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

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Introduction and Summary

On November 1, 1973, the President's Personal Representative for Micronesian Status Negotiations, with the endorsement of the Secretary of the Interior, announced the formal United States policy with respect to the public lands of the Micronesian Islands. 1/ The Policy Statement indicates the willingness of the United States to transfer the public lands in each district in accordance with the wishes of the people, as indicated by the district legislature.

The recipient must agree "to hold the public land in trust for the people of that district to be disposed of under terms determined by the district legislature" and to be bound by various other specific limitations and safeguards. Moreover, the recipient "must be legally qualified to receive and accept title to property, and if a legal entity is not available or is not qualified legally to receive real property under the law it must be created or become so qualified for this purpose."

We recommend that a private corporation be formed for the purpose of receiving and administering the public lands of the Marianas Islands in the manner contemplated

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1/ "Transfer of Title of Public Lands from the Trust Territory of the Pacific Islands Administration to the Districts: United States Policy and Necessary Implementing Courses of Action" [hereinafter cited as Policy Statement].

by the Policy Statement, as an interim arrangement looking to the termination of the Trusteeship Agreement and the creation of a new political status for the Marianas. The corporation would be designated by the District Legislature as the recipient of the public lands of the Marianas. The terms on which the corporation would hold, administer and dispose of lands -- set forth in its articles and bylaws and an agreement with the U.S. -- would have the specific approval of the Legislature. The corporation would be a private, non-profit membership corporation. The members -- who would be entitled to elect the directors and vote on certain fundamental policy questions -- would be either the people of the Marianas or their elected representatives in the Legislature.

A broadly-based, representative group would be designated to organize the corporation; perhaps the Marianas Political Status Commission could fill this function. This group, in consultation with the District Legislature and representatives of major segments of the Marianas society, would make the final decisions as to organization, limitations and powers of the corporation, and would draft articles of incorporation and bylaws. At the same time, the group -- with such staff or consulting assistance as might be necessary -- would take the first steps toward dealing with operational questions. It would investigate staffing and

financial requirements; study the existing public lands, including present leases; negotiate for sufficient resources to accomplish the transition; and prepare initial recommendations with respect to personnel and budgets. It would consult with the United States so as to ensure a mutual understanding of the legal and operational questions involved.

Acting as incorporators, the organizers would actually charter the corporation. If it is decided that the people of the Marianas should constitute the membership, the incorporators would specify a few initial members and directors. As promptly as possible thereafter, 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. Following completion of these steps, an election would be held at which the people could 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 the final agreement between the corporation and the United States. This would have the added advantage of giving the people an opportunity to ratify the proposed agreement.

If it is decided that the District legislators should constitute the membership, the first board of directors could be selected immediately after incorporation. Even in this case, we believe that an election should be held to

allow the people of the Marianas to ratify the articles, bylaws and proposed agreement.

The corporation and the United States would then enter into a formal contract under which the United States would transfer the public lands of the Marians to the corporation. As a corporation "wholly owned by citizens of the Trust Territory," and as a "citizen of the Trust Territory" itself, the corporation would be legally qualified to hold title to the land. 1/ The U.S. would agree to refrain from interfering with -- and to act affirmatively to protect -- the corporation's contemplated rights, powers and independence.

Under the contract, the corporation would agree to assume responsibility for administering the public lands in trust for the people of the Marianas, and would specifically and formally agree to the various limitations and safeguards spelled out in the Policy Statement. It would agree to honor titles issued in connection with the homestead program, and leases and other land uses acquired by individuals or business or private concerns from the Trust Administration. It would be bound to respect tenancies at will or by sufference for a reasonable period, to be determined. The transfer of lands would be subject to unresolved claims, and the Trust Territory central government would

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1/ 57 T.T.C. §11101.

retain the right to control activities affecting the public interest within tidelands, filled lands, submerged lands and lagoons.

All of the public lands of the Marianas would be transferred to the corporation under the agreement, including land subject to negotiations with the U.S. for military uses. The Marianas Political Status Commission would, as part of the transaction, make a formal commitment to accommodate defense needs in good faith on terms to be mutually agreed with the United States authorities. And the corporation would be bound to sell or lease military land to the U.S. on whatever terms are subsequently negotiated and agreed to by the people of the Marianas.

