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October 1, 1973

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A PROPOSAL FOR A PRIVATE CORPORATION TO RECEIVE AND ADMINISTER THE PUBLIC LANDS OF THE MARIANAS ISLANDS

The suggestion has been made that a private corporation be formed to receive and administer the public lands of the Marianas Islands, as part of interim arrangements looking to the termination of the Trusteeship Agreement and the creation of a new political status for the Marianas. The United States would transfer the public lands to the corporation. The corporation would lease part of the land back to the United States for military bases. It would administer the remaining land for the benefit -- and under the control -- of the citizens of the Marianas. Provision would be made for returning control of the land to an independent Marianas government upon its creation. This memorandum addresses the major questions arising out of such a proposal and suggests a possible framework for organizing and operating the corporation.

I. Introduction - The Use of Private Corporations to Perform Public Functions

The use of private corporations to accomplish essentially public purposes is now a common feature of American society. The Congress itself has directly chartered a number of such corporations. Some congressionally-chartered corporations are non-profit organizations established, for example, to further patriotic objectives (American Legion, 36 U.S.C.

§§41-51), to encourage specific charities (National Fund for Medical Education, 36 U.S.C. §§601-617), or to obtain and administer historically significant sites and buildings (National Trust for Historical Preservation, 16 U.S.C. §§468-468d). Other corporations have been chartered directly by Congress to engage in profit-making activity deemed in the public interest, such as the maintenance of a secondary market for home mortgage loans. (Federal National Mortgage Association, 12 U.S.C. §§1716-1723d.)

In other instances, Congress has directed the organization of private entities under the corporation laws of a state or the District of Columbia, to accomplish some public purpose. Some such corporations have been organized on a not-for-profit basis, such as the Corporation for Public Broadcasting, 47 U.S.C. §396. Congress has also directed the formation of private, profit-making corporations for purposes such as creating a communications satellite network (Comsat, 47 U.S.C. §§731-743), encouraging the production of low and moderate income housing (National Corporation for Housing Partnerships, 42 U.S.C. §§3931-3941), providing intercity rail passenger service (National Railroad Passenger Corporation, 45 U.S.C. §§541-548), and administering valuable rights in natural resources (regional and village Alaskan native corporations, 43 U.S.C. §§1606-1607).

Moreover, private corporations organized at the initiative of private citizens -- rather than by Congressional charter or direction -- play an ever more significant role in performing essentially public functions in the United States. These entities often take the form of non-profit membership corporations in which membership is open to anyone willing to purchase a subscription or contribute dues to be used toward a shared objective such as providing consumer information (Consumers' Union) or influencing certain matters of public policy (Common Cause).

Another, more pervasive, form of such institution is the homeowners' association. These associations are generally private, non-profit membership corporations which are organized to own and maintain common open space and recreational facilities in a specific subdivision or other residential neighborhood. Typically, all residents of the neighborhood automatically become members of the association, entitled to elect officers and directors and to vote on important policy matters. The members are bound -- and often required to pay dues to finance the association's activities -- by covenants running with the land sold to each individual homeowner. See generally Urban Land Institute Technical Bull. 50, The Homes Association Handbook (rev. ed. 1970). With the tremendous growth in planned subdivisions since World War II, arrangements of this kind have become a common feature throughout the United States.

In the last 15 years, moreover, the homeowners' association concept has been tremendously enlarged with the development of new communities. These "new towns", beginning with Reston, Virginia and Columbia, Maryland, are intended to become largely self-sufficient cities, some exceeding 100,000 in population. New towns are generally organized around neighborhoods or villages, each having an association patterned after the standard homeowners' association. In addition, many new communities have also created a central homes association, a private, non-profit corporation whose members are often representatives of the neighborhood associations. A central association of this kind may own and maintain large amounts of land dedicated to the "public" use of the residents of the new town; operate a wide range of recreational facilities such as swimming pools, tennis clubs, golf courses and community centers; and even provide social services such as pre-school education and health care. Such organizations may receive grants from federal, state and local governments and perform what are normally regarded as governmental functions. But subject to certain reasonable limitations (see generally Note, "Democracy in the New Towns: The Limits of Private Government," 36 U. Chic. L. Rev. 378 (1969)), which will be discussed below, they are essentially private entities, organized under state corporate law at the initiative of private citizens.

Thus, the concept of a private corporation organized at the initiative of private citizens of the Marianas for the purpose of receiving and administering the public lands of the Marianas on behalf of all its citizens represents no substantial departure from American public policy. Indeed, the demonstrated efficiency and flexibility of such an approach -- combined with the obvious advantage of providing a meaningful form of self-government -- suggest that it should be a major objective of future negotiations between the Marianas and the U.S.

II. Enforceability and Protection Against Impairment of the Contract With the United States

The central purpose of the proposed corporation is to receive and administer the public lands of the Marianas. In order to accomplish this end, it must contract with the United States for the transfer of the lands to the corporation, in consideration of a lease of certain lands back to the United States for a military base. The concept of the corporation may prove infeasible unless there is some assurance that the contract with the United States and the transfer of lands under the agreement would be valid and enforceable, and that the United States would be precluded from materially impairing the structure or operation of the corporation.

Under Article I, Section 10 of the Constitution, no state may pass any law "impairing the obligation of contracts." This principle applies not only to agreements between private persons, but generally as well to grants or contracts to which the state itself is a party, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-39 (1810); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 517 (1819). As to the federal government, "there is at least a tendency for the contract clause and the due process clause to coalesce." Hale, "The Supreme Court and the Contract Clause: III," 57 Harv. L. Rev. 852, 890 (1944). "When the United States, with constitutional

authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. . . . [The] right to make binding obligations is a competence attaching to sovereignty." Perry v. United States, 294 U.S. 330, 352-53 (1935).

Particularly where the private party seeks to protect a right to real property, the Supreme Court has generally rejected any claim that the United States may recover the property without compensation:

> [The United States] cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable. Sinking-Fund Cases, 99 U.S. 700, 719 (1878).

