BRIEFING PAPER NO. 12

RESTRICTIONS ON LAND ALIENATION

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Ownership of land is one of the fundamental aspirations of most citizens, and ownership of a significant portion of the land by citizens is one of the attributes of an economically sound and prospering political entity. These considerations are of particular importance in the Northern Mariana Islands where land is in very limited supply.

There are circumstances under which the normal free market system with respect to acquisition of land may be wisely suspended in order to permit the citizens of an economically developing area to accumulate enough economic power to compete effectively with outside interests in the free market. The Covenant reflects the judgment of the people of the Northern Mariana Islands that they currently find themselves in such circumstances. The Covenant requires restrictions on the alienation of land in the Commonwealth -- by sale or long-term lease -- to persons who are not of Northern Marianas descent.

This briefing paper examines the issues involved in implementing these restrictions. It examines the question of whether the Convention or the legislature should have primary responsibility for putting any proposed restrictions into effect, and analyzes the legal

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terms that must be defined in order to make any restrictions concrete. The paper then discusses the advantages and disadvantages of restrictions that would apply for a limited time as compared to permanent restrictions.

I. BACKGROUND AND GENERAL CONSIDERATIONS

A. Applicable Provisions of the Covenant

Section 805 of the Covenant sets out the basic restriction:

> [N]otwithstanding the other provisions of this Covenant, or those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands, the Government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency:
>
> will until twenty-five years after the termination of the Trusteeship Agreement, and may thereafter, regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent 1/

This language is amplified by the Drafting Committee's Report, which states that:

1/ S. REP. NO. 94-433, 94th Cong., 1st Sess. p. 117 (1975) [hereinafter cited as S. REP. NO. 94-433].

> The parties intend that it will be the responsibility of the Government of the Northern Mariana Islands to implement the provisions of this Section. In particular, the parties understand that the Constitution or laws of the Northern Mariana Islands will define the operative terms in this Section, including such terms as 'long-term interest in real property,' 'acquisition' and 'persons of Northern Mariana Islands descent.'2/

Finally, the Senate Committee report describes the phrase "Northern Marianas descent" as meaning "of Chamorro or Carolinian ancestry."3/

These documents make clear the general policy that the Commonwealth must follow -- that control of land in the Northern Marianas is to be left to the people who have lived there.

B. Principal Issues

There are three sets of issues with which the Convention must deal in its treatment of the land alienation question. First, it must decide whether it will deal with the problem itself, or leave the matter to the legislature. As will be seen, this matter is as complex as many of those that other briefing papers suggest should

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2/ REPORT OF THE JOINT DRAFTING COMMITTEE ON THE NEGOTIATING HISTORY, reprinted in S. REP. NO. 94-433, p. 406.

3/ S. REP. NO. 94-433, p. 87.

be left to the legislature. In this case, however, there are strong arguments favoring action by the Convention.

Second, the general terms of the Covenant must be translated into a workable system that is sufficiently well-defined to regulate many different kinds of land transactions involving many different types of interests. The Convention faces six problems. It must:

- decide who is a "person of Northern Marianas descent";
- devise a formula for dealing with land ownership by corporations and other non-natural persons;
- determine the sweep of the term "acquisition";
- define the term "interest in real property";
- decide the length of time an interest must run to be classed as "long-term";
- indicate the treatment to be given to transactions violating the restrictions.

The third set of issues focuses on the duration of the restrictions that the Convention may impose. Section 805 requires a period of 25 years and permits restrictions for a longer period. The Convention must examine the advantages and disadvantages of continuing the restrictions for longer than the minimum mandated by the Covenant.

C. Policy Considerations

There are four policy factors that the Convention must balance in dealing with the question of land alienation. First, of course, is the importance of land to the culture of the people of the Northern Marianas. The moral and psychological effects on the people of losing their land would be very serious. Accordingly, the Convention must be conscious of the undesirability of such an outcome.

The second factor to be considered is the danger of economic exploitation of the citizens of the Commonwealth. Despite the progress the Islands have made in recent years, many of the people would be at a disadvantage in dealing with experienced businesspeople from other places. The Convention may therefore wish to provide some safeguards against such an eventuality.

The third factor to be considered is the cost of these restrictions to the people of the Northern Marianas. The citizens of the Commonwealth will expect economic development to continue. However, since the Northern Mariana Islands are not rich in capital, non-Marianas investors must be persuaded to provide the resources that are needed for growth. Restrictions on land alienation will impede the flow of capital from abroad, and slow the improvement of the economy.

Further, restrictions will, to some extent, distort the market in land and decrease its market value. The Convention therefore must be alert to the economic consequences of the restrictions that are imposed.

Finally, there are considerations of practicality that cannot be neglected. Any restrictions will necessarily reduce the discretion of the legislature to deal with unforeseen problems. Further, some approaches to this question are more easily enforced than are others. There is little justification for casting any restrictions in a form that the Commonwealth government will find it difficult to implement. This may indeed be one of the more difficult aspects of this whole question. Historically, many provisions of this sort have either not lasted very long, or survived only because they were not interpreted as restrictively as they might have been.[4/] The Convention may wish to consider this record.

4/ For example, the original statute forbidding land ownership by aliens (Act of Mar. 3, 1887, 24 Stat. 476) lasted only 10 years before being considerably softened by amendments (Act of Mar. 2, 1897, 29 Stat. 618, currently 48 U.S.C. §§ 1501-07 (1970)).

Again, for the non-restrictive interpretations given Mexican laws restricting alien land ownership, see Miller, Investing in Real Property in Mexico, 44 L.A. BAR BULL. p. 561 (1969).

II. SPECIFIC ISSUES FOR DECISION

This section discusses first the advisability of constitutional treatment of the subject of restrictions on land alienation.

It then examines two categories of factors by which these restrictions, mandated by the Covenant, can be made more or less rigorous: (1) the definition of what is to be regulated -- "acquisition," "interest in land," and "long-term" interest; and (2) the definition of who is to be affected by the regulations -- persons of Northern Marianas descent, non-Marianans currently owning long-term interests in land, and corporations and other nonnatural persons. If the definitions of what is being regulated are narrow, then more interests in land will be governed by the free market, and the impact of the regulations on non-Marianans will be less severe, regardless of how they are defined. Similarly, if the definition of "Northern Marianas descent" is broad, then more persons will be eligible to own land and the adverse economic impact of the regulations will be less severe. This section assesses the options available to the Convention for broad or narrow application of both of these categories of factors.

Finally, this section examines questions of enforcement and duration of the regulatory plan that has been devised.

A. Advisability of Constitutional Treatment

Before the Convention will be able to deal with the substantive problems of land alienation, it must decide the role that it wishes to play in the process. Section 805 requires only that alienation be restricted; it does not require that all the restrictions be in the Constitution. The Convention, indeed, could leave the entire question to the legislature.

Strong arguments, however, can be made for setting the outlines of the restrictions in the Constitution. This question is unlike many matters that come before the Constitutional Convention, in which wise policy favors leaving the legislature free to deal with the subject as circumstances seem to require. In this case, questions are presented that must be answered if landowners in the Commonwealth are to be able to be certain of their rights to important assets. It is desirable for this matter to be settled quickly because land transactions cannot take place in any orderly

fashion until that happens. To leave the matter to the legislature obviously involves some delay. Moreover, if the matter is left to the legislature, a very basic aspect of land law can be altered relatively easily. The stability required in land law is thus not really available unless the land alienation question is treated in the Constitution.