The specific powers and limitations of the corporation in administering the public lands would be determined by its articles, bylaws and agreement with the United States. In addition to the safeguards required by the Policy Statement, additional guidance might be included with respect to matters such as a homesteading program and whether (and on what conditions) the corporation might sell land as well as lease it. The corporation would be precluded from distributing any revenues in excess of expenses except in a manner intended to benefit the people of the Marianas; it might be further limited by a requirement that it allocate any such profits as the District Legislature may direct.

Periodic financial and operating reports to the members -- and specific prohibitions against conflicts of interest and other problems -- would be provided in the corporation's articles and bylaws, in the terms of its contract with the United States, and under the laws of the Trust Territory. In addition, the directors would be required to stand periodically for election. Finally, the charter would provide a mechanism whereby ownership of the public lands would be transferred to the new government created upon termination of the Trusteeship.

We recommend that the corporation be established under the laws of the Trust Territory. However, the present corporate law of the Trust Territory is either silent or, in our judgment, incomplete in many significant respects. For this reason, we urge the Congress of Micronesia, in implementing the Policy Statement, to empower the district legislatures to charter (and provide for the administration of) corporations such as the one proposed. As an alternative, the Congress of Micronesia could itself adopt a modern nonprofit corporation law, such as the Model Nonprofit Corporation Act drafted by the Committee on Corporate Laws of the American Bar Association, or the United States could so provide by an executive order of the President or order of the Secretary of the Interior. Notwithstanding the somewhat greater uncertainty, however, we believe the cor-

poration may be successfully formed and operated under the present provisions of the Trust Territory Code if it is not possible to enact a more satisfactory statute promptly.

Finally, recognizing that both the U.S. and the people of the Marianas would require the corporation to be independent, we have considered at some length the question whether the executive or legislative branches of the United States or Trust Territory governments might be free to interfere in the rights or activities of the proposed corporation. While it is impossible to analyze this question completely without knowledge of the precise actions that might be taken and the circumstances surrounding them, we believe that certain broad protections would be available to the corporation under its contract with the United States and under the contract and due process clauses of the United States Constitution and the Trust Territory Code. We believe it unlikely that the United States -- or, without fair compensation, the Trust Territory -- could materially restrict the corporation's rights in the public land or its structure or operations in the manner and for the purposes contemplated.

I. 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, 1/ to encourage specific charities, 2/ to obtain and administer historically significant sites and buildings, 3/ or to promote the development of United States territories 4/ 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. 5/

In other instances, Congress has directed the organization of private entities under the corporation law of a state or the District of Columbia, to accomplish some public purpose. Some such corporations have been organized

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1/ American Legion, 36 U.S.C. §§41-51.

2/ National Fund for Medical Education, 36 U.S.C. §§601-617.

3/ National Trust for Historical Preservation, 16 U.S.C. §§468-468d.

4/ Virgin Islands Corporation, 48 U.S.C. §§1407-1407l.

5/ Federal National Mortgage Association, 12 U.S.C. §§1716-1723d.

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on a not-for-profit basis, such as the Corporation for Public Broadcasting. 1/ Congress has also directed the formation of private, profit-making corporations for purposes such as creating a communications satellite network, 2/ encouraging the production of low and moderate income housing, 3/ providing inter-city rail passenger service, 4/ and administering valuable rights in natural resources. 5/

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 any one 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

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1/ 47 U.S.C. §396.

2/ Communications Satellite Corporation, 47 U.S.C. §§731-744.

3/ National Corporation for Housing Partnerships, 42 U.S.C. §§ 3931-3941.

4/ National Railroad Passenger Corporation, 45 U.S.C. §§541-548.

5/ Regional and Village Alaskan Native Corporations, 43 U.S.C. §§1606-1607.

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. 1/ 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 resi-

1/ See generally Urban Land Institute Technical Bulletin 50, The Homes Association Handbook (rev. ed. 1970).

dents 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, 1/ 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 people 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.

1/ See, e.g., Note, Democracy in the New Towns: The Limits of Private Government, 36 U. Chic. L. Rev. 378 (1969).

II. 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 1/ 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

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1/ 43 U.S.C. §1606.

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.[1/] 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 in the affected lands on the ground that these

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1/ 43 U.S.C. § 1607.

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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 may 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 people 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

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.