See Also Reichert v. Felps, 73 U.S. (6 Wall.) 160 (1867).

And a similar view has prevailed against actions by the states to impair interests in land acquired from the government. See Fletcher v. Peck, supra; Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Choate v. Trapp, 224 U.S. 665 (1912); Appleby v. New York City, 271 U.S. 364 (1926); Wood v. Lovett, 313 U.S. 362 (1941).

Of course, contractual rights against the government are subject to condemnation under the power of emminent domain, West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848); Cincinnati v. Louisville & N.R.R., 223 U.S. 390 (1912), even if the government has expressly agreed to forego such powers, Pennsylvania Hospital v. Philadelphia, 245 U.S. 20 (1917). There is authority for the proposition that a state may revoke an improvident grant of public property without recourse to emminent domain, on the theory that certain grants exceed its inherent powers. Illinois Cent. R. R. v. Illinois, 146 U.S. 387 (1892) (grant of substantially all the submerged lands under the Chicago harbor, giving the grantee working control over the development and operations of the harbor). But in light of the continuing reliance on Fletcher v. Peck -- and because the proposed agreement between the corporation and the U.S. would include substantial consideration -- we believe the Illinois Central case has no application.

It is important to note, however, that in the course of one of our most protracted and contentious constitutional disputes, the Supreme Court has appreciably narrowed the prohibition against impairment of obligations and the related due process right. The tension was expressed by Mr. Justice Brandeis in Lynch v. United States, 292 U.S. 571, 579 (1934):

> The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment . . . . When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals . . . . As Congress had the power to authorize [the contracts at issue], the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power. (Emphasis added.)

A great number of opinions have been written and a vast body of literature created in an effort to accommodate the contract and due process clauses with the reserved rights

of the state and federal governments. See Hale, "The Supreme Court and the Contract Clause," 57 Harv. L. Rev. 512, 621, 852 (1944); Warren, The Contract Clause of the Constitution (1938).

For the purposes of this analysis, it is sufficient to say that a delicate weighing of interests would be required in light of the facts in order to predict the potential outcome of any particular action by the United States. A variety of factors have been considered important by the courts in making such determinations: whether the government action affected "property already acquired" or "fruits actually reduced to possession" as opposed to "franchises" or "privileges"; whether the action impaired the "obligation" itself or merely the "remedy" to enforce that obligation; whether the action was a "reasonable" and "appropriate" step to "safeguard the vital interests" of the people; whether it was addressed to the "mere advantage of particular individuals" or to "a basic interest of society." Under these standards, one can venture only the most tentative of predictions. But with this caveat, we believe that the United States would be prohibited under the standards of the contracts and due process clauses from impairing the rights or obligations of the corporation in a manner fundamentally inconsistent with its objectives.

This leads to the question whether the contract clause and the due process clause are in effect in the

Trust Territory. For purposes of this memorandum, it is not necessary to determine whether these clauses are in effect by virtue of the Constitution itself. The due process clause and the contract clause of the Constitution are repeated verbatim in Sections 4 and 5 of the Bill of Rights of the Trust Territory, 1 T.T.C. §§4, 5. The Congress of Micronesia is specifically forbidden from adopting legislation inconsistent with these provisions. Department of the Interior Order No. 2918, §2(d), 34 Fed. Reg. 158 (1969). Thus, even if the contract clause and the due process clause were not applicable to the Marianas solely by virtue of the Constitution, the United States would be forced to repeal these two provisions of the Bill of Rights of the Trust Territory before it could impair the validity of the agreements contemplated.

Of course, there are a variety of ways in which the United States might be effective in limiting the operation of the corporation if it sought to use its sovereignty over the government of the Trust Territory for that purpose. There can be no constitutional solution to all such potential problems. To fortify the corporation's defense against such conduct, we suggest that the basic lease of military land to the United States contain carefully drafted language forbidding the U.S. from taking -- or, insofar as it has the power, permitting -- any action which would impair the legality of the corporation itself or materially restrict its operations in the manner and for the purposes contemplated.

The provision could also bind the United States to act affirmatively in cooperation with the corporation to assure the preservation of the corporations's status and powers. The failure of the U.S. to perform this obligation could be a grounds for termination of the lease. The courts might choose to ignore a provision of this sort, on the theory that the United States is not free to contract away its reserved general powers. But particularly where the legal questions are so finely balanced, the additional weight behind the corporation's position appears helpful.

In any case, if the United States were to undertake an unjustified campaign to restrict the corporation or its activities, the people of the Marianas may eventually find relief not in the courts of the U.S. but in the political forums of the international community. And that very possibility would add to the security of the proposed arrangement.

III. Profit-Making Versus Non-Profit Form

As indicated above, private corporations formed to serve a public purpose have been organized both as profit-making entities and on a non-profit basis. Profit-making corporations have shareholders each owning an individual stock interest. The shareholders receive dividends on their stock, if the corporation is able -- and elects -- to pay dividends. Shareholders are usually free to sell their stock at any time, although restrictions may be imposed on the sale of stock.

The regional corporations established by Section 7 of the Alaskan Native Claims Settlement Act, 43 U.S.C. §1606, are profit-making corporations of this kind. Over a number of years, the regional corporations are to receive cash grants of nearly $1 billion and take title to the subsurface estate (oil and mineral rights) in approximately 40 million acres of land. During the first five years after formation of the regional corporations, they are required to distribute to their stockholders at least 10 percent of the revenues received both from the settlement fund and from any sales or leases of mineral or oil rights. Under the statute, each native enrolled in the region must be issued 100 shares of stock upon the organization of the regional corporation. In order to prevent speculation in the stock of the regional corporations for a period of 20 years, the stock may not be sold, pledged, forfeited in judgment, assigned in the present or future,

or otherwise alienated -- other than by reason of death, divorce, separation or the like.