A second argument in favor of dealing with the question at the Convention is the matter of public confidence. One of the standards by which the Constitution may be judged is its treatment of the land question. Dissatisfaction with the approach taken on this matter could be reflected in general disapproval of the document.

Finally, to settle the main outlines of these restrictions in a document that must be approved by the voters will raise the dignity of the restrictions. It will emphasize the importance of the subject in a way a legislative enactment cannot. In light of the possibility of a legal challenge to the constitutionality of section 805 and any implementing provision, this is

an important consideration.[5/]

5/ Section 501 attempts to insulate § 805 from the effects of otherwise applicable portions of the United States Constitution but it is not clear that the courts will give effect to § 501 because American courts are reluctant to exempt American governments from limitations on their powers. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668-69 n.5 (1974).

Section 805 may therefore be tested on its merits under several sections of the United States Constitution:

(1) The equal protection clause of the Fourteenth Amendment, or the due process clause of the Fifth Amendment: the provisions of § 805 could be alleged to violate the duty of equal protection by denying certain persons the right to acquire land solely on account of their race. It would appear that § 805 could be defended by analogy to laws conferring special benefits on Indians and Alaskan natives, but this is by no means certain.

(2) The "taking" clause of the Fifth Amendment, or the due process clause of the Fourteenth Amendment as applied to "takings": since § 805 will make it unlawful to sell land even to persons who, as non-Marianan Trust Territory citizens, are currently lawful purchasers, the section could be interpreted as taking a portion of the property rights of land-owners in the Northern Marianas -- namely, the right to sell the property to non-Marianan Micronesians. If this action were a taking, the land-owners would be entitled to "just compensation." A strong argument can be made that this section is merely an exercise of the police power and thus does not trigger the "taking" issue, but the point may be raised.

(3) The "national" privileges and immunities clause of the Fourteenth Amendment: states are forbidden to deprive a citizen of the privileges and immunities of national citizenship. These privileges include the right to travel to and reside in any state. Shapiro v. Thompson, 394 U.S. 618 (1969). Section 805 might be considered an impediment to the exercise of this right. It would, however, be measured against the same standard as would apply to the equal protection challenge. If it survives one, it will survive the other.

[Footnote continued on next page]

B. Definition of "Acquisition"

The Covenant restricts the acquisition of certain interests in land by persons who are not of Northern Marianas descent. In determining the precise extent of this restriction, it is necessary to look first at the meaning of the term "acquisition."

The Covenant is drafted in a way that permits the Convention to provide a definition for the term "acquisition." Normally, the word is read very broadly. For example, in a case involving an alien's "acquisition" of land in the District of Columbia in violation of a federal statute, the court observed: "Lands may be acquired by purchase, and the purchase may be by grant or devise."[6/]

[Footnote continued from previous page]

(4) The "interstate" privileges and immunities clause of Article IV, section 2: by discriminating against non-residents as non-residents, § 805 might be alleged to contravene the interstate privileges and immunities clause. Toomer v. Witsell, 334 U.S. 385 (1948). That clause, however, permits discrimination when there are "perfectly valid independent reasons" for the discrimination. Id. at 396. Again, if the section withstands an equal protection challenge, it should be able to meet an attack under this clause

6/ Larkin v. Washington Loan & Trust Co., 31 F.2d 635, 637 (D.C. Cir. 1929) (emphasis added). The statute involved was what is now 48 U.S.C. § 1501 (1970).

The Convention's alternatives here are to use the term broadly as is normally done, or to carve out exceptions. In favor of the latter course, it may be argued that restrictions on alienation should generally be read narrowly, and that a narrow definition of acquisition would help to do this. Against this argument, it can be observed, first, that the clear intent of section 805 is to restrain acquisition generally, and second, that it may be more efficient to achieve a narrowing result by defining broadly the terms "person of Northern Marianas descent" and "interest in land."

Even if a broad definition of "acquisition" is desired, two possible exceptions might be created for acquisition by inheritance and acquisition by mortgage foreclosure.

1. Inheritance

The Convention could define "acquisition" to exclude situations in which a person becomes the owner of land through inheritance. This has three justifications. First, the purpose of the Covenant is to prevent economic power from being exerted against persons of Northern Marianas descent, and this purpose is not adversely affected by permitting other persons to become owners of land through inheritance. Second, transfers through inheritance will be a relatively small proportion of the total number of

transfers in any given year and thus will have little impact on the effectiveness of the restriction in keeping land ownership in Northern Marianas hands. Third, it is unlikely that an exception for inheritance can be manipulated to any significant extent by persons otherwise ineligible to own land.

A review of the practice in other American jurisdictions is of little help on this question. The constitution of the state of Washington formerly provided:

> [T]he ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts 7/

This provision appears to have been aimed solely at preventing foreign commercial interests from gaining control of agriculture in the state. It was not aimed at preventing adverse cultural impact.

The opposite approach is taken by Samoan law which provides:

> It is prohibited to alienate any lands except freehold lands to any person who has less than one-half native blood, and if a person has any nonnative blood whatever, it is prohibited to alienate

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7/ WASH. CONST. art. II, § 33 (emphasis added) (repealed in 1966).

> any native lands to such person unless he was born in American Samoa, is a descendant of a Samoan family, lives with Samoans as a Samoan, lived in American Samoa for more than five years and has officially declared his intention of making American Samoa his home for life.
>
> If a person who has any nonnative blood marries another person who has any nonnative blood, the children of such marriage cannot inherit land unless they are of at least one-half native blood.8/

This is, of course, an extremely strict provision. It effectively prevents acquisition of land by outsiders of any description. The land tenure system in American Samoa, however, differs markedly from that of the Northern Marianas. It seems a fair inference that conveyance of communal land there to non-Samoans poses even more of a danger to the culture than would similar transactions among the Northern Marianans.

A different, and perhaps useful, approach is taken by Mexico. Ownership of land by foreigners in certain areas of the country is prohibited. The law provides, however, that a foreigner acquiring land by inheritance shall have five years to dispose of the land.9/ Limited to family members, this last approach would prevent

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8/ AMERICAN SAMOAN CODE tit. 27, §§ 204(b), (c) (1973) (emphasis added).

9/ Miller, Investing in Real Property in Mexico, 44 L.A. BAR. BULL. p. 561, at 563 (1969).

foreigners from establishing themselves within the culture by requiring sale of the land within five years. At the same time, it would permit a person of Northern Marianas descent to provide for those close to him by a devise of land, giving a long enough period for disposition of the land to mitigate its forced sale aspects.

2. Mortgage

The other form of acquisition that might be considered for special treatment is acquisition through foreclosure of a mortgage. One of the more common ways to raise capital is to pledge land as security for a loan. Normally, this would be one of the devices by which the people of the Northern Marianas would gain access to funds from sources outside the Islands. The value of such a pledge to a lender, however, is reduced if the lender is barred from acquiring any interest in the pledged land in the event of a default. At the minimum, the lender must have the right to sell the land and must have such equitable rights in the land prior to sale as arise from his right to sell. Without such rights upon foreclosure, the pledge is valueless to the lender. Yet, such rights would appear to constitute rather important interests in the land, in some ways equivalent to ownership.

