

- In the CNMI's view, the Covenant and Technical Agreement memorialized a phased land-use arrangement reflecting the parties' understanding that (i) in the long term, the United States might choose to develop a joint service base that is compatible with, integrated into, and a source of economic support for the community; but, (ii) until such a base is needed, the United States would use only a portion of its leased land for military maneuvers, leasing back the remainder so that economic, cultural, and recreational uses by Tinian residents could continue. Given this understanding, the CNMI reasons that the United States has no affirmative obligation to develop a permanent military base community on Tinian, but *if* a long-term military project is to be developed on the island, it must be one that provides the kind of sustainable community service, economic, and infrastructure benefits for which the parties to the Covenant and Technical Agreement bargained. The CNMI contends that the CJMT is not such a project and is destructive, inherently incompatible with the local community, and threatens Tinian's nascent tourism economy.

Second, the CNMI asserts that the CJMT is contrary to section 9(b) of the 1983 Lease Agreement. Section 9(b) explicitly requires the United States to correct all damage to the military lease area on the island of Tinian. The DoD's April 2015 Draft Environmental Impact Statement describes that the CJMT would cause permanent damage to Tinian that cannot be avoided or mitigated. The CNMI respectfully submits that this inconsistency with the 1983 Lease Agreement is plain, explicit, and indisputable. The CNMI believes the CJMT cannot proceed without a substantial re-negotiation of the Lease Agreement.

Third, the CJMT discusses the withdrawal of groundwater by the Navy from Tinian's fragile freshwater lens aquifer. The CNMI maintains that neither the Covenant, nor the Technical Agreement, nor the 1983 Lease Agreement provides such a right. The CNMI understands the DoD has acknowledged that it holds no right to Tinian's groundwater and, further, that the Navy will work with the Commonwealth Utility Corporation on joint military-civilian water infrastructure should the CJMT move forward.

The DoD position is that its actions including CJMT are in full compliance with the Covenant, Technical Agreement, and 1983 Lease.

First, the Covenant and Technical Agreement recognize the United States' ability to acquire additional interests in land beyond that provided for these documents. The original Divert proposal sought to acquire a very small interest in new lands on Saipan. The current preferred Divert alternative that proposes to acquire additional land on Tinian is the configuration recommended by CNMI. For the CJMT, new alternative concepts are being developed as part of its revised DEIS that seek the minimum interest in additional leased land and fully take into account the scarcity and importance of land within the CNMI.

Second, the documents specifically provide the United States may use its leased land for "any purpose required to carry out the defense responsibilities of the United States." The DoD position is that this right is unqualified. Until such time as the United States' uses its leased lands, the lease allows the United States to lease its lands back to the CNMI but provides that

any use of military land “must be compatible with planned military activities” and is “subject to cancellation upon one year’s notice,” if the land is required for military purposes. The economic benefits provided for in Part III of the Technical Agreement only arise under the very specific conditions provided for in each section of the Technical Agreement.

Third, Section 9(b) of the lease provides that the CNMI and the United States will “consult in good faith to determine and agree upon the extent of damage, taking into account conditions at the time and the potential uses of the Premises. The military will correct the damage, including removal of unexploded ordnance and exploded ordnance fragments introduced or uncovered by the United States during the terms of the lease.” DoD’s position is that it will consult in good faith under the terms of the lease to establish the appropriate level of correction occasioned by its activities and CNMI’s potential uses of the leased area. Finally, the Technical Agreement specifically states that “[p]otable water will be made available to the United States ... by the Government of the [CNMI] at a mutually agreed upon cost.” DoD’s position is that it is engaging in good faith discussions with representatives of the CNMI to identify how such water can be provided to the military in accordance with these terms.

Through the 902 Consultations, DoD has committed to increasing its involvement with the CNMI Government as part of its environmental planning to ensure that the amount of land it seeks to acquire is the minimum necessary to support its defense purposes (as is required under the Covenant). As part of this commitment, DoD proposed establishing a CNMI/DoD Coordinating Council as a forum to promote continued cooperation and beneficial relationships, and to work together to seek approaches that support DoD’s military missions and the CNMI’s economic self-sufficiency.