Approximately half of the receipts of the regional corporation must be distributed among village corporations organized pursuant to Section 8 of the Act, 43 U.S.C. §1607. Village corporations may be profit-making or non-profit, and no statutory restrictions are imposed on the payment of dividends by village corporations. The stock received by the initial shareholders is subject to the same restrictions against resale as shares in the regional corporations.

The major advantage of organizing such a corporation as a profit-making entity lies in the ease of distributing revenues in the form of dividends to the present shareholders, rather than holding them for the benefit of future natives. This may have been particularly attractive in the Alaskan Native Claims Settlement Act because the corporations are to receive substantial amounts of cash in settlement of past claims. As a matter of public policy, one may justify the distribution of payments for this purpose to the natives now residing on the affected lands on the ground that these individuals are being compensated for injuries suffered in the past. Of course, it is more difficult to make such an argument with respect to the proposed Marianas corporation.

Moreover, the use of a profit-making corporation carries with it certain very substantial difficulties, particularly in the context of the Marianas. In the first place, selecting a group of stockholders is

very difficult. Most profit-making corporations select stockholders based upon their ability to pay for the stock in a public or private offering. This is plainly unacceptable for a corporation to control the public lands of the Marianas. The Alaskan Native Claims Settlement Act resolved this problem by requiring the distribution of an equal amount of free stock to every native Alaskan Indian living on the date of the passage of the Act. Any such means of selecting stockholders, however, creates potential inequities. For example, is it fair to treat a brother and sister differently merely because one is born six months before passage of the Act and another six months after? Is it fair to distribute stock equally to adults and children rather than to adults alone, or to family units only?

Furthermore, because corporate stock represents the right to receive any dividends that might be paid in the future and a share of the corporation's assets should it be liquidated, the stock itself may become a valuable piece of property. Where valuable corporate stock is distributed among a great number of shareholders, substantial pressures invariably arise for the creation of a market in which the stock may be sold and purchased. A shareholder can ordinarily sell his stock, thus converting a number of small periodic payments he and his descendants

might otherwise have received over the years into a single substantial lump sum of cash available immediately. Wealthy investors and speculators would be able -- and perhaps encouraged -- to seek control of the corporation, and therefore of the land. The objective of preserving the rights of the Marianas citizens to control the administration of their public lands could thus be defeated if the corporation holding the lands were owned by shareholders who were free to sell the stock.

The device most frequently used to limit this possibility is a severe restriction upon any alienation of the stock. As stated above, sale of the stock in the Alaskan native corporations will be prohibited for a period of 20 years, after which all restrictions will be lifted. It may be that such restrictions will be satisfactory in the Alaskan native instance. The assets held by the corporations in that case are of two kinds: cash from the Alaskan Native Claims Settlement Fund and the oil and mineral rights in certain lands. It is apparently intended that the cash be distributed over a relatively short period of time. And the oil and mineral rights are wasting assets which may well be depleted, or at least largely sold or leased, within 20 years.

The public land of the Marianas Islands, on the other hand, is a different kind of asset. If properly

administered, the land should increase in value, not decrease, over the years. Any stock restrictions which would lapse in the foreseeable future create the risk that ownership of the public lands may be concentrated in the hands of a few speculators and investors who might not have a long-term interest in wise public administration. And if the stock were to be restricted indefinitely, there would be no reason to organize the corporation on a profit-making basis. If the stock could not be sold, the only thing accomplished by having shareholders is a means of directing payments, in the form of dividends, to a class of citizens of the Marianas; this objective could be attained as well through the use of a trust or a non-profit charitable corporation with the citizens as beneficiaries.

Morecver, we do not believe the corporation should be required to distribute its profits in cash routinely to the citizens. Whether shares of stock in a profit-making corporation are distributed at the outset, or a commitment is made by a non-profit corporation or trust to distribute its revenues automatically, an essentially governmental body would be abandoning one of the central responsibilities of public administration: selecting among competing demands on the public purse. The corporation is intended to operate as a democratic institution independent of U.S. control. As such, it could provide an ideal vehicle for making essentially governmental decisions as to the allocation

of any profits in the interest of the citizens of the Marianas.

For these reasons, we believe the corporation should be organized on the not-for-profit basis. We suggest that the corporation be formed as a membership organization, following the apt precedent of homeowners' associations and new communities associations. These entities accomplish the same objective that is sought with respect to the public land of the Marianas: the continuing and democratic administration of public lands, facilities and services by and for the benefit of the citizens of the community. The balance of this memorandum is devoted to a discussion of various aspects of a non-profit, membership corporation to accomplish these objectives.

IV. Jurisdiction in Which the Corporation Should be Organized

The corporation will be operating almost exclusively in the Marianas Islands. When a corporation is to operate almost exclusively in one jurisdiction, it is ordinarily considered most advantageous to organize it under the laws of that jurisdiction. Moreover, there might be important political and psychological disadvantages to incorporating outside the Trust Territory. We begin, therefore, with a preference for organizing under the law of the Trust Territory.

Problems in Incorporating Under the Law of the Trust Territory.

In analyzing the problems associated with organization within the Trust territory, we assume that no fundamental change will be made in the organization and laws of the Trust Territory. We recognize that the corporation may be organized after -- or at the same time as -- the implementation of proposals for interim political arrangements which might include new governmental entities for the Marianas Islands and fundamental changes in law. If such changes are made at or before the time when the corporation is to be organized, we believe that steps could be taken in the course of such changes which would make it easier to organize and operate the corporation. We consider it unlikely that interim arrangements acceptable to the

citizens of the Marianas would make it more difficult to create and maintain the corporation. For these reasons, we have attempted to accommodate the objectives of the corporation to the present law of the Trust Territory.

One danger inherent in organizing the corporation under the laws of the Trust Territory is the sovereignty of the United States over its executive and legislative branches. The fear is that at some later time the United States might seek to use its governmental authority not to undermine the validity of the contract (which, as discussed above, it is substantially precluded from doing) but to undermine the legal standing of the corporation. It was settled very early that corporate charters, particularly the charters of "eleemosynary institutions" established for "useful purposes," are contracts between the corporations and the state, protected under the contract clause. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 637 (1819). By virtue of the logic discussed above in connection with the enforceability of the agreement between the corporation and the United States, the United States would be forbidden either directly under the Constitution or under Sections 4 and 5 of the Bill of Rights of the Trust Territory from impairing the charter of the corporation.