Jurisdictions that forbid ownership of land by aliens deal with the question of foreclosure of security

interests in several ways. It may be assumed that there are nations that forbid pledging land as security for a debt to a foreigner. On the other hand, the provision of the Washington constitution, set out above, excepted from its prohibition acquisition of land "under mortgage." The federal statutes restricting alien ownership of land in the territories[10/] offer a third alternative. Under these statutes, the general prohibitions on acquisition by aliens do not extend to

> enforcing any . . . lien, nor [to] acquiring and holding title to real estate . . . upon which a lien may have [been] fixed, or upon which a loan of money may . . . be made and secured. All lands so acquired shall be sold within ten years after title shall be . . . or the same shall escheat to the United States.[11/]

This way of dealing with the matter resembles that of Mexico, which, however, requires a sale within five years, with extensions possible upon a showing of good cause. "Good cause" includes the inability to find a buyer willing to pay an amount equal to the outstanding debt.[12/]

10/ 48 U.S.C.A. §§ 1501-07 (1976).

11/ 48 U.S.C.A. § 1503 (1976).

12/ Seminar on the Law of Real Property Acquisition in Mexico, 12 ARIZ. L. REV. p. 265, at 288 (1970).

If the Commonwealth wished to avoid permitting such extensions, it could provide that such land would be condemned by the government if the mortgagee had not been able to find a buyer within a fixed period.

Thus, there are at least three alternatives regarding the question of foreclosure. The Convention could simply forbid all pledges of land to foreigners. This would eliminate any chance of foreign encroachment upon land in the Northern Marianas. It would also severely limit the availability of outside financing for development of the Islands. The second alternative would permit transfer of full title in collection of a debt, which would ease the difficulties of obtaining foreign financing. Even good faith transactions under such a provision, however, would lead to foreign ownership of land in the Northern Marianas. Furthermore, it would be necessary to police such forms of dealing very closely to ensure that transactions that were mortgages in form were not sales in fact.

The third alternative permits the use of land as security so that some of the economic impact is alleviated but requires relatively rapid disposition of the land so that foreign holdings do not become significant. It should be pointed out that it is impossible to predict how such a provision would work. A lender might be unwilling to lend money on the strength of a possible resale when the

total number of possible purchasers was very small. Further, the limited number of possible purchasers might force the Commonwealth to give a lender a considerable period of time within which to sell the property, or to be ready to purchase appreciable quantities of land. During the post-foreclosure period, the lender would be the owner of the property. No Northern Marianan would derive any income from his use of the land. The situation thus differs from leases for periods not quite long enough to be "long-term." A lease arrangement would at least give a return to a Northern Marianan landowner. Finally, this third alternative requires policing to an extent no less than that required in the second. Someone would have to keep track of the length of time a lender had occupied the land, and take steps to ensure his departure at the end of whatever period was selected. The third alternative, in short, may combine some of the disadvantages rather than the advantages of the first two, but it may still be more practical.

It should be noted that, whichever alternative is chosen, much of the detailed work may be left to the legislature. For example, if the second alternative is chosen, the Constitution need not itself attempt to set out the difference between a "mortgage" and a "sale." Likewise, under the third alternative, the Convention need

only settle upon the principle of ownership for a limited period. The length of the period may be left to statute.

C. Definition of "Interest in Real Property"

Once the term "acquisition" is defined, there is a need to give attention to what is to be acquired. The Covenant refers to "interests in real property" as the object of the limitation. If these interests are defined narrowly, then the scope of the restriction will be decreased.

One standard reference work, Black's Law Dictionary, defines "interest (property)" as "[t]he most general term that can be employed to denote a property in lands or chattels. . . . More particularly, it means a right to have the advantage accruing from anything . . . ."[13/] It would appear that normal usage of the term in American law would cover any right to use or derive profit from land for any period of time. Thus, not only ownership and leases are covered; equitable interests, of the sort possessed by the beneficiary of a trust,[14/] easements, and

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13/ BLACK'S LAW DICTIONARY p. 950 (4th rev. ed. 1968).

14/ Mexico does not treat the situation where, in its equivalent of the trust arrangement, a foreigner is beneficiary, as violating its laws restricting land ownership by foreigners. Foreigners have used this device frequently to gain effective control of land in that country. Seminar on the Law of Real Property Acquisition in Mexico, 12 ARIZ. L. REV. p. 265, at 286 (1970).

covenants running with the land would all appear to be reached.

One limitation on the definition of "interests in real property" that the Convention might consider is its application to corporate stock. Corporate stock is not normally considered an interest in land, and that interpretation might be continued. In view of the problem raised by section 805 of the Covenant, however, this may have to be made explicit. Section 805 forbids acquisitions of interests in land by persons not of Northern Marianas descent. If stock of corporations owning land is not "an interest in land," the shareholders of a land-owning corporation, or the corporation itself, could sell to foreigners enough shares to constitute a controlling interest. This would accomplish the objective forbidden by section 805, and yet would not be unlawful, unless it could be proved that the corporation was in fact controlled by foreigners at the time of the land acquisition.

There are three possible ways of dealing with this problem. The first is to exclude stock interests so that corporate transactions could proceed freely without being affected by section 805.

The second is to provide that all such stock is under all circumstances an "interest in land," of the same

sort that the corporation enjoys. Under this formula, stock could never be acquired by persons not of Northern Marianas descent. Thus, even if a corporation was permitted to have 20 percent, or 25 percent or 40 percent of its shares in non-Marianas hands at the time the land was acquired, the non-Marianas shareholders could thereafter sell their shares only to Northern Marianans. The effect of such a rule would be to make it very unlikely that non-Marianans would ever acquire stock in any Northern Marianas corporation. Even a corporation having no permanent or long-term interests in land would not be attractive, because if the corporation did acquire an interest in land in the future, the foreign shareholder's stock would immediately become very unliquid. In effect, Northern Marianas corporations would be forced to leave 100 percent of their shares in Northern Marianas hands, with all the disadvantages that are discussed in section II(G) below. On the other hand, such a rule is at least simple. A violation is easy to define, although perhaps difficult to discover.

The third alternative is to provide that a share of stock of a land-owning corporation is an interest in land only if its sale to a non-Marianan would lower the total amount of stock in Northern Marianas hands below the percentage permitted for corporations wishing to acquire land in the Northern Marianas. For example, if a

corporation must have 75 percent of its shares in the hands of persons of Northern Marianas descent to be eligible to acquire land, stock which, if sold, would lower the percentage of Northern Marianas owners below 75 percent would be an interest in land. The effect of such a provision would be that non-Marianas shareholders could always dispose of their stock. Since the stock would start out in the possession of a non-Marianan, its transfer to another non-Marianan could not change the percentage distribution of stock ownership. Northern Marianas shareholders, however, would be in a rather difficult position. They would have great difficulty knowing whether they could sell their stock to a non-Marianan at any given moment. It would be necessary to know the status of almost all the shares before such a transfer could take place.

This latter problem is the main disadvantage of this approach. Under the second alternative, a person could at least be certain when he was violating the law, although catching him might be difficult. Under the third alternative, a Northern Marianas shareholder could never be sure; nor, for that matter, could the authorities. The great advantage, of course, is that this way of dealing with the matter makes possible equity participation in Northern Marianas corporations by non-Marianans without any significant risk of undermining the objective of the restrictions on land alienation.