Both within and apart from the NEPA process, DoD will redouble its efforts to be transparent and consult with the CNMI political leadership on all issues of concern. DoD will strive to meet that commitment with engagements through the NEPA process and through separate engagements outside the NEPA process by Joint Region Marianas and U.S. Pacific Command. In addition, DoD will work with the CNMI to establish a consultative structure shortly after conclusion of the 902 Consultations. This consultative structure would be apart from the Section 902 process and provide another avenue and regular forum to address issues of mutual interest or concern beyond the current of 902 Consultations.

Part III of the Technical Agreement authorizes the establishment of a Civil-Military Advisory Council to coordinate on “social and civil infrastructure arrangements.” It should be noted that a “Council” established in support of these post-902 discussions would have a broader scope than “social and civil infrastructure arrangements.” This is permissible and supported by both the CNMI and DoD. This consultative structure will be referred to as the “CNMI/DoD Coordinating Council.” The CNMI/DoD Coordinating Council will offer an opportunity for intergovernmental consultations on a broad range of issues; either government may propose topics to be addressed within the Council.

## **(2) Potential Impacts of the CJMT on the CNMI's Economic Self-Sufficiency**

The CNMI's position is that military activities have the potential to significantly affect the economy of the CNMI. On the one hand, substantial military investment in community infrastructure and employment will have positive economic impacts. On the other hand, military activities can result in economic harm by restricting access to land and marine resources, creating land uses that are incompatible with civilian activities, and causing property and environmental damage. As a general matter, the CNMI holds that the scope and scale of the CJMT is simply not compatible with sustainable economic development in the CNMI. The CNMI has explained that tourism is the primary economic engine of the Commonwealth and that most tourists who visit the CNMI are drawn by its natural and cultural resources; the CNMI argues that the CJMT will close off access to many of those resources during training and that the CJMT will fundamentally change the peaceful character of the CNMI.

DoD studied the economic effects of the CJMT in a Draft Environmental Impact Statement (DEIS) issued pursuant to the NEPA. The DEIS analysis demonstrated that the CJMT's proposed action would have both positive and negative economic effects on Tinian. In consideration of changed circumstances and the CNMI's concerns expressed prior to and during the 902 Consultations, DoD will revise its analysis of economic impacts and issue a Revised DEIS. DoD will share the framework for this revised economic impact analysis and will also confer with the CNMI on the draft economic analysis before the Revised DEIS is released.

Once the Revised DEIS is released, the Commonwealth will have a further opportunity to review and comment on the economic analysis via the NEPA process. DoD will also consider additional requests from the Commonwealth for federal grants to better enable the CNMI to undertake another review of this analysis. DoD will take the Commonwealth's comments into account in finalizing the NEPA analysis. DoD commits to make every reasonable effort to avoid, minimize, and mitigate adverse economic impacts identified during the NEPA process.

Economic impacts could also be discussed in the proposed CNMI/DoD Coordinating Council. Through these discussions, the parties could seek a common understanding on how DoD's use of the land can balance its critical need for critical training could be accomplished without adverse economic consequences, perhaps even improving the CNMI's socio-economic conditions. If this understanding could be achieved, it could be reflected in DoD's plans.

The CNMI is also concerned about the adequacy of infrastructure, public services, and community capacity on the island of Tinian in connection with the CJMT. It is the DoD position that development of Divert infrastructure north of the Tinian airport and CJMT construction in the Military Lease Area would rely to some degree on public utilities, roadways, and services in the construction and operation of the military missions. Additionally, DoD notes that when the United States agreed to amend the lease and return to the CNMI the harbor and airport, the United States retained the right to install utilities along

and through those returned lands. DoD will engage the Commonwealth through the CNMI/DoD Coordinating Council and otherwise to identify instances where DoD's infrastructure requirements could also benefit the CNMI.