The courts have upheld a broad power to modify corporate charters and other forms of government grant when such a power is expressly reserved in the grant or

the general legislation authorizing it. Sinking-Fund Cases, 99 U.S. 700 (1878). But even this power is said to be subject to limitations which appear to parallel those discussed above in connection with the enforceability of the contract:

> The reserved power is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, or to take property without compensation, or arbitrarily to make alterations that are inconsistent with the scope and object of the charter or to destroy or impair any vested property right. Phillips Petroleum Co. v. Jenkins, 297 U.S. 629 634-35 (1936).

And although most general corporate laws contain a reservation of "the right to alter, amend, or repeal this chapter, or any part thereof, or any certificate of incorporation or certificate of authority issued pursuant to its provisions," D.C. Code §29-1099g, the corporate law of the Trust Territory contains no such provision.

A potentially greater problem for the corporation is the uncertainty as to its powers, procedures and responsibilities if it is organized under the law of the Trust Territory. The general corporate law of the Trust Territory is embodied in six brief sections of the Trust Territory Code, 37 T.T.C. §§ 1-6; the entire subject matter occupies three pages in the annotated Code. Four additional sections, 37 T.T.C. §§ 51-54, are devoted to the organization and powers of the Registrar of Corporations; these matters occupy an additional two pages in the annotated Code.

On the basis of our initial review, we do not believe it is impossible to organize and operate a corporation of the kind contemplated under the Trust Territory Code alone. The Code gives the High Commissioner the authority to grant charters of incorporation, including charters to "associations of persons for any lawful purpose other than pecuniary profit." 37 T.T.C. § 1. Persons seeking a charter are required to submit articles of incorporation providing certain specified information, including "provision for voting by members" and "provisions for shareholding, if any." 37 T.T.C. § 3(l)(k), (l). The Registrar of Corporations, "with the approval of the Attorney General and the High Commissioner, shall have the power to prescribe such rules and regulations as are deemed advisable to administer and carry into effect the provisions" of the corporate law, and such rules and regulations "shall have the force and effect of law." 37 T.T.C. § 52.

Even without reference to rules and regulations by the Registrar of Corporations, the Code appears to provide sufficient support for the formation and operation of a corporation of the kind contemplated. Many questions as to the corporation's procedures, powers and limitations could be resolved in its articles and bylaws. However, in the absence of statutory law, substantial uncertainty would remain as to many of these matters.

To suggest the scope of the problem, we have briefly

reviewed the District of Columbia Non-profit Corporation Act, D.C. Code §§29-1001 to 29-10991. This act is a typical modern statute, designed to apply to membership and other forms of non-profit corporations. It occupies 25 pages (in small type) in the District of Columbia Code; it contains 111 sections. Following is a summary of subject matter covered by that statute as to which the Trust Territory Code is either silent or -- in our judgment -- incomplete:

> general powers, including unlimited life
> defense of ultra vires
> bylaws
> members -- generally; meetings; notice; voting; quorum
> directors -- generally; number; classification; removal; elections; vacancies; quorum; place and notice of meetings; committees
> greater voting requirements
> waiver of notice
> action by members or directors without a quorum
> officers -- generally; removal
> books and records
> shares of stock and dividends prohibited
> loans to directors and officers prohibited
> effect of issuance of certificate of incorporation
> organization meetings
> amendment to articles -- procedures
> merger and consolidation -- procedures
> sale, lease, exchange or mortgage of assets
> voluntary dissolution -- procedures
> involuntary dissolution -- procedures
> venue and process
> liquidation -- procedures; jurisdiction of court
> annual report
> regulating authority -- duties and functions; appeal

If matters as important as these are not embodied in the statute under which the corporation is organized, substantial uncertainty will always be present as to its operation.

We have considered whether some other law governs in those areas where the corporate law of the Trust Territories is silent. Unfortunately, no other law appears applicable. If there were a corporate law embodied in the Trusteeship Agreement, or in an act of Congress, executive order of the President or order of the Secretary of the Interior, these provisions would be applicable by virtue of 1 T.T.C. §101. Local customary law, if any, would be applicable under 1 T.T.C. §102. And if there were a common law of corporations "generally understood and applied in the United States," these provisions would also have the effect of law. 1 T.T.C. §103. However, none of these is of any substantial use as a source of the corporate law. It is true that rules and regulations adopted by the Registrar of Corporations have the effect of law. But even if such provisions were adopted, they would be of only limited value in reducing uncertainty, because of the ease with which they might be changed.

There are at least four ways in which greater certainty could be brought to the law under which the corporation would be established. First, the Congress of Micronesia could amend the Trust Territory Code to adopt a modern corporate law. This would be the most direct solution. Moreover, it is a step which should be taken for its own sake; in order to encourage economic and social development in the Micronesian Islands -- both by citizens

of the Islands and others -- the Trust Territory should offer the added degree of certainty available under modern corporate laws. This need is as great for non-profit corporations as for profit-making companies.

We recognize, however, that it may not be possible to secure the enactment of such a law. In this case, there are still three means by which a more general corporate law may be made applicable to the proposed corporation: by act of Congress, by an executive Order of the President or by an order of the Secretary of the Interior. Each of these "have the effect of law in the Trust Territory." 1 T.T.C. §101(2). The added certainty provided by any such provision corresponds to the difficulty of repeal or modification, in the order listed above. But it is recognized that this order also indicates the relative difficulty of securing any such provision.