Moreover, 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. Or it could be required to take directions, with respect to the allocation of profits, from some other independent democratic institution which lacks the resources to deal effectively with the public problems of the Marianas -- such as the District Legislature.

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.

11. Incorporation Under the Laws of the Trust Territory

We have considered at some length the question of whether the proposed corporation should be incorporated under the laws of the Trust Territory or outside the Trust Territory.

We believe it would be possible for the corporation to be organized under the laws of some other jurisdiction, 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 might be required to secure a permit pursuant to the Foreign Investors Business Permit Act, 1/ and subjected to the procedural regulations under that Act. In our view, the corporation could successfully carry on its proposed activities subject to such regulation.

However, it may be difficult to explain to the people of the Marianas why a corporation organized on their behalf should be incorporated in another jurisdiction, and there may be other political and psychological disadvantages to such action. Moreover, the United

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1/ 33 T.T.C. §§ 1 - 19.

States Policy Statement emphasizes the requirement that the legal entity receiving public lands must be "qualified legally to receive real property under the law." 1/ Under the Code,"[o]nlycitizens of the Trust Territory or corporations wholly owned by citizens of the Trust Territory may hold title to land in the Trust Territory . . . ." 2/ Although it might be argued that a corporation organized outside the Territory but completely controlled by and operated for the benefit of the people of the Marianas was "wholly-owned by citizens of the Trust Territory", the corporation's right to hold title could be in no doubt if it were organized under the Trust Territory Code. For these reasons, we believe that the corporation should be so organized.

There are certain potential problems in incorporating under the Trust Territory Code which must be considered. In the first place, it might be feared that at some later time the United States or the Trust Territory government might seek to use governmental power not to undermine the validity of the contract (which, as discussed below, they are substantially precluded from doing) but to undermine the legal standing

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1/ p. 2.

2/ 57 T.T.C. § 11101.

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. 1/ By virtue of the logic discussed below in connection with the enforceability of the agreement between the corporation and the United States, the United States would be forbidden under the Constitution, and the Trust Territory government under Sections 4 and 5 of the Bill of Rights of the Trust Territory, 2/ 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. 3/ But even this power is said to be subject to limitations which appear to parallel those discussed below in connection with the enforceability of the contract: 4/

1/ Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 637 (1819).

2/ 1 T.T.C. §§4, 5.

3/ Sinking-Fund Cases, 99 U.S. 700 (1878).

4/ Phillips Petroleum Co. v. Jenkins, 297 U.S. 629, 634-35 (1936).

> "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."

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," 1/ the corporate law of the Trust Territory contains no such provision.

A different 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; 2/ the entire subject matter occupied three pages in the annotated Code. Four additional sections, 3/ are devoted to the organization and powers of the Registrar of Corporations; these matters occupy an additional two pages in the annotated Code.

1/ D.C. Code §29-1099g.

2/ 37 T.T.C. §§ 1-6.

3/ 37 T.T.C. §§ 51-54.

On the basis of our initial review, we believe it is possible successfully 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." 1/ Persons seeking a charter are required to submit articles of incorporation providing certain specified information, including "[p]rovision for voting by members" and "[p]rovisions for shareholding, if any." 2/ 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." 3/

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.

1/ 37 T.T.C. § 1.

2/ 37 T.T.C. § 3(1)(k), (l).

3/ 37 T.T.C. § 52.

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, uncertainty would remain as to many of these matters.

To suggest the scope of the problem, we have briefly reviewed the District of Columbia Nonprofit Corporation Act. 1/ 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

1/ D.C. Code §§29-1001 to 29-10991.

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 such matters are not resolved in the statute under which the corporation is organized, even carefully drafted articles and bylaws cannot lay to rest all the uncertainty as to some potentially significant questions.

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. 1/ Local customary law, if any, would be applicable. 2/ And if there were a common law of

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1/ 1 T.T.C. §101.

2/ 1 T.T.C. §102.

porations "generally understood and applied in the United States," these provisions would also have the effect of law. 1/ 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.

As the most desirable means of bringing greater certainty to the law under which the corporation would be established, we strongly recommend that the Congress of Micronesia, in implementing the Policy Statement, empower the district legislatures to charter (and provide for the administration of) corporations such as the one proposed. As an alternative, the Congress of Micronesia could itself adopt a modern non-profit corporation law, such as the Model Nonprofit Corporation Act drafted by the Committee on Corporate Laws of the American Bar Association.