D. Definition of "Long-Term" Interest

The final aspect of defining what is to be regulated is the examination of the qualification "long-term." The Covenant does not require that all interests in real property remain in the hands of persons of Northern Marianas descent -- only "permanent and long-term interests in real property" are affected. Since transfers of ownership (or title) are automatically "permanent and long-term," the narrow or broad reading of this part of the restriction depends entirely on the treatment of leasehold interests. As is true of many aspects of this question, defining this term requires resolving a conflict between the approach most conducive to economic development and that most likely to protect the Northern Marianas culture from erosion and the Northern Marianas people from exploitation. A long-term lease is in many ways equivalent to ownership. The owner of the land may be deprived of all possibility of taking advantage of any new economic opportunity for a period equal to or greater than his lifetime. Unless the lease contains liberal provisions regarding renegotiation of terms, the landowner is forced to guess the likely increase in value of his land in setting the rent. This would be particularly difficult for landowners whose experience in commercial land dealings is limited. Yet, if such leases are not available, outside enterprises

will find it difficult to do business in the Commonwealth. Such enterprises must expect to put up their own buildings, and to go through a period of getting established. Such an undertaking would not be worthwhile if an enterprise could not be certain of being able to stay on the land it was using long enough to recover its investment. Frequent renegotiations of terms likewise reduce the usefulness of the lease. Furthermore, if only unrealistically short terms are permitted, the temptation to circumvent the law will be strong, and the difficulties of enforcement thus very great. In short, the Convention must somehow strike a balance.

Precedent is of limited utility here. The Trust Territory government requires all leases to non-citizens of the Trust Territory to be approved by the High Commissioner.[15/] Implementing this restriction, the Trust Territory Manual of Administration provides, in part 483.1:

> Leases of 30 years or more, including renewal options, shall not be approved in the absence of the submission of clear, detailed and substantial evidence that such term is in the best interest of the lessor and/or the Trust Territory. A lease which is, in effect, a sale of the real property will not be approved.

15/ TTC tit. 1, § 13 (1970); Land Management Regulation No. 4.

It should be noted that there is no absolute prohibition on leases longer than 30 years, only a heavy presumption against them.

In Mexico, a lease for 10 years or longer is considered a sale.[16/] The restrictions on land ownership in that country, however, apply to only a portion of its land, and are not in fact absolute.

The former constitutional provision used in the State of Washington was interpreted as forbidding leases of 99 and 49 years.[17/] Again, however, the restrictions were not total, and applied essentially to agricultural leases.

The Convention has three alternatives in this matter. It can define "long-term" without giving the legislature power to modify its choice. It can set an outside limit, a permitted maximum, and empower the legislature to shorten the period. Alternatively, it can set a minimum -- a period the legislature could not reduce. The last two alternatives can, of course, be combined with language such as "not less than ___ but not more than ___."

16/ Seminar on the Law of Real Property Acquisition in Mexico, 12 ARIZ. L. REV. p. 265, at 284 (1970).

17/ State v. Morrison, 18 Wash. 664, 52 Pac. 228 (1898); State ex rel. Winston v. Hudson Land Co., 19 Wash. 85, 52 Pac. 576 (1898).

The great advantage of the first alternative is its certainty; all interested parties would know their rights under this method. Of course, if the term selected proved unsatisfactory, changing it would be difficult. The second alternative will ensure protection against leases of a certain number of years or longer, but persons interested in investing in the Islands could never be entirely sure what lease term a particular legislature might select. Conversely, a fixed minimum would reassure foreign interests, but may expose the people of the Islands to increased economic pressure. Combining these last two would offer a measure of certainty to all parties, plus the flexibility required to take care of most difficulties.

E. Definition of "Northern Marianas Descent"

The second set of factors that will determine the economic impact of the restrictions on land alienation is that relating to eligible persons. Once the Convention defines what transfers are to be covered by the restrictions, then it must turn to the persons to whom the covered interests can be transferred. A broad definition of eligible persons will have the same effect as a narrow definition of the eligible interests.

The most important of this second set of factors is a definition of the term "persons of Northern Marianas

descent." Considering only the question of classifications for human beings,[18/] three issues are presented. First, the Convention should define "Marianan." Next, the Convention should determine what proportion of Northern Marianas descent will be required. Third, the Constitution should indicate the status of non-Marianan spouses and adopted children of persons of Northern Marianas descent.

1. Definition of "Marianan"

The question of the definition of "Marianan" is a very complex one. In large part, the matter is ethnic. The Senate Report makes this clear through its reference to the Chamorros and Carolinians, the ethnic groups indigenous to the Northern Marianas. The question, however, is also geographical. Chamorros living on Guam, or Carolinians living on Truk, presumably could not be considered as being of "Northern Marianas descent." The problem presented by the United States Constitution complicates matters further, for the provision must be drawn as carefully as possible in order to withstand the constitutional attack that will arise if there are persons who are citizens of the Commonwealth due to the effect of section 301(b) of

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18/ Treatment of corporations and other nonnatural persons is discussed in § II(G) below.

the Covenant, but who are ineligible to acquire land under section 805 of the Covenant.

Particularly because of the geographical aspect of the definition, it appears that any formula adopted will have to start by requiring residence at a particular time period. There are several ways of approaching this matter.

a) Direct evidence

One approach is to require that a person be of Chamorro or Carolinian ancestry and either have resided in the Northern Marianas at a particular time or be descended from one residing there at that time. Thus, a person would have to show two things: first, his ethnic status; and second, his residence or descent from a resident, through whatever records might exist, plus the testimony of people acquainted with his family and himself.

This approach is fairly common. The Hawaiian Homes Commission Act, which established a special homesteading system in Hawaii for which only "native Hawaiians" are eligible, defined "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[19/]

19/ Hawaiian Homes Commission Act of 1920 § 201(7), 42 Stat. 108 (1921).

Similarly, the laws of American Samoa permit alienation of almost all land only to "native Samoans."[20/] Since that term is not further defined, it must be assumed that the direct evidence method is used. A similar approach is used for determining eligibility for enrollment as a member of some American Indian tribes. For example, the regulations governing enrollment as a Snake or Paiute provide:

> Persons of Snake or Paiute Indian ancestry born on or prior to and living on August 20, 1964, who were members of or are descendants of members of the bands whose chiefs and headmen We-you-we-wa (Wewa), Caha-nee, E-hi-gant (Egan), Po-nee, Chaw-watanee, Owits (Otis), and Tashe-go, signed the unratified Treaty of December 10, 1868, and elect not to participate as beneficiaries in the awards granted in Docket No. 87 to the Northern Paiute Nation shall be eligible for inclusion on the roll prepared pursuant to this Part 43d.[21/]

And the definition of "Alaskan native" in the Alaska Native Claims Settlement Act reads: "(b) 'Native' means a citizen of the United States who is a person of one-fourth degree or more Alaska Indian . . . Eskimo, Aleut blood, or combination thereof."[22/]

20/ AMERICAN SAMOAN CODE tit. 27, § 204(b) (1973).

21/ 25 C.F.R. §§ 43d.3, 43d.6 (1975).

22/ 43 U.S.C. § 1602(b) (Supp. V, 1975).

The advantage of this method is that it focuses directly on the characteristics at issue. It is the only way to approach the question that looks exclusively to ethnicity and residence.

There are, however, several disadvantages. Preliminarily, it should be noted that the precedents cited above are of limited use. The Samoan case is not really analogous, for example, because the Samoan culture has been more communally oriented than the Marianan and, further, only proofs of ethnicity are involved. In Hawaii, a difficult test could be used because only a portion of the land -- not all ownership rights in the Islands -- was affected. The Indian example uses a very recent date.