One problem associated with direct action by the U.S. in this fashion is that it appears to be inconsistent with providing increased self-government for the Trust Territory. However, it must be noted that the transfer of land to the corporation and lease of a portion of the land to the United States for military purposes would certainly necessitate either an act of Congress, an executive order of the President or an order of the Secretary of the Interior. Because the formation of the corporation (and thus the question of its powers, procedures and limitations) arises as part of the same transac-

tion, there would be independent justification for direct action by the United States to secure as much legal certainty for the corporation as possible. For these reasons, we believe that action could be taken to provide greater certainty as to the legal framework under which the corporation will be created and operated, and we recommend that such action be sought.

Problems in Incorporating Outside the Laws of the Trust Territory

As an alternative to incorporation under the laws of the Trust Territory, the corporation could be established under the laws of some other jurisdiction. It is likely that the other jurisdiction would be within the United States, either one located relatively near the Marianas, such as Hawaii or California, or one with a modern and successful non-profit corporation act, such as the District of Columbia.

If the corporation were established outside the laws of the Trust Territory, it would face certain difficulties in doing business within the Marianas. Section 3 of the Foreign Investors Business Permit Act, 33 T.T.C. §3, provides that "no noncitizen shall be permitted to do business in the Trust Territory without first obtaining a business permit under this Chapter." It might be argued that if the corporation is organized on a not-for-profit basis, it is not intended to "do business" within the meaning of the Trust Territory Code. Many provisions of

the Foreign Investors Business Permit Act suggest that the Act is primarily concerned with traditional profit-making enterprises, including references to the "sale of shares of stock to Trust Territory citizens" and "stock purchase programs for employees;" a "detailed investment analysis;" and the "extent of participation of Trust Territory citizens . . . in the ownership and management of the enterprise." 33 T.T.C. §§6(2)(d), (j), 7(3)(d).

However, there are other provisions in the Act which are equally applicable to profit-making and non-profit-making corporations, such as references to "specific economic and social programs the applicant intends to implement;" the impact of the proposed operation on "natural resources" and the "environmental balance"; opportunities for training and employment for Trust Territory citizens; and preservation of existing "social and cultural values and ethnic conditions". 33 T.T.C. §§6(2)(k), 7(3)(c), (e), (g). Moreover, under traditional motions of "doing business" the question hinges not on the economic nature of the activities involved but whether it is equitable -- given the extent of the corporation's involvement with the jurisdiction, transactions with its citizens and use of its facilities and services -- to subject it to judicial process and regulation within the jurisdiction. See generally CT Corporation System, What Constitutes Doing Business (1973). It is expected that the corporation will

employ a substantial staff and resources for the purpose of administering the public lands. Moreover, the corporation will doubtless enter into major agreements within the Marianas to sell or lease the lands and provide for their administration. For these reasons, it appears that the corporation would be "doing business" within the meaning of this Act.

It might also be contended that although the corporation is "doing business," it is not a "noncitizen" for the purposes of the Act. Section 2 of theAct defines a non-citizen as "any person who is not a Trust Territory citizen or any company, corporation, or association in which a person not a Trust Territory citizen owns any interest." No "interest" in the corporation would be owned by a noncitizen, so the only question would be whether the corporation -- which itself would not be a citizen -- is a "person" for purposes of this provision. Although the term "person" generally includes corporations, it may be argued that the language of this provision suggests the contrary. The provision is drafted, arguably , to provide two different tests. The test for an individual is actual citizenship; the test of whether a corporation or other organization is a citizen depends not upon its jurisdiction of organization but upon the ownership of interest therein. Particularly insofar as the Act is intended to protect the economic interests of Micronesian citizens, such a construction is supportable. However,

if such a construction were sustained, the corporation would be immune from certain provisions which seem expressly designed to apply to all organizations not created under Trust Territory law, particularly provisions related to service of process and maintenance and inspection of books and records. 33 T.T.C. §10. For these reasons, it seems likely that the corporation would be required to secure and comply with the terms of a business permit under the Act.

Although the procedure for obtaining a business permit seems cumbersome, it would not appear to pose any particular additional difficulties for the corporation. Under Section 6 of the Act, 33 T.T.C. §6, an application would be filed with the Department of Resources and Development. The application is required to provide a great variety of information concerning the corporation, including its purpose, scope and objective; proposals regarding employment and training of Trust Territory citizens and various other labor matters; detailed capital plans and investment analyses; and specific economic and social programs to be implemented. In addition to the statutory requirements, the Director of Resources and Development may require additional information.

Under Section 7 of the Act, 33 T.T.C. §7, the Director and the District Economic Development Board undertake an investigation of the applicant and the application. The Board consults with various district officials

and makes a determination as to whether granting the permit would meet certain criteria. Following the receipt of the preliminary opinion of the Director, the Board reports its decision to the High Commissioner. The Board is free to recommend a permit subject to certain conditions. Both the Board and the High Commissioner must agree before a permit may be issued, except that:

> In any case where disposition of an application by District Boards would be in conflict with Executive Orders of the President of the United States, Secretarial Orders of the Department of the Interior, or the commitments of the United States under the Trusteeship Agreement, the High Commissioner shall so specify at the time the application is forwarded to the District Boards. In such a case the report of the Board shall be advisory only, and the final disposition of the application for a business permit shall rest in the High Commissioner. 33 T.T.C. §9.

Therefore, as in the case of providing more certain corporate law discussed above, appropriate reference by the United States in an order (but apparently not a statute) confirming the transaction could simplify the granting of a business permit.

A problem might arise out of the continuing operation of the corporation under a business permit. Under Sction 5 of the Act, the District Economic Development Board is required to assure compliance with the Act and any rules and regulations thereunder. In this regard, the Board has the power to perform "investigatory functions as appropriate," and may

> upon receipt of a sworn affidavit from any person that there is reason to believe that any provision of this Chapter or any regulation issued pursuant thereto has been violated, investigate such alleged violation and in cooperation with the office of the Attorney General, enforce this Chapter and rules and regulations issued hereunder. In connection with any hearings or investigations required by this Chapter or rules or regulations issued hereunder, the Board may subpoena witnesses, records, books and documents. 33 T.T.C. §5(4).