Either step would not only solve the immediate problem of forming this corporation, but serve a broader need; 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.

1/ 1 T.T.C. § 103.

We recognize, however, that it may not be possible to secure the enactment of such a law. In this case, there are other 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/ Such action would accord with the contract obligation of the United States, pursuant to our recommendation above, to act affirmatively to facilitate the operation of the corporation and to protect its legal status and powers.

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 execution of the contract and the transfer of land to the corporation may well be accompanied by such an action, particularly by 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 transaction, there

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1/ 1 T.T.C. §101(2).

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.

Organization and Structure

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 procedure if feasible. 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, 1/ i.e., resident citizens 18 years of age or over.

1/ 34 Fed. Reg. 158 (1969).

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/ If this question is answered in the affirmative, the districts from which directors are chosen should contain approximately equal numbers of members. 2/

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 desirable simply to conduct a private election, using insofar as possible the public election machinery already

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1/ 1 T.T.C. § 7.

2/ Reynolds v. Sims, 377 U.S. 533 (1964).

ting. 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 a post-Trusteeship 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.

An Alternative Approach to the Selection of Members and Directors. The United States Policy Statement would vest substantial control over the transfer and administration of the public lands in the District Legislature. We believe that the Legislature might properly delegate these powers to the corporation, with members and directors to be chosen in the manner described above.

However, the District Legislature is itself a democratically elected body representative of the people of the Marianas. Accordingly, it would also be appropriate to organize and structure the corporation around the Legislature. This could be done by providing that the members of the District Legislature shall constitute the entire membership of the corporation; this representative body of members could then in turn directly elect the board of directors of the corporation.

This procedure would be subject to the danger that a narrow majority of the Legislature could elect an entire slate of directors, thus preventing adequate minority representation on the corporation's board. This problem could be overcome by providing for cumulative voting such that any group of at least, for example, 20 percent of the Legislature could be certain of electing one director. An alternative approach would be to provide simply that every member of the Legislature would be both a member of

the corporation and a director; this might create some difficulty because of the size of the Legislature.

If the members of the Legislature are to be made members or directors of the corporation, the articles and bylaws must be drafted so as to provide for the danger that the Legislature might be abolished, or its members might no longer be democratically and representatively elected. Under these circumstances, a fallback procedure such as the one described earlier in this section could be provided for.

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 would 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 cooperation with the District Legislature and in

consultation with representatives of all major segments of the Marianas society, would make the decisions as to many of the matters discussed here and in the following sections of this memorandum: eligibility for membership; election of directors; nomination and election machinery; officers; restrictions imposed on the corporation; transfer of land to a post-Trusteeship Marianas government; etc. They would then draft articles of incorporation and bylaws resolving these and other, more traditional, questions as to corporate organization, powers and restrictions.

At the same time, this group -- with such staff or consulting assistance as may be necessary -- would take the first steps toward administration of the public lands by the corporation. It would investigate staffing and financial requirements; study the existing public lands, including present leases; negotiate for sufficient resources to accomplish the transition; and prepare initial recommendations with respect to personnel and budgets. It would consult with the United States so as to insure an understanding of the legal and operational questions involved.

Acting as incorporators, the organizers would actually charter the corporation. If it is decided that the people of the Marianas should constitute the membership, the incorporators would specify a few initial members and directors. As promptly as possible thereafter, the corpor-

ation 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. Following completion of these steps, an election would be held at which the people could 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 the final agreement between the corporation and the United States. This would have the added advantage of giving the people an opportunity to ratify the proposed agreement.

If it is decided that the District legislators should constitute the membership, the first board of directors could be selected immediately after incorporation. Even in this case, we believe that an election should be held to allow the people of the Marianas to ratify the articles, bylaws and proposed agreement.

V. Safeguards and Limitations on the Administration of the Public Lands

Once transferred to the corporation, the public lands of the Marianas would thereafter have the legal status not of public land but private -- land wholly owned by a private, non-profit corporation. The private nature of the corporation gives it certain advantages with respect to its lands. Perhaps most importantly, the government would be substantially restricted -- as described below at length -- 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 those other than the people of the Marianas.