Use of this test would raise certain problems. In the first place, a very precise test is important, because a broad range of rights to own land is involved. Yet precision is not likely to be possible, in view of the absence of records. This, in turn, will lead inevitably to decisions based on subjective factors. Further, the problems of proof might frequently turn on extrinsic elements, such as whether a claimant was sufficiently well-liked to persuade people to testify for him.

b) Census list

An alternative approach would focus on more objective factors. One way of doing this would be to require that any claimant be himself named or be descended from a person named on an existing list, such as a census. The assumption behind this approach is that the list would include all persons who possessed the desired characteristics and only those persons.

This approach is frequently used in regulations concerning enrollment of American Indians. For example, the regulation concerning the Tillamooks provides:

> Each person of Tillamook Indian ancestry whose name appears on either the census roll of the Naalem (Nehalem) Band of Tillamook Indians dated January 28, 1898, or on the annuity payment roll of the Tillamook Band of Tillamook Indians prepared in 1914 under the provisions of the Act of August 24, 1912 . . ., who was living on August 30, 1964, and all descendants born prior to and living on August 30, 1964, of persons whose names appear on either of the above specified rolls, regardless of whether the original enrollees are living or deceased, shall be eligible for inclusion on the roll prepared pursuant to this Part 43c.23/

The advantage of this approach is its certainty. The only reliable census of the Northern Marianas is that of 1973, which is recent enough to keep problems of proof

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23/ 25 C.F.R. § 43c.3 (1975) (citation omitted).

to a minimum. The disadvantage goes to the basic assumption of the approach. The 1973 census lists people as Trust Territory citizens or non-Trust Territory citizens, with some indication of places of birth. Particularly because of the large number of Trust Territory employees on Saipan in 1973, it might be difficult to determine who was a Northern Marianan and who was not. Moreover, people who were away from the Islands would not be included.

c) Legal status

It would be possible to define Northern Marianas descent in the same terms that the Covenant uses to describe eligibility for citizenship. Section 301(a) of the Covenant provides:

> The following persons and their children under the age of 18 years on the effective date of this Section, who are not citizens or nationals of the United States under any other provision of law, and who on that date do not owe allegiance to any foreign state, are declared to be citizens of the United States, except as otherwise provided in Section 302:
>
> > all persons born in the Northern Mariana Islands who are citizens of the Trust Territory of the Pacific Islands on the day preceding the effective date of this Section, and who on that date are domiciled in the Northern Mariana Islands or in the United States or any territory or possession thereof;

Section 303 adds:

> All persons born in the Commonwealth on or after the effective date of this Section and subject to the jurisdiction of the United States will be citizens of the United States at birth.

It would appear that these definitions of citizen reach most of those who could be included as "persons of Northern Marianas descent." To be sure, it includes the children of resident non-Marianas Micronesians, but the number of non-Marianans would be small. Further, this definition has a legal advantage. If the provision was challenged as violating the United States Constitution, it could be defended on the ground that it avoids purely racial criteria and includes residents in need of protection who are tied to the Islands by birth. To emphasize this focus on ties to the Islands, persons of the proper descent born out of the Islands could be required to return by a certain age in order to meet the section 805 requirements.

There are numerous precedents for defining persons eligible to buy land by reference to citizenship. The Mexico constitution provides:

> Only Mexicans by birth, Mexicans by naturalization, and Mexican associations have the right to own lands, waters and their accessions, or obtain concessions for the exploitation of mines or waters.24/

24/ UNITED MEXICAN STATES CONST. art. 27, § 1, quoted in Miller, Investing in Real Property in Mexico, 44 L.A. BAR BULL. p. 561, at 562 (1969).

Likewise, the Liberia constitution reads:

> No person shall be entitled to hold real estate in the Republic, unless he be a citizen of the same. Nevertheless, this article shall not be construed to apply to colonization, missionary, educational, or other benevolent institutions, so long as the property or estate is applied to its legitimate purposes. 25/

The current law of the Trust Territory is similar, stating:

> Only citizens of the Trust Territory or corporations wholly owned by citizens of the Trust Territory may hold title to land in the Trust Territory 26/

The advantage of this approach is its precision. It would, of course, require proof dating from the birthdate of a claimant. The proof, however, at least goes only to objective factors, such as place of birth. The problems of arbitrary determinations, perhaps, could be avoided, as could the risk of over- or under-inclusion posed by the census list.

The disadvantages of this approach are its failure to exclude all non-Marianans, its possible exclusion of persons of clearly "Northern Marianas descent" and its reliance on sources of proof that might be hard to obtain. Injustice from the latter problem could be reduced by putting the burden of

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25/ LIBERIA CONST. art. V, § 2.

26/ TTC tit. 57, ch. 11, § 11101 (1970).

proof in any case involving a person's descent on the party alleging that the other party failed to meet the descent requirements.

It must be emphasized that the foregoing alternatives are neither mutually exclusive nor exhaustive. The first alternative could be used in conjunction with the second or third, so as not to exclude a person whose name was not on the list or was domiciled in a third country but could prove his Northern Marianas descent by other means.

It is also important to note that the more recent the date prior to which a person's ancestors are required to have moved to the Northern Marianas, the better.[27/] This will make the provision as nonexclusionary as possible, which will be important in any court test.

The Convention also should be aware that it need not attempt to construct a perfect definition. It may well set out a basic provision, but permit the legislature to modify it so as to liberalize it.

Finally, it should be noted that, in any case, it will probably be necessary for the Commonwealth to establish a register of eligible persons as quickly as it conveniently can. The complexities of this matter are such that some reliable and precise guide will be needed as soon as possible.

27/ Selection of the date is primarily important regarding the first and second alternatives; it is fairly automatic under the third.

2. Definition of descent

Any requirement of descent from a particular group for entitlement to a privilege is aimed at preserving the cultural identity of that group. Cultural identity, however, is often preserved as effectively by fostering loyalty and a personal stake in the preservation of a way of life or a cultural heritage as it is by emphasizing blood relationships. The Constitution could permit any degree of Northern Marianas blood, however slight, to satisfy section 805, or it could adopt a very stringent requirement such as one-half Northern Marianas blood.

It is difficult to determine the positive and negative points of particular proportions of Northern Marianas blood. This discussion will simply give examples, and will comment upon the similarities and differences between the areas involved in each, and the Northern Marianas.

Samoa uses a high proportion of one-half.[28/] But here, cultural considerations are important, and the isolation of the Islands lessens the degree of intermarriage.

28/ AMERICAN SAMOA CODE tit. 27, § 204(b) (1973).

The Hawaiian Homes Commission Act also uses one-half,[29] but here again, the drafters were primarily interested in rebuilding a culture thought to be dying out.[30] Also, only a small amount of land was involved, so the danger of the creation of an elite was minimal. The Alaska Native Claims Settlement Act uses one-fourth. The rationale for the distribution of property involved here was the settlement of a claim, rather than a limitation on landowning throughout a jurisdiction. Proportions required for enrollment as a member of an Indian tribe vary widely.[31]

In summary, it must be pointed out that none of the above examples involve racial limitations on the right to own land throughout a jurisdiction likely to be in close touch with other cultures. A lower proportion than those listed may therefore be in order. Indeed, the Convention

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29/ Hawaiian Homes Commission Act of 1920 § 201(7), 42 Stat. 108 (1921).

30/ Levy, Native Hawaiian Land Rights, 63 CALIF. L. REV. p. 848, at 864-65 (1975).