Under Section 10(2) of the Act, those holding business permits must file annual reports describing their activities and updating the information required in an original application. Although this procedure in itself would not be difficult -- and indeed seems desireable -- Section 10(4) gives the Registrar of Corporations or his agent the authority "upon his own initiative . . . or, upon request by a District Board" to:

> call for the production of the books and papers of any noncitizen business doing business in the Trust Territory, and examine its officers, members of its Board of Directors, its agents, or its employees, under Oath concerning the business activities of said business; and the Registrar of Corporations shall submit to the appropriate Boards copies of all such documents or examinations. 33 T.T.C. §10(4).

Finally, Section 13 of the Act allows the "abridgement, modification, suspension or revocation" of the permit by the High Commissioner or by the Board for a variety of broadly-stated reasons, including violation of "any of the provisions of the Trust Territory Code or any of the rules or regulations issued thereunder," or any "business activities outside the scope of the business

permit or charter." 33 T.T.C. §13(1). This is a particularly sweeping provision, with obvious possibilities for mischief. On the other hand, it seems likely that the same kinds of due process restraints applicable to the power to alter or amend corporate charters, discussed above, would be read into this provision. And it might be desireable to have recourse to such a remedy as a final measure in the event of unlawful or flagrantly inappropriate conduct by the corporation.

In conclusion, we are not prepared to make a final recommendation at this time as to where the corporation should be organized. On the basis of the information presently available, we tend to favor incorporation under the law of the Trust Territory, particularly if steps can be taken to bring greater certainty to Trust Territory law in this area. But we do not foresee insuperable obstacles to the establishment and operation of the corporation whether it is organized in the Trust Territory or under the laws of some other jurisdiction.

V. Organization and Structure of the Corporation

Members. As suggested above, we believe the most appropriate vehicle to accomplish the desired objectives would be a non-profit membership corporation. We conceive of the members of this corporation acting in the same relation to the corporation as an enlightened electorate acts toward a responsible, democratic government.

It will, of course, be necessary to define exactly who shall be members of the corporation. Membership could be available only to natives of the Marianas, or to all resident citizens or to all residents. Because the primary right of a member is to vote on certain important matters, it might be wise to limit membership to adults. In most membership corporations, those eligible for membership must specifically enroll in some manner in order to become members. This has substantial advantages in conducting elections and in allowing the corporation to keep its members informed periodically of the conduct of affairs; accordingly we recommend such a requirement. The corporation might be able to make efficient use of the existing public election rolls and machinery if membership is simply made available only to those entitled to vote under Section 7 of Department of the Interior Order No. 2918, 34 Fed. Reg. 158 (1969), resident citizens 18 years of age or over.

Election of Directors. As in most corporations, important policy decisions would be made -- and day-to-day management supervised -- by a board of directors elected by the members. Although it is possible to provide for the election of all directors at large, we recommend that the directors be elected from regional or local districts, because of the governmental nature of the duties they are to discharge. Later in this memorandum we discuss the question whether the activities of the corporation amount to "state action" for purposes of the equal protection clause of the 14th Amendment, embodied in the Trust Territory Bill of Rights, 1 T.T.C. §7. If this question is answered in the affirmative, the districts from which directors are chosen should contain approximately equal numbers of members. Reynolds v. Sims, 377 U.S. 533 (1964).

Various alternatives are available for the conduct of such an election. In most large membership corporations, elections are conducted by mail. The feasibility of such a system depends on both the mail service in the Marianas and the ability of the corporation to compile and certify in advance an accurate role of its members. It may prove more desireable simply to conduct a private "election," using insofar as possible the public election machinery already existing. Such an election has the advantages of providing a prompt outcome and allowing individual eligibility and enrollment problems to be resolved as

they arise.

Voting by Members on Other Issues. As indicated below, we believe that the final decision regarding return of the public lands to an independent government of the Marianas should be made in a general vote of the membership. Perhaps there are other policy determinations of such magnitude that they should be made only by the members and not by the directors. Insofar as these issues can be identified in advance, the appropriate requirements may be made a part of the articles of incorporation. In addition, the directors may be given the power to submit other issues to the members.

Nomination of Directors. Because of the number of members and the form of election, attention must be given to the mechanism by which directors would be nominated. We believe that at least two mechanisms should be provided. A nominating committee of distinguished non-partisan citizens, chosen by the Board -- but including no members of the Board -- should be required to nominate at least two qualified candidates for each directorship. Further, any member obtaining a specified number of signatures of members residing in his district should also be recognized as a candidate. The nominating committee could be required to publish a brief biographical description of each candidate, whether nominated by the committee or by petition.

Officers. As in any corporation, the day-to-day affairs of the corporation would be conducted by officers chosen by -- and subject to the supervision of -- the board of directors. The specific delineation of responsibilities between directors and officers can be established in the articles and bylaws. Although we believe that only members should be eligible for election as directors, there may be some advantage in allowing the directors to select as officers people who are not members of the corporation. We believe there should be a limitation on the number of directors who may serve as officers of the corporation.

Procedures for Initial Organization. A broadly based representative group would be required to organize the corporation; perhaps the Marianas Political Status Commission could fill this function. This group, in consultation with representatives of all major segments of the Marianas society, would draft articles of incorporation and bylaws for the corporation. The articles of incorporation and bylaws would make specific provision for many of the matters discussed here and in the following sections of this memorandum: eligibility for membership; districts from which directors will be elected; nomination and election machinery; officers; transfer of land to an independent Marianas government; restrictions imposed on the corporation; etc.

Acting as incorporators, the organizers would actually charter the corporation and specify a limited initial membership. (In the alternative, no initial members could be specified, and the incorporators could simply select directors to serve during the organization phase.) As promptly as possible after such organization, the corporation would (1) identify and enroll all eligible members, and (2) appoint a nominating committee to select (and encourage petitions for) official candidates for the board of directors. When these are accomplished, an election would be held at which the members could both ratify the articles of incorporation and bylaws and select the first board of directors. We believe that these steps should if possible, precede the execution of any agreement between the corporation and the United States. This would have the added advantage of giving the members an opportunity to ratify the proposed agreement.