The very independence associated with the private corporation, however, makes it necessary that the interests of the people of the Marianas in the public lands be specifically protected. The United States Policy Statement 1/ speaks directly to this need in several respects.

The Policy Statement requires a fundamental commitment by the recepient to "agree to hold the public land in trust for the people of that district . . . ." The recipient would be required to honor titles issued in connection with the homestead program and "leases and other land uses acquired by individuals or business or private concerns from

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1/ pp. 2-3.

the Trust Administration . . . ." Present tenancies at will or by sufference must be respected "for a reasonable period of years, whose number is to be determined." The transfer of lands would be subject to unresolved claims, and the Trust Territory central government would retain the right to control activities affecting the public interest within tidelands, filled lands, submerged lands and lagoons.

All of the public lands of the Marianas would be transferred to the corporation under the agreement, including land subject to negotiations with the U.S. for military uses. The Marianas Political Status Commission would, as required by the Policy Statement, make a "formal commitment to accommodate [defense] needs in good faith on terms to be mutually agreed with the United States authorities." And the corporation would be bound to sell or lease military land to the U.S. on whatever terms are subsequently negotiated and agreed to by the people of the Marianas.

Just as a government is bound by its constitution, laws and agreements, the proposed corporation would be bound to each of these restrictions by its charter, bylaws and contract with the United States. Thus the specific safeguards of the Policy Statement would be guaranteed, and in a manner enforceable in the courts. Moreover, additional restrictions on the administration of the public lands may be built into the articles and bylaws, to meet other policy objectives deemed important by the people of the Marianas.

For example, the articles and bylaws could impose limitations controlling the sale or lease of land by the corporation. Under these provisions, the corporation might 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 altogether 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's power to grant renewal or other options could be restricted. 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. In some or all of these matters, the corporation could be bound to follow basic policies established by the District Legislature.

There is no doubt that the corporation can be granted powers -- and subjected to limitations -- 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 desirable 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. And in any case, the cadastral program should relieve these problems within the next three years, if it is completed on the schedule announced in the Policy Statement.

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 existing leases alone would be sufficient to sustain the operations of the corporation. Or the revenues of the corporation may depend primarily upon the amount of additional 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 people of the Marianas, to be turned over to the post-Trusteeship 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: construction, 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 amount to transitional substitutes for governmental activities. It might be preferable simply to provide for a commitment by the corporation to allocate any revenues in excess of expenses at the direction of the District Legislature or any independent representative body that succeeds it. This would make the corporation responsive to the Legislature in the traditional function of creating social and economic programs and allocating resources among them.

VI. Other Checks and Balances

It is important to recognize that the proposed corporation would be, 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 would be capable of the same abuses as any government body. Thus, in addition to the limitations discussed above on the administration of public lands, 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. 1/ 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. 2/ If certain other kinds of

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1/ See Pasley, Non-Profit Corporations -- Accountability of Directors and Officers, 21 Bus. Law. 621 (1966).

2/ See, e.g., D.C. Code § 29-1028 (loans to officers and directors prohibited).

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. 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. 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." 3/ 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." 4/

1/ 37 T.T.C. § 4(1).

2/ 37 T.T.C. § 4(2).

3/ 37 T.T.C. § 6.

4/ 37 T.T.C. § 53.

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If the corporation is organized outside the Trust Territory, roughly comparable provisions would presumably exist in the jurisdiction of its organization. 1/ 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, annual reports, and loss of business permit for certain unlawful or unauthorized acts.

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

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1/ 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).

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/ 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. 2/ The concept has also been extended to a privately owned shopping center, 3/ a park nominally owned by private trustees, but maintained by public employees after "a tradition of municipal control had become firmly established," 4/ and a coffee shop leased from a municipal parking authority 5/.

1/ 1 T.T.C. §§ 4, 7.

2/ Marsh v. Alabama, 326 U.S. 501 (1946).

3/ Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

4/ Evans v. Newton, 382 U.S. 296, 301 (1966).

5/ 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. 1/ And when confronted with the argument that discrimination by private housing sub-developers constituted state action, the Court resolved the case before it on statutory grounds. 2/

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. One noted scholar has written: 3/

> I find in the decisions . . . in the area of 'eleemosynary' institutions such as schools, colleges, libraries, and hospitals . . . . that if private action has resulted in a general and serious denial of values the [Fourteenth] Amendment was meant to protect, an answer that the state has merely failed to prevent this will not suffice.