Finally, there are concerns an increased military presence in the Commonwealth might require (or otherwise lead to) changes to existing programs allowing Chinese and Russian visitation, including existing visa waiver programs for tourists from those countries. The CNMI has asked DoD (i) to confirm that the CJMT will not affect the existing visa waiver program for Chinese and Russian visitors; or (ii) if DoD is unable to provide such a confirmation, to evaluate the economic impacts of losing the existing visa waiver program using data and assumptions acceptable to the CNMI and commit to fully mitigating an impact revealed by that evaluation.

The DoD position is that it does not have the authority to commit the United States to any particular immigration policy and therefore cannot speak to how CJMT may affect the existing visa waiver program for visitors. An available workforce, however, is critical to DoD's construction projects and future operations. Consequently, DoD will inform DHS of DoD's interest in an available workforce to execute the Divert and CJMT initiatives and to support an enduring economy that can best accommodate the DoD presence.

### **(3) The Need to Ensure Meaningful Opportunities for the CNMI to Participate in Decision-Making Affecting the Commonwealth**

DoD and the U.S. Navy are currently in litigation with certain non-governmental organizations that make claims about the departments' compliance with NEPA requirements. One of the claims in that litigation challenges the decision to analyze in separate environmental impact statements the Guam Relocation Project and the CJMT. In light of the litigation, which remains ongoing, this Report does not present statements of the parties' positions on this claim.

DoD appreciates the concerns expressed by the Commonwealth and others regarding the CJMT since publication of the DEIS in April 2015. As part of its Revised DEIS, DoD is developing new alternatives that strive to address these concerns while continuing to meet joint training requirements. Recognizing that these new alternatives are still being developed, DoD will engage in a sincere dialogue with the Commonwealth as it develops reasonable alternatives for analysis in the Revised DEIS.

In response to the CNMI's concerns and with respect for the unique relationship between our two governments, in addition to that which is required under NEPA, DoD commits to build upon the progress made during the 902 consultations. To that end, DoD agrees to work with the CNMI to develop the CNMI/DoD Coordinating Council as a framework for senior-level government-to-government meetings to discuss all things related to the military's present and future activities in the CNMI.

#### **(4) Appropriate Compensation for Military Activity on Farallon de Medinilla**

The CNMI has agreed to lease the entire island of Farallon de Medinilla to the United States for use as a live-fire bombing range. The lease, originally executed in 1983, has an initial term of 50 years. The United States has an option to extend the lease for an additional 50 years. The terms of the lease require that “upon identification by [the CNMI] of a project for use of a specific area ... the United States shall, to the extent practicable, remove all unexploded ordnance and exploded ordnance fragments from that area.”

The CNMI argues that the intensity and frequency of the Navy's bombardment of Farallon de Medinilla have made it unlikely that the island can be returned to the CNMI in a condition permitting reasonable re-use at the end of the lease term. The CNMI has also noted that the long-term economic value of Farallon de Medinilla lies in its fishing grounds. The CNMI also notes that its concerns about long-term damage to Farallon de Medinilla and surrounding fishing grounds are “somewhat heightened” by (i) DoD’s statement in a Position Paper submitted during the 902 Consultations that it will likely need Farallon de Medinilla for the full length of the lease term and (ii) DoD’s recent proposal to expand restricted airspace and a surface danger zone around the island from three to twelve nautical miles.

The DoD position is that Farallon de Medinilla remains a vital range in the Pacific and will likely be needed in its entirety for the full length of the lease term and extension. DoD conducts periodic assessments of the conditions at Farallon de Medinilla and offers to share the reports from those assessments with the Commonwealth. DoD acknowledges that the lease requires that “[w]ith respect to Farallon de Medinilla, upon identification by [the Commonwealth] of a project for use of a specific area and notification to the United States ..., to the extent practicable, [the United States will] remove all unexploded ordnance and exploded ordnance fragments from that area.” The DoD recognizes that this cleanup standard, which was negotiated and agreed to by both parties, may result in permanent impairment to some portions of the island. Should that prove to be the case, in accordance with Section 806 of the Covenant, DoD recommends that the parties consult to establish an appropriate level of continued United States’ interest in the island and compensation to the Commonwealth.

