Brooklyn Journal of International Law

Volume 2 | Issue 1 Article 5

1975

CASE COMMENT: *People of Saipan ex rel. Guerrero v. United States Department of the Interior*

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CASE COMMENTS

People of Saipan ex rel. Guerrero v. United States Department of the Interior—The citizens of the Trust Territory of the Pacific Islands are endowed with individual legal rights by virtue of the Trusteeship Agreement between the United Nations and the United States but those rights are judicially enforceable in courts of the United States only if the Trust judiciary finds itself incapable of adjudicating issues arising out of those rights.

I. INTRODUCTION

The Trust Territory of the Pacific Islands, otherwise known as Micronesia, has a population of ninety thousand people living on several archipelagoes spread over three million square miles in the western Pacific Ocean.[1] In *People of Saipan ex rel. Guerrero v. United States Department of the Interior*[2] [hereinafter referred to as *Saipan*] the United States Court of Appeals for the Ninth Circuit defined the basis and scope of the legal rights of citizens of the Trusteeship and, in so doing, developed a new test to determine the impact of United Nations trusteeship agreements upon the American judiciary. This comment will consider the relationship of the *Saipan* decision to prior case law concerning treaty self-execution, the application of the doctrine of comity, and the effectiveness of the doctrine of incorporation as an alternative to the court's rationale.

II. FACTS

Citizens of Saipan, an island in the Northern Marianas of the Trust Territory, brought an action in the High Court of the Trust Territory[3] to enjoin implementation of a fifty-year lease agreement for the private construction of a hotel on public land adjacent to Micro Beach. When the High Court found itself unable to adjudicate the issues involved, plaintiffs sought relief in the District Court of Hawaii.[4] They contended that the lease

1. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES 8 (1947). Guam, although commonly considered part of Micronesia, is not part of the Trust Territory.

2. 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

3. 6 T.T.R. 124 (High Court 1972).

4. People of Saipan *ex rel.* Guerrero v. United States Dep't of the Interior, 356 F. Supp. 645 (D. Hawaii 1973).

agreement required the filing of an environmental impact statement pursuant to the National Environmental Policy Act of 1969 [hereinafter referred to as NEPA][5] and that the action of the High Commissioner[6] in granting a long-term lease of public land to an American corporation, contrary to the unanimous advisory opinion of the District Land Advisory Board,[7] violated fiduciary obligations arising from the Trusteeship Agreement between the United Nations and the United States.[8]

The district court ruled[9] that the Territorial Trust government was exempt from compliance with NEPA because the government was not meant to be a federal agency under the Administrative Procedure Act[10] and, by analogy, would fall outside the scope of NEPA as well. The district court also rejected plaintiffs' claim to rights inuring from the Trusteeship Agreement or from Executive Order No. 2918.[11] Citing *Pauling v. McElvoy*,[12] the

5. National Environmental Policy Act of 1969, § 2 *et seq.*, 42 U.S.C. § 4321 *et seq.* (1970), *as amended*, (Supp. III, 1973) [hereinafter cited as NEPA]. Section 4332(2)(C) specifically requires that "all agencies of the Federal Government" prepare a detailed environmental impact statement for "major Federal actions significantly affecting the quality of the human environment."

6. In the High Court, plaintiffs brought the action solely against the High Commissioner of the Trust Territory, Edward E. Johnston. Joined as defendants in the district court were the Department of the Interior, Secretary of the Interior Rogers C.B. Morton, Deputy Assistant Secretary of the Interior for Territorial Affairs Stanley S. Carpenter, and Continental Airlines, Inc.

7. 67 T.T.C. § 53 (1970).

8. Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189, 12 Bevans 951 (1947) [hereinafter cited as Trusteeship Agreement]. The Trusteeship Agreement was approved by the Security Council of the United Nations on April 2, 1947, and by the President of the United States on July 18, 1947, pursuant to a Joint Resolution of Congress. *See also* Dep't of the Interior Order No. 2918, 34 Fed. Reg. 157 (1969) which creates basically a republican form of government in the Trust Territory with executive, legislative, and judicial branches.

9. 356 F. Supp. at 657-58.

10. 5 U.S.C. § 701(b)(1)(C) (1970) excludes from the definition of agency "the governments of the territories or possessions of the United States." The district court found Saipan's status as a Trust Territory rather than a possession to be an immaterial difference "because the legislative history of the [Administrative Procedure Act] makes it clear that Congress intended to exclude from judicial review *all* governments created pursuant to the authority of Congress." 356 F. Supp. at 656.

11. Dep't of the Interior Order No. 2918, pt. II § 1 states:

> The executive authority of the Government of the Trust Territory, and the responsibility for carrying out the international obligations undertaken by the United States . . . shall be vested in a High Commissioner of the Trust Territory and shall be exercised and discharged under the supervison and direction of the Secretary [of the Interior].