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. 4/

1/ Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

2/ Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

3/ H. Friendly, The Dartmouth College Case and the Public-Private Penumbra 18 (undated).

4/ 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 additional checks.

VII. Transition to a Post-Trusteeship Government

The proposed corporation is intended to administer the public lands of the Marianas only during an interim period pending the establishment of a new form of government. At such time as a post-Trusteeship 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 new 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 people 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 empowered to sell, lease, exchange, mortgage or otherwise dispose of substantially all of its assets, 1/ or to distribute its assets following a voluntary dissolution. 2/ 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 cor-

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1/ See D. C. Code §29-1046.

2/ See D. C. Code §§29-1047 to 29-1052.

porate affairs are deadlocked, or illegality or corporate waste are shown, or the corporation is insolvent. 1/ 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 people of the Marianas.

1/ See D. C. Code §§29-1053 to 29-1063.

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It is important to consider whether there are significant ways in which the executive or legislative branches of the United States or Trust Territory government might, without fair compensation, act to take or restrict the use of the lands or fundamentally alter the structure or activities of the corporation. Of course, it is impossible to analyze these possibilities completely without speculating as to the precise actions that might be taken and the circumstances surrounding them. However, there would be certain broad protections available to the corporation under its contract with the United States and under the contract and due process clauses of the United States Constitution and the Trust Territory Code.

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. 1/ As to the federal government, "there is at least a tendency for the contract clause and the due process clause to coalesce." 2/

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

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1/ Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-39 (1810); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819)

2/ Hale, The Supreme Court and the Contract Clause: III, 57 Harv. L.Rev. 852, 890 (1944).

recover the property without compensation: 1/

> [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.

And a similar view has prevailed against actions by the states to impair interests in land acquired from the government. 2/ 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

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1/ Sinking-Fund Cases, 99 U.S. 700, 719 (1878); see also Reichart v. Felps, 73 U.S. (6 Wall.) 160 (1867).

2/ Fletcher v. Peck, supra; Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815); Board of Trustees v. Indiana, 55 U.S. (14 How.) 268 (1852); Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Choate v. Trapp, 224 U.S. 665 (1912); Appleby v. City of New York, 271 U.S. 364 (1926); Wood v. Lovett, 313 U.S. 362 (1941).

tension was expressed by Mr. Justice Brandeis in Lynch v. United States: 1/

> 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. 2/

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 merely reduces the value of property or deprives the owner of "all or most of his interest"; whether

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1/ 292 U.S. 571, 579 (1934).

2/ See F. Bosselman, D. Callies & J. Banta, The Taking Issue (19 Hale, The Supreme Court and the Contract Clause, 57 Harv. L. Rev. 512, 621, 852 (1944); Warren, The Contract Clause of the Constitution (1938).

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the 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 government 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 would be applicable in these circumstances against the United States or the Trust Territory. We believe that the due process clause (and, through it, the contract clause) of the United States Constitution is applicable in the Trust Territory. The Supreme Court concluded in the Insular Cases 1/ that in territories acquired by treaty and not yet "incorporated" into the United States, only certain "fundamental"

1/ Downes v. Bidwell, 182 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904) Balzac v. Porto [sic] Rico, 258 U.S. 298 (1922).

constitutional rights apply. Mr. Justice Black's plurality opinion in Reid v. Covert sharply questioned the Insular Cases and concluded that "we can find no warrant, in logic or otherwise, for picking and choosing" which constitutional rights are so "fundamental" as to be applied in the territories, and that "neither the [Insular Cases] nor their reasoning should be given any further expansion." 1/ Thus it appears that the limited constitutional guaranties available abroad under the Insular Cases have been substantially expanded.

However, one authority has stated that "despite the aspersions cast on them, the Insular Cases continue to govern the United States in such unincorporated territories as Guam and the Trusteeship Islands in the Pacific." 2/ Even under the original Insular Cases, there is substantial dictum indicating that the citizens of the territories are entitled to "certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law. . . ." 3/ "Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty and property." 4/ Indeed, there

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1/ 354 U.S. 1, 9, 14 (1957)

2/ Henkin, Foreign Affairs and the Constitution 268 (1972).