31/ E.g., Ponca, one-fourth (25 C.F.R. § 43a.3(a)(2)); Cherokee Band of Shawnee, mere descent from one named on an 1889 roll (25 C.F.R. § 43b.3).

may wish to consider requiring no more than "descent," perhaps providing that descendants whose blood quantum is below a certain proportion must meet tests similar to those required in American Samoa of persons possessing "any non-native blood."[32/] Such an approach would simplify enforcement requirements considerably. In addition, the Convention could provide that, whatever the standard, the legislature could liberalize but not tighten it.

3. Ancillary considerations

One of the more difficult aspects of defining the term "Northern Marianan" relates to spouses, blood relatives and adopted children of persons themselves part of the proper group. The Convention, of course, is free to designate spouses and adopted children of Northern Marianas, or either alone, as "persons of Northern Marianas descent" for section 805 purposes or to specifically exclude such persons. On the one hand, it seems harsh to define legal terms so as to make it impossible for a person whose only valuable possession is his land -- which may be true of many citizens of the Commonwealth -- to provide for those closest

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32/ These tests are:

> [B]orn in American Samoa, . . . lives with Samoans as a Samoan; lived in American Samoa for more than five years and has officially declared his intention of making American Samoa his home for life.

AMERICAN SAMOAN CODE tit. 27, § 204(b) (1973).

to him. On the other hand, if marriage to or adoption by a person of Northern Marianas descent was to confer full rights regarding land ownership, possibilities of abuse would be created. The delegates will have to weigh the likelihood of any abuse against the importance of protecting family interests.

F. Treatment of Non-Marianans Currently Owning Long-Term Interests in Real Property

There are three categories of persons currently owning interests in land in the Northern Marianas whose status may cause some confusion. First are noncitizens of the Trust Territory owning "permanent" interests. Trust Territory law forbids ownership of land by noncitizens,[33/] but the courts of the Trust Territory have held that title held contrary to this provision is good until attacked by the government.[34/] Such persons may therefore exist. Second are non-Marianas Trust Territory citizens owning permanent interests in land in the Northern Marianas. No provision of law, of course, prevents a citizen of the Trust Territory from owning land outside his district. The last category includes both non-Marianas citizens and noncitizens with interests that will be classified as "long-term."

33/ TTC tit. 57, § 11101 (1970).

34/ Acfalle v. Aguon, 2 T.T.R. 133 (H.C.T.T. Tr. Div. 1959).

After the enactment of the Constitution, it will become unlawful for persons in the categories described to acquire the types of interest they now hold. However, section 805 only forbids acquisitions. It does not require that persons be divested of interests they currently own simply because they would not be able to lawfully obtain such interests in the future. Indeed, a prohibition on ownership that made invalid previously valid titles solely on ethnic grounds might well be unconstitutional.

While the individuals in the three categories will not lose their land, they may face difficulties of another sort. Not being persons of Northern Marianas descent (if that term is defined strictly), they would be unable to acquire more land, even if their businesses made such acquisitions necessary. They might, furthermore, find it difficult to provide for those members of their families who were also not of "Northern Marianas descent."

The Convention has three alternatives. It could make no special provision for people in these categories. It could provide that such persons, their spouses, and their blood relatives residing in the Islands were "persons of Northern Marianas descent" for all purposes. Alternatively, it could provide that such persons' spouses and blood relatives

residing in the Northern Marianas were exceptions to the "persons of Northern Marianas descent" rule as far as inheriting existing interests was concerned, but in no other case.

The precedent in this area is somewhat sparse. Current Trust Territory law prohibits "holding" rather than acquisition of title. The relevant statute, however, also provides:

> that nothing herein shall be construed to divest or impair the right, title, or interest of noncitizens or their heirs or devisees, in lands in the Trust Territory held by such persons prior to December 8, 1941, and which have not been vested in the Alien Property Custodian . . . or if vested, are released from the terms of said order by direction of the High Commissioner. . . . ."35/

The statutes prohibiting aliens from owning land in the Territories of the United States are similar, exempting from their effect

> [l]and owned in any of the Territories of the United States by aliens, which was acquired on or before March 3, 1887, so long as it is held by the then owners, their heirs or legal representatives, . . .36/

35/ TTC tit. 57, ch. 11, § 11101 (1970).

36/ 48 U.S.C.A. § 1502 (1976).

In both of these examples, the governments involved followed the third alternative. Ineligible owners were neither divested nor forbidden to provide for their families, but were also not permitted to increase their holdings. The advantages of this way of dealing with the problem are noteworthy. It avoids the legal and ethical problems of taking a person's property without payment, and of preventing a person from passing his wealth on to those close to him. At the same time, it makes sure that exceptions in favor of existing owners do not become the means of achieving what the rule hopes to prevent. The basic assumption would appear to be that the existing degree of ownership by noneligibles is tolerable, but that any increase in noneligible ownership, including that by current owners, poses risks.

In favor of the first alternative, it could be argued that any ownership by non-Marianans is undesirable, and existing holdings should come back into government hands as soon as possible, even if this means preventing a person from leaving his land to his children. The Convention may believe this approach to be warranted. It must be remembered, however, that the stricter the standard, the more closely the courts will examine it.

The second alternative has the advantage of avoiding some types of discrimination, and thus eliminating some grounds of legal attack. It would permit, however, persons already landowners in the Trust Territory to expand their holdings. The dangers believed to flow from non-Marianas land ownership could therefore be a problem.

Finally, it must be remembered that questions will be raised if non-Marianan landowners and Northern Marianas landowners are treated differently with regard to disposition of land. Thus, if Northern Marianans could leave land to non-Marianas spouses and children who did not live "as Marianans," there seems no reason to deny the same privilege to non-Marianans, the dangers being the same. Conversely, if a Northern Marianas landowner is to be prevented from leaving land to blood relatives with less than a certain percentage of Northern Marianas blood, it seems unfair (and may be illegal) to permit non-Marianans to leave land to blood relatives with no Northern Marianas blood at all. In light of the possibility of challenge under the United States Constitution, these considerations must be borne in mind when this problem is examined.

G. Treatment of Corporations and Other Non-Natural Persons

Section 805 speaks of persons of Northern Marianas descent, and only natural persons can "descend." It is

possible to interpret this language, therefore, as forbidding all ownership of land by nonnatural persons. There is no evidence, however, that such an interpretation was intended. In light of the very serious effects such a prohibition would have on economic development, it seems logical that the matter would not have been left to interpretation if such an effect were desired.[37/]

37/ Such provisions are not unknown, for example, P.R. CONST. art. VI, § 14:

> No corporation shall be authorized to conduct the business of buying and selling real estate or be permitted to hold or own real estate except such as may be reasonably necessary to enable it to carry out the purposes for which it was created, and every corporation authorized to engage in agriculture shall by its charter be restricted to the ownership and control of not to exceed five hundred acres of land; and this provision shall be held to prevent any member of a corporation engaged in agriculture from being in any wise interested in any other corporation engaged in agriculture.
>
> Corporations, however, may loan funds upon real estate security, and purchase real estate when necessary for the collection of loans, but they shall dispose of real estate so obtained within five years after receiving the title.

One contrary indication is that § 806 makes clear that the prohibitions of § 805 do not apply to the United States government. If the United States government can own land in the Commonwealth, it follows that the government of the Commonwealth must enjoy the same power, whether or not it is a "person of Northern Marianas descent."