VI. Administration of the Public Lands by the Corporation

Once the corporation is organized, it is contemplated that it would enter into an agreement with the United States for the transfer of all the public lands of the Marianas Islands to the corporation. As part of this agreement, the corporation would lease certain land tc the United States for military purposes.

As to the remaining land, it would thereafter have the legal status not of public land but private -- land wholly owned by a private, non-profit corporation. The nature of the corporation gives it certain advantages with respect to its lands. Perhaps most importantly, the United States -- as described above at length -- is substantially restricted from impairing rights associated with the land without providing due process of law and paying just compensation. Another advantage of the private status of the corporation is that it may make it easier for the corporation to impose restraints against the alienation of lands to noncitizens of the Marianas.

Basically, just as a government is bound by the terms of its constitution, the provisions of the articles of incorporation and bylaws will determine the powers and impose the limitations that will control the sale or lease of land by the corporation. It may be free to sell any and all lands, or it might be restricted as to the amount of land that could be sold or the purposes for which land could be sold. The corporation could be prohibited alto-

gether from selling land. It may be permitted to lease land for long terms, or limited solely to short-term leases, or limited in the duration of the lease by the purpose for which the land is leased. The corporation may be allowed to enter into leases renewable at the option of the lessee, or the corporation may be precluded from including renewal options in its leases. The corporation may be authorized to undertake the equivalent of a homestead program, selling small quantities of land to specifically designated classes of purchasers. In the alternative, such land sales could be restricted to those demonstrating non-speculative intent, or could be precluded entirely.

There is no doubt that the corporation can be granted powers of this kind. It would be necessary to determine which restrictions should be embodied in the articles of incorporation, so as to be impossible or difficult to change without the express consent of the members, and which policies should be left to be decided from time to time by the directors. As a check on directors, for example, it might be desireable to impose maximum limits on the amount of land which the corporation could sell (or lease for a period in excess of, say, ten years) in any one year. It might also be important to require the corporation, in carrying out its functions, to consult closely with district and municipal governmental entities, particularly where public lands are used by municipal

governments.

There are some functions normally associated with the administration of public lands that could not be performed by a private corporation of the kind proposed. The corporation would lack the power to make laws of general application regulating the use and disposition of land. (As to the land it owns, however, it may create binding legal rights and obligations by its contracts, leases and covenants.) Moreover, the corporation would not have legal authority to meet three of the apparent present needs of the Marianas with respect to land now owned by private parties -- correcting boundary errors, resolving ownership disputes, and speeding the process of land survey and title registration. However, existing governmental entities may retain the corporation to make factual determinations required as part of the solution of these problems, and to suggest more efficient procedures.

Perhaps the most important aspect of the operation of the proposed corporation relates to its financial position. There is obviously a substantial cost associated with administering the large amount of public land of the Marianas. At least initially, the corporation would require an outside source of funds to finance its organization and first operations. We are unable to predict whether or not the corporation can thereafter be self-sustaining. It may be that the revenues from the military

lease to the United States alone would be sufficient to sustain the operations of the corporation. Or the revenues of the corporation may depend primarily upon the amount of land it is permitted and determines to sell or lease. In any case, if the corporation is unable to meet its continuing costs from its operating revenues, additional funds must be made available from some other source.

A more pleasant problem would arise if the operating revenues exceed expenditures. As discussed above, we do not believe that profits derived in this manner should be routinely distributed to the members. Some or all of the funds could be simply accumulated for the benefit of the citizens of the Marianas, to be turned over to an independent government when established. The remaining funds, or perhaps all funds not needed to establish prudent reserves, could be expended to supplement economic or social development programs normally provided by governmental institutions: constructing transportation, communications or similar public facilities; providing health care, special education, manpower training or other public services; furnishing loans to Marianas citizens forming new business enterprises or other economic development assistance. The corporation might be empowered to undertake such endeavors itself or -- perhaps more appropriately -- to make grants to organizations established by others for such purposes.

Of course, these mechanisms are intended merely as transitional substitutes for governmental activities. It is possible that the interim arrangements between the Marianas/and the United States will provide for the creation of an independent representative body -- or an expansion of the powers of the existing district legislature -- to create such programs and allocate funds. In that event, these institutions might be preferable vehicles for the allocation of profits derived by the corporation.

VII. Transition to an Independent Government

The proposed corporation is intended to administer the public lands of the Marianas only during an interim period pending the establishment of an independent government. At such time as an independent government is established, it is contemplated that the lands still owned by the corporation -- together with its rights in existing leases, its accumulated cash and other assets, after provision for its debts -- would be assigned to the new government. In the alternative, provision could be made for a change in the structure of the corporation so as to become a creature of the government, resembling a public agency or authority. (For example, it could become a non-membership corporation, all of whose directors are named by the government.)

In either case, it would be necessary to provide a mechanism for the transition to the ownership and control of the public lands by the independent government. Because of the difficulty of determining in advance precisely what constitutes a sufficiently independent government, we believe this problem would be best resolved by requiring a referendum of the members before transferring ownership and control of the public lands. The directors could be required to submit the question to the members upon the happening of certain events, for example, if the citizens of the Marianas

are asked to ratify a pending proposal for the formation of a new government. The directors should also be empowered and directed to conduct a referendum of the membership in connection with the possible transfer of the land to a governmental entity at any other time they believe appropriate. Finally, a referendum should be required if a sufficient number of members request it on their own initiative. Because of the importance of a transfer of lands, perhaps two-thirds or some other extraordinary majority of the members should be required to approve it.

Consideration should also be given as to whether (and subject to what controls) the corporation should be enpowered to sell, lease, exchange, mortgage or otherwise dispose of substantially all of its assets, see D.C. Code §29-1046, or to distribute its assets following a voluntary dissolution, see D.C. Code §§ 29-1047 to 29-1052. These are both voluntary procedures which would provide the corporation substantial flexibility in case, for example, it became necessary to achieve a fundamental reorganization. On the other hand, such procedures might be subject to abuse, and an effort should be made to reduce this possibility.