3/ Balzac v. Porto [sic] Rico, 258 U.S. 298, 312-13 (1922).

4/ Downes v. Bidwell, 182 U.S. 244, 283 (1901).

a substantial body of law that the United States may not take the property of alien friends without compensation. 1/

Moreover, there is additional support in other closely related areas. Private property may not be taken from an American citizen in a foreign country without compensation, even by military authorities, 2/ unless the property is taken not to be "used" but by or for its destruction for military purposes. 3/ And in a closely related area, the Constitution prohibits the United States from taking land owned by Indian tribes under its "guardianship" without paying compensation, 4/ and the courts have jurisdiction to hear suits seeking to enjoin the Secretary of the Interior from consummating such a taking. 5/ Finally, we believe that any assertion by the United States that the due process clause was inapplicable in the Trust Territory would be inconsistent with its strong statements in

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1/ Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931); Guessefeldt v. McGrath, 342 U.S. 308 (1952).

2/ Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134-35 (1851); United States v. Russell, 80 U.S. (13 Wall.) 623, 627-28 (1871).

3/ United States v. Caltex, Inc., 344 U.S. 149 (1952).

4/ United States v. Creek Nation, 295 U.S. 103 (1935); Shoshone Tribe v. United States, 299 U.S. 476 (1937).

5/ Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919).

negotiating the Trusteeship Agreement: 1/

> My Government feels that it has a duty towards the peoples of the trust territory to govern them with no less consideration than it would govern any part of its sovereign territory. It feels that the laws, customs and institutions of the United States form a basis for the administration of the trust territory compatible with the spirit of the Charter. For administrative, legislative and jurisdictional convenience in carrying out its duty towards the peoples of the trust territory, the United States intends to treat the trust territory as if it were an integral part of the United States.

For all these reasons, we believe the corporation would be protected against interference by the United States under the due process clause.

Moreover, 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. 2/ The Congress of Micronesia is specifically forbidden from adopting legislation inconsistent with these provisions. 3/ We believe these provisions

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1/ Statement of the United States Representative upon agreeing to the deletion of the phrase "as an integral part of the United States" from the description of powers of the administering authority, U.N. Security Council Off. Rec., 116th Meeting, March 7, 1947, p. 473, quoted in 1 Whiteman, Digest of International Law at 778 (Released June, 1963).

2/ 1 T.T.C. §§ 4, 5.

3/ Department of the Interior Order No. 2918, § 2(d), 24 Fed. Reg. 158 (1969).

thus offer substantial protection against undue interference with the corporation by the Trust Territory government.

The corporation would also be protected against excessive interference by the terms of its contract with the United States. Recognizing the difficulty of predicting specific problem areas, the contract should include carefully drafted language forbidding the United States and any of its officers or agents from taking -- or, insofar as they have the power, permitting -- any action which would materially impair the corporation's rights in the land or its operations in the manner and for the purposes contemplated. The provisions should also bind the United States to act affirmatively in cooperation with the corporation to assure the preservation of the corporation's independence, rights and powers.

The contract between the corporation and the United States would provide for substantial consideration to the United States. As required in the United States Policy Statement, the corporation would agree "to hold the public land in trust" for the people of the Marianas. 1/ The corporation would agree to be bound by various specific safeguards and limitations relating to the disposition of the lands. 2/ These restrictions would bind the corporation

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1/ p. 2.

2/ pp. 2-3.

with respect to the homesteading program, and would require it to respect leases and other land use arrangements "previously entered into by the Trust Administration" and various tenancies at will or by sufference. Perhaps more importantly, the U.S. will obtain a "formal commitment to accommodate [defense] needs in good faith on terms to be mutually agreed with United States authorities."

Thus, under the contract, the United States will not only be relieved of the responsibility of administering the public lands, but it will receive formal assurances with respect to various protections of the public interest and use of public lands for defense purposes. We believe there is no doubt this contract would bind the United States. "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." 1/

Moreover, we believe that the agreement would be enforceable in the federal courts. It is possible that damages might be recoverable in the Court of Claims "upon any claim against the United States founded . . . upon any express or implied contract with the United States . . . ," 2/

1/ Perry v. United States, 294 U.S. 330, 352-53 (1935).

2/ 28 U.S.C. § 1491.

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