The question is essentially one of determining what degree of participation in a corporation by human beings of Northern Marianas descent confers "Northern Marianan" status upon a corporation. One well known authority has proposed six alternatives for determining whether a corporation is an alien, in a discussion that is applicable to this situation.[38/]

(1) The nineteenth century American approach was to look to the place of the incorporation of the enterprise. Mexico continues to deal with the subject in this fashion, forbidding land ownership in certain areas by corporations with foreign shareholders, but permitting land-owning corporations to be owned themselves by other Mexican corporations that may be completely foreign owned.[39/] In light of the ease with which non-Marianas persons may be able to incorporate in the Commonwealth, however, this test alone may not be sufficient.[40/] The Mexican regulation has not blocked foreign landholdings in that country. Local incorporation might

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38/ Vagts, The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise, 74 HARV. L. REV. p. 1489 (1961) [hereinafter cited as Vagts].

39/ Miller, Investing in Real Property in Mexico, 44 L.A. BAR BULL. p. 561 (1969).

40/ The subject of incorporation is discussed in BRIEFING PAPER NO. 14: CORPORATIONS § II.

> capital . . . . A desirable compromise would be to have the alien investor's money but not his vote. The Bank of the United States achieved this goal by allowing the sale of shares to aliens but depriving the shares of the proxy right unless exercised by a resident of the United States. Organizations of lesser financial attractiveness could not, however, hope to duplicate this feat. Therefore there is pressure on the lawmaker to permit some minority power in proportion to investment.
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> Considerations of administration also militate against a 100 per cent requirement. If shares are fairly widely distributed, the odds are great that sooner or later some shares will fall into the hands of aliens by virtue of inheritance or devise . . . . The menace of such consequences is scarcely conducive to additional investment by [locals] and would tend to make the securities of such a firm non-negotiable.41/

Despite these arguments, Trust Territory law requires that corporate land buyers be wholly owned by Trust Territory citizens, but long-term leases are least theoretically possible under Trust Territory law. Such is not likely to be true under Commonwealth law.

Federal statutes requiring corporations to be American citizens to be eligible for particular activities have often included requirements for extraordinary majority, but not complete, American citizen voting-share ownership.42/

41/ Vagts pp. 1532-33 (footnotes omitted).

42/ Corporations engaged in broadcasting, 80%, 47 U.S.C.A. § 310(b)(3) (1976); parent corporations of broadcasting subsidiaries, 75%, 47 U.S.C.A. § 310(b)(4) (1976); corporations owning land in federal territories, 80%, Act of March 3, 1857, ch. 340, § 2, 24 Stat. 477 - repealed 1897; corporations engaged in coastal shipping, 75%, 46 U.S.C. § 802(a) (1970); domestic air carriers, 75%, 49 U.S.C. § 1301(13) (1970).

(5) A fifth way of classifying a corporation is by the nationality of its managers and directors.[45/] This device alone, however, is unlikely to serve to guarantee Northern Marianas control, if a high degree of non-Marianas shareholding is permitted. In most federal statutes where it appears, it is coupled with other tests, such as nationality of stockholders.[46/] The theory is clear: if both most stockholders and most or all officers and directors are locals, the likelihood that local interests will control the management of the corporation for the benefit of the locality is high.

(6) A sixth approach, often used in conjunction with all of the others, is simply to focus on the key question of control itself. That is, local control is required and an expert agency is established to determine whether or not control of the corporation is in alien hands. This approach is taken in several statutes dealing with: aviation,[47/]

45/ For an example of this classification, see 12 U.S.C. § 72 (1970) (regarding national banks).

46/ 47 U.S.C.A. §§ 310(b)(3), (4) (1976) (broadcasting); 49 U.S.C. § 1301(13) (1970) (air carriers); 12 U.S.C. §§ 614, 619 (1970) (banks engaged in foreign operations); 46 U.S.C. § 802(a) (1970) (shipping corporations).

47/ 49 U.S.C. § 1301(13) (1970):

> 'Citizen of the United States' means . . . (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions. (Emphasis added.)

communications,[48] shipping,[49] and atomic energy.[50] As

48/ 47 U.S.C.A. § 310(b)(4) (1976):

> No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by--
>
> any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens . . . .

49/ 46 U.S.C. § 802(a) (1970):

> Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States . . . .

46 U.S.C. § 808 (1970):

> The issuance, transfer, or assignment of a bond, note, or other evidence of indebtedness which is secured by a mortgage of a vessel to a trustee of the owner's right, title, or interest in a vessel under construction, to a person not a citizen of the United States, without the approval of the Secretary of Commerce, is unlawful unless the trustee of such mortgage or assignment is approved by the Secretary of Commerce. The Secretary of Commerce shall grant his approval if such trustee or a substitute trustee is a bank or trust company which . . . is a citizen of the United States . . . .

50/ 42 U.S.C. § 2134(d) (1970):

> No license may be issued to . . . any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, foreign corporation, or a foreign government . . . .

the experts point out:

> The use of a concept of control seems to be the surest method of effectuating the policies of exclusory legislation. If these statutes are to cope with every type of legerdemain conceivable in the mind of the sophisticated international lawyer, nothing less flexible than this can fill the bill. Particularly where a major legislative purpose is the exclusion of foreign influences from an industry . . ., it is felt that nothing less than an individualized and continuing scrutiny of corporations, taking into account all aspects of their operation and ownership--the equivalent of a corporate 'loyalty check'--will suffice 51/

The concept of "control," however, is an amorphous one. If it is the only standard, it is difficult for individuals to be certain of what is lawful and what is not. In part, this uncertainty can be lessened by requiring certain objective qualifications such as the fifth alternative, in addition to control. Noncompliance with such rules would at least permit clear, negative decisions. Predictability is also aided if the definition involved makes clear (a) the sort of control that is meant to be forbidden and (b) the extent of the agency's discretion to consider factors other than technical compliance with the statute.52/ If the Convention chooses to use a "control" as well as an objective standard, it could

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51/ Vagts p. 1545.

52/ Vagts pp. 1546-50.

leave to the legislature the task of refining definitions of terms and establishing the necessary administrative machinery. It should also be noted that this sixth approach can succeed only if the Commonwealth can generate the expertise necessary to pass upon fairly complicated questions of corporate power. The requirement can be lessened by requiring corporations seeking to acquire restricted interests to submit opinions by independent counsel that such corporations are in compliance with the law. Some capability for enforcement, however, is needed to make the sanction realistic, and a "control" test is clearly the most difficult to enforce of those discussed.

H. Enforcement of the Restrictions

There are, in theory, three ways of dealing with a transaction that violates the restrictions required by section 805. The transaction could be deemed absolutely void; that is, the non-Marianan would be held never to have had any title. A sale or lease by the non-Marianan, even for value to an innocent third party, would thus be ineffective, and the original owner could reclaim his land at any time. This approach has been taken, on occasion, in Liberia.[53/]

A second approach is to make the lease or sale voidable. Until such time as it is attacked, the alien's

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53/ Parnall, Aliens and Real Property in Liberia, 12 J. OF AFRICAN L. p. 64, at 72-75 (1968).

title is good. Sales and leases for value to innocent third parties would thus be effective. The alien himself, however, could be ousted by anyone with an interest.

The third approach, and the one most generally taken, is that the non-Marianan's title would be good against all except the Commonwealth. If the state prevailed in an attack on the alien's title, the land would revert to the Commonwealth. Private Northern Marianans would not benefit. This line is taken by the common law,[54/] by Liberia regarding leases.[55/] by the United States regarding alien land ownership in the territories,[56/] and by the Trust Territory.[57/] In addition, when Washington enforced its constitutional prohibition on alien landholding, it permitted actions by the state only.[58/]

The assumption behind the last alternative is perhaps the best starting point for an analysis of all three. The "good against all but the state" theory arises from the English common law doctrine that an alien could purchase land only for the benefit of the king.[59/] The restriction,

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54/ Id.