It would also be advisable to review whether provisions should be made for court-ordered and supervised liquidation or reorganization of the corporation where corporate affiars are deadlocked, or illegality or corporate waste are shown, or the corporation is insolvent. See D.C.

Code §§ 29-1053 to 29-1063. These are essentially involuntary proceedings designed for the protection of members, directors, creditors and the general public. Because such controls are generally healthy restrictions, and in light of the difficulty of abusing them, we believe they would be appropriate in this instance.

As pointed out above, however, the laws of the Trust Territory define no procedures for such actions. Unless the law applicable to the corporation is expanded or the corporation is organized outside the Trust Territory, such proceedings may be possible only under the general equity powers of the courts. In any case, the articles of incorporation should make provision for the possibility of dissolution, in an attempt to insure -- insofar as is so possible -- that the public lands would continue thereafter to be held and administered for the benefit of the citizens of the Marianas.

VIII. Checks and Balances

It is important to recognize that the proposed corporation is in many ways the equivalent of a government agency with extensive power over some 90 percent of the lands of the Marianas. As such, it is capable of the same abuses as any government body. And any framework for the creation of such a corporation must include appropriate restrictions against misconduct by individuals or abuses of institutional power.

As to the conduct of individual officers and directors, this is a familiar problem in the life of corporations, even non-profit corporations. See Pasley, "Non-Profit Corporations -- Accountability of Directors and Officers," 21 Bus. Law. 621 (1966). As indicated above, we believe that a limit should be imposed on the number of directors who may be employees of the corporation; perhaps all directors should be prohibited from such employment. We believe that strict conflict-of-interest rules should be adopted in the bylaws of the corporation. These rules might entirely prohibit certain kinds of transactions between the corporation and its officers or directors. See, e.g., D.C. Code § 29-1028 (loans to officers and directors prohibited). If certain other kinds of transactions between the corporation and officers or directors are thought to be permissible in some cases (for example, leases or consulting contracts), perhaps they should be allowed only after public notice and upon the vote of a majority of disinterested directors.

As to the conduct of the corporation itself, the law of the Trust Territory provides some assistance. If the corporation is established in the Marianas, it will be subject to the High Commissioner's power to appoint officials to audit and report on its accounts. Such officials have the right to examine the books of the corporation. 37 T.T.C. §4(1). The members would also have the right to inspect and examine the books, during normal business hours and in such a manner as not to interfere with the usual conduct of corporate affairs. 37 T.T.C. §4(2). The Attorney General or the District Attorney may seek relief, including an injunction, against any corporate practices "in violation of the law of the Trust Territory", including regulations thereunder, "or contrary to the public interest." 37 T.T.C. §6. The Registrar of Corporations may convene a special meeting of the members, directors or officers upon 10 days' notice "when deemed by him to be in the public interest." 37 T.T.C. §53.

If the corporation is organized outside the Trust Territory, roughly comparable provisions would presumably exist in the jurisdiction of its organization. See, e.g., D.C. Code §§ 29-1053 (involuntary dissolution); 29-1055 (jurisdiction of court to liquidate assets and affairs of corporations); 29-1083 (annual report). As discussed above, it also appears that the corporation would be subject to the Foreign Investors Business Permit Act, which includes broad provisions concerning investigations by

the District Economic Development Board and the Registrar of Corporations, 33 T.T.C. §§5(4), 10(4); see also 37 T.T.C. §54; annual reports, 33 T.T.C. §10(2); and loss of business permit for certain unlawful or unauthorized acts, 33 T.T.C. §13.

These corporate provisions provide some protection to members, but we suggest they be augmented in the articles and bylaws. In the first place, the corporation should be required to provide more frequent financial statements to its members -- perhaps audited statements annually and unaudited statements quarterly. This is the normal business practice (and requirement under the securities laws) in the United States, and should be the minimum standard for a corporation performing a public function. In addition, the corporation should be required to publish and distribute to its members a quarterly report summarizing and explaining its activities. Finally, the corporation could be required to publish on a continuing basis information as to certain important kinds of transactions. For example, perhaps every proposed sale or lease of land -- or at least every major proposed land transaction -- should be made public in advance of its execution. A full public disclosure of this kind, combined with the normal equity powers of the courts, can provide an additional measure of protection for the members of the corporation.

Moreover, it may be that the organization and powers of the corporation are so uniquely governmental in nature that -- at least for some purposes -- the corporation itself will be subject to the provisions of the due process and equal protection clauses, incorporated in Sections 4 and 7 of the Bill of Rights of the Trust Territory, 1 T.T.C. §§4,7. The Supreme Court has held that the management of a private company town can amount to state action such as to invoke the 14th Amendment. Marsh v. Alabama, 326 U.S. 501 (1946). The concept has also been extended to a privately owned shopping center, Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); a park nominally owned by private trustees, but maintained by public employees after "a tradition of municipal control had become firmly established," Evans v. Newton, 382 U.S. 296, 301 (1966); and a coffee shop leased from a municipal parking authority, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). On the other hand, the Supreme Court has held that the concept of state action does not extend to a private club solely by virtue of state licensing and regulation of the sale of liquor in the club. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). And when confronted with the argument that discrimination by private housing subdevelopers constituted state action, the Court resolved the case before it on statutory grounds. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

For these reasons, it is impossible to predict the extent to which the due process and equal protection clauses will apply to the corporation's actions. But it is probably fair to conclude that the more extreme the action complained of, the more likely it is to be entertained by the courts. It has already been suggested, for example, that efforts to deny the vote to citizens of new communities or to base their voting rights on property ownership may violate the equal protection clause. Note, "Democracy in the New Towns: the Limits of Private Government," 36 U. Chic. L. Rev. 378 (1969).

In any case, we believe that thoughtfully drafted articles and bylaws -- combined with the requirement that directors, like public officials, must stand periodically for reelection -- can provide sufficient checks on the operation of the corporation.