#### ***Way Forward***

The CNMI and DoD agree that significant improvements in communication and relationships were developed through the 902 Consultations process. An improved level of mutual trust and understanding was fostered during meetings and visits to Saipan, Tinian, and Pagan. The parties agree:

- On the need for the CNMI/DoD Coordinating Council.
- To identify instances where military infrastructure planning can be coordinated with and support civilian infrastructure needs.



- That DoD will share the framework for the revised economic analysis as part of the CJMT Revised DEIS, and confer with the CNMI on the draft economic analysis before the Revised DEIS is released.
- To make economic impacts an agenda item for future CNMI/DoD Coordinating Council discussions.

The CNMI asked that the Report on Consultations memorialize DoD's statement of position/interest with respect to immigration issues. DoD agrees to inform the Department of Homeland Security that DoD has an interest in ensuring a stable, available workforce in the CNMI.

DoD agrees to share the new CJMT alternatives with CNMI leaders prior to publishing the Revised DEIS; these revised alternatives will seek to respond to public (including the CNMI) concerns while meeting DoD's joint training requirements.

The CNMI is "generally amenable" to DoD's proposal that if Farallon de Medinilla proves to be permanently impaired, the parties should consult to establish an appropriate level of continued U.S. interest in the island and compensation to the CNMI. The CNMI asks that damage to fisheries and submerged lands be included within that consultation.

Finally, DoD has committed to cleaning up the former military facility at Chiget. The CNMI appreciated this commitment and asked for additional details regarding the office with responsibility for preparing the clean-up plan and the date by which the plan will be provided to the CNMI.

## *Recommendations by the Special Representatives*

### **RECOMMENDATION #1 – CNMI/DoD Coordinating Council**

The Special Representatives appreciate and understand that the rebalance to the Asia-Pacific region is a critical national commitment. It includes diplomatic, economic, and military components all to ensure – at a time of dramatic political, economic, and security change in the region – that the Asia-Pacific region remains a place where every nation can rise and be prosperous.

Growth and prosperity require security in the Asia-Pacific region. A key element of that security depends heavily on the stability provided by U.S. military forces in the western Pacific region. U.S. military forces in the region require training that is absolutely essential to their mission success. That training is currently deficient. The CJMT is a critical component to address the current training deficiencies identified earlier in this report.

Likewise, the Special Representatives fully appreciate the importance of land to the people of the CNMI and the impact of DoD actions on the CNMI's economy. To that end, the Special Representatives are committed to recommending actions that guarantee future stability in the western Pacific region and minimize and mitigate to the greatest extent practicable any resulting environmental and economic impacts from military activities, and they welcome DoD support for CNMI economic development.

The Special Representatives fully support the establishment of the CNMI/DoD Coordinating Council and recommend that such a mechanism be launched within 90 days after this report is submitted to the President. It is clear from the success of the 902 Consultations process that there is room for growth and an opportunity to strengthen the CNMI-DoD relationship. The establishment of the CNMI/DoD Coordinating Council will continue the progress made by these 902 Consultations, but will have a separate and distinct line of authority for its establishment. This avenue also addresses concerns raised by the CNMI that more conversations beyond the NEPA process must occur with DoD officials about overall proposed military activities in the CNMI.

While there remain some fundamental disagreements over positions by the CNMI and DoD regarding compliance with the Covenant, Technical Agreement, and Leases, as well as the CNMI concern over the execution of DoD NEPA actions, the Special Representatives are hopeful that through honest, open, and respectful communication, facilitated by agreed-upon process improvements including the CNMI/DoD Coordinating Council, leaders can find common ground to enable DoD missions while preserving the CNMI's culture and way of life and advancing its economic development.

Throughout the 902 Consultations, the CNMI and DoD were able to gain a better appreciation for each other's concerns raised by the proposed military activities. Resolving these issues in a mutually satisfactory manner will take continued engagement and a commitment to explore

concerns and potential approaches, on both sides. These 902 Consultations have laid the groundwork for such a relationship, but the hard work and dedication must continue.