55/ Id.

56/ 48 U.S.C.A. § 1504 (1976).

57/ Acfalle v. Aguon, 2 T.T.R. 133 (1959).

58/ Abrams v. State, 45 Wash. 327, 88 Pac. 327 (1907).

59/ McMillan v. Pawnee Petroleum Corp., 1 P.2d 775, 778 (Okla. 1931).

therefore, appears to derive from considerations of the needs of the government rather than from a desire to protect private parties. It is thus appropriate on this theory that the public authorities be charged with enforcing it. Furthermore, as a practical matter, the private party suing is almost certain to be either the person who made the illegal transfer originally or someone claiming through him. It has been thought unfair to permit such a person to profit by denying the validity of his own act.60/

The Convention must determine the extent to which these considerations apply here. Section 805 makes clear that the restrictions in question are imposed to protect the people of the Islands as well as to further public policy. In light of the fact that many persons in the Northern Marianas are inexperienced in business, it may be asked whether considerations normally involved in denying the validity of one's own act apply. On the other hand, the enforcement of section 805 will have an important effect on many aspects of life in the Commonwealth, more so than has ever been true in other American jurisdictions with similar provisions. It might therefore be thought that so vital a function ought to be entrusted exclusively to the government. The Trust Territory

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60/ Abrams v. State, 45 Wash. 327, 88 Pac. 327, 330-31 (1907).

follows the common law approach, although its reasons for doing so are not clear.[61/] The Convention must decide, in short, whether the public policy aspects of the restriction are more important than protection of particular individuals.

An additional decision must be made with regard to innocent third parties. The Convention may decide that, whoever the proper plaintiff may be, the rights of innocent third parties cannot be affected. Alternatively, it may choose to put such rights at risk. If it is not believed absolutely necessary to carrying out the purposes of section 805, it would seem best not to divest innocent purchasers for value of their interest. Otherwise, a court may set the restriction aside as going further than is required to implement public policy objectives.

Finally, some attention to the special problems created by nonnatural persons is required. The shares of those of such organizations that own interests in land present no problem; they may be treated as interests in land without injustice to anyone. Difficulties are present, however, regarding corporations which, at the time they acquire their interests, are not qualified to do so. If, for example, a corporation purchases land, and subsequently is shown to have had one percent more of its stock in non-Marianas hands than the law permitted, it would be somewhat

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61/ Acfalle v. Aguon, 2 T.T.R. 133 (1959), in which the doctrine is adopted.

harsh to have the land revert to the Commonwealth, thus harming all the law-abiding stockholders. To avoid unfairness the Convention may wish to provide that only the stock in non-Marianas hands above the permitted minimum would escheat.

I. Duration of the Restrictions

Section 805 requires that alienation be restricted for 25 years and permits restrictions thereafter. There would appear to be at least five ways in which the Convention could deal with this issue:

- it could provide that the restrictions will expire at some fixed date, either in 25 years or after a longer period;
- it could require that the matter be reexamined after a fixed period, with the restrictions to expire if not extended, and in any case not to be extended beyond a certain date;
- it could fix no limit to the number of possible extensions, regular reconsideration being required;
- regular reconsideration could be required, but with the restrictions to continue unless repealed;

° it could simply put in no restrictions, with no changes possible without amendment.

There are a number of considerations that affect the resolution of this issue. One is the necessity of defending the restrictions in the courts. To the extent that the plan used shows by its time frame that the Commonwealth intends to maintain the restraints only as long as necessary, the courts are more likely to consider it reasonable. This would argue against permanence, or the alternative requiring extraordinary action to extend the restriction.

The Convention must also consider the practical effect of limiting the duration of the restrictions. A law that will or might expire on a given date will become more difficult to enforce as the date draws closer. Thus, a fixed reconsideration date might weaken the effect of the restrictions and might provide an opportunity for attacks on them whether or not they prove necessary and helpful.

In favor of fixed reconsideration dates, it may be argued that to the extent that the need for the restrictions declines, fixed reconsideration dates provide an antidote to the difficulty of changing anything once

established. As to whether the restrictions should continue if not repealed, or lapse if not extended, the test would appear to be the basic reason for the restrictions. If it is primarily fear of exploitation, the need for the restrictions should lessen over time, and special action to continue them be appropriate. If the reason is primarily cultural, however, the need for the restrictions is unlikely to disappear. In such circumstances, putting the burden on those favoring repeal might be appropriate.

The use of definite termination dates, as opposed to those for reconsideration, depends entirely on the Convention's confidence in predicting the future.

Conclusion

The restriction on land alienation that is a part of the Covenant covers a large proportion of the land transactions that will occur in the next 25 years. The scope and duration of that restriction should not be increased beyond what is provided by the Covenant except for well-articulated and considered reasons. Restrictions on land alienation are costly to the economy and ultimately an inefficient way to equalize economic power. The citizens of the new Commonwealth should take advantage of the restrictions that are provided by the Covenant for the purpose for which they

were intended -- to encourage local development of a strong economic base. But they should not look to such restrictions as a permanent way of dealing with potential investments by outsiders unless all other practical alternatives prove insufficient. Land ownership is only one aspect of national pride and sovereignty. The institutions of government that are shaped by the Commonwealth Constitution, after gathering experience with self-government, should be capable of setting goals for the economic and social security of the people of the Northern Mariana Islands and of meeting those goals with a minimum of artificial economic controls.

APPENDIX A

SUMMARY OF RESTRICTIONS ON LAND ALIENATION IN SIX JURISDICTIONS

ASPECT OF RESTRICTION	TRUST TERRITORY	SAMOA	HAWAII	LIBERIA	US	MEXICO
Amount of land involved	All land in jurisdiction	Essentially all land in jurisdiction	About 5% of land in state (200,000) acres	All land in jurisdiction	All land in territories	All land within 100 km. of border and 50 km. of coast
Type of restriction	Ownership by ineligible persons prohibited; leasing by ineligibles subject to government approval (informal limit of 30 years); inheritance and mortgage rights unclear	Statute forbids "alienation." Extent of restruction unclear.	Ineligible persons not permitted to participate in long-term homestead leasing program; transfers by lessees must be approved. Right to devise limited	Ownership by ineligible persons prohibited	Ownership by ineligible persons prohibited. Ownership by ineligibles through mortgage or inheritance limited to 10 years	Onwership by ineligible persons prohibited. Ownership by ineligibles through mortgage or inheritance limited to 5 years. Leases to ineligibles limited to 10 years
Eligible group	Citizens of Trust Territory	Native Samoans	Native Hawaiians	Citizens of Liberia	American citizens	Mexican citizens
Definition of eligibility	Birth in Trust Territory, or birth to parents at least one of whom was born or naturalized in Trust Territory	Persons with one-half native blood	Any descendant of not less than one-half part of the blood of races inhabiting islands before 1778	Only black persons eligible for citizenship	Declaration of purpose and minimum residence	Declaration of purpose and minimum residence
Corporations and non-natural persons	100% ownership by eligible persons required	Unclear	No express provision	Unclear	Unclear	100% ownership by eligible persons required
Method of enforcement	Government action only	Unclear	Government supervision of transfers	Private or government action	Government action only	Unclear
Source of authority	Statute and administrative regulation	Constitution and statutes	Constitution	Constitution and statutes	Statute	Constitution and statute