12. 164 F. Supp. 390 (D.D.C. 1958), *aff'd on other grounds*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960).

court concluded that the Trusteeship Agreement did not vest individual citizens of the Trust Territory with rights that could be asserted in United States district courts.[13] In *Pauling*, citizens of the Marshall Islands (also in the Trusteeship) sued to enjoin the Atomic Energy Commission and the Secretary of Defense from detonating nuclear weapons in the Marshall Islands. The district court held that the Trusteeship Agreement was not self-executing and that it gave no rights to the citizens of the Trusteeship, in the absence of implementing legislation.[14]

The court of appeals in *Saipan* affirmed the finding of the lower court as to the inapplicability of the NEPA guidelines on the government of the Trust Territory but rejected the lower court's position as to the self-executing nature of the treaty. The court distinguished *Pauling* by noting that strategic interests of the United States were involved in that case and drew the inference that such interests had taken precedence over any alleged rights derived from the Trusteeship Agreement. When nonstrategic considerations are in dispute, as in *Saipan*, the citizens of the Trust Territory have judiciable legal rights. "The preponderance of features in this Trusteeship Agreement suggests the intention to establish direct, affirmative, and judicially enforceable rights."[15] The court dismissed the suit without prejudice to the rights of the plaintiffs, however, stating that

> in a case involving actions by the High Commissioner within the scope of his duties as chief executive, these rights are not initially enforceable in United States courts. Rather, upon principles of comity, they should be asserted before the High Court of the Trust Territory.[16]

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13. 356 F. Supp. at 659-60. Future references to *People of Saipan ex rel. Guerrero v. Dep't of the Interior of the United States* are to the decision by the court of appeals unless otherwise specified.

14. 164 F. Supp. at 393. *But cf.* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 154 (1965). For a comprehensive analysis of the problem of self-executing treaties, see Evans, *Self-Executing Treaties in the United States of America*, 30 BRIT. Y.B. INT'L L. 178 (1953); Henry, *When Is A Treaty Self-Executing?*, 27 MICH. L. REV. 776 (1929); Comment, *Criteria for Self-Executing Treaties*, 1968 U. ILL. L.F. 238. *See also* note 30 *infra*.

For the evolution of the principle that not all treaties are self-executing, see The Head Money Cases, 112 U.S. 580, 598-99 (1884); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829). *Foster* was overruled on other grounds in *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

15. 502 F.2d at 97.

16. *Id.* at 99.

The *Saipan* court ruled that if the High Court found itself incapable of reviewing the actions of the High Commissioner, the plaintiffs could then refile their action in the District Court of Hawaii.[17]

III. Self-Execution

The American relationship with the Trust Territory of the Pacific Islands was formulated within the context of two documents, the United Nations Charter[18] and the Trusteeship Agreement.[19] The relevant sections of the United Nations Charter are Chapter XI (Declaration Regarding Non-Self Governing Territories: Articles 73 and 74), Chapter XII (The Trusteeship System: Articles 75-85), and Chapter XIII (The Trusteeship Council: Articles 86-91). Plaintiffs argued that Article 73, coupled with the Trusteeship Agreement, evidenced an intent to vest judicially enforceable rights in the citizens of the Trust Territory without the need for implementing legislation.[20] Article 73 of the United Nations Charter states that the administrating authority, the United States in the instant case,

> accept[s] as [a] *sacred trust* the obligation to *promote* to the utmost, within the system of international peace and security . . . the well-being of the inhabitants of these territories, and, to this end:
>
> a) to ensure . . . their just treatment, and their protection against abuses;
> b) to develop self government . . . ;
> c) to further international peace and security;
> d) to promote constructive measures of development.[21]

Since the Trusteeship Agreement deals specifically with this trust, its terms merit closer scrutiny than those of the United Nations Charter. Several provisions of the Agreement were cited by plaintiffs as evidence of an intent to establish obligations that were judicially enforceable against the United States at the moment the Agreement was signed. The articles of the Agreement most related to the obligations of the United States are Articles

17. *Id.*
18. U.N. Charter art. 79, 59 Stat. 1031, 1049, T.S. No. 993, 3 Bevans 1153 (1945).
19. Trusteeship Agreement, *supra* note 8.
20. 502 F.2d at 96-97.
21. U.N. Charter, *supra* note 18, at art. 73 (emphasis added).

6 and 7. Article 6 pledges the United States, as the administrating authority of the Trust Territory,[22] to:

> 1. *foster* the development of . . . political institutions . . . ;
> 2. *promote* the economic advancement and self-sufficiency of the inhabitants . . . ;
> 3. *promote* the social advancement of the inhabitants . . . ;
> 4. *promote* the educational advancement of the inhabitants. . . .[23]

Article 7 lists the freedoms that the United States promises to uphold:

> freedom of conscience, and, subject only to the requirements of public order and security, freedom of speech, of the press, and of assembly; freedom of worship, and of religious teaching; and freedom of migration and movement.[24]

In concluding that the United Nations Charter and the Trusteeship Agreement created binding obligations upon the United States with regard to the administration of justice to the people of Saipan, the *Saipan* court employed a two-step approach. An initial determination was made that there was an intent to invoke the terms of the Agreement without the need for implementing legislation.[25] The court then found that the language of the Agreement was not too vague to be interpreted, citing other ambiguous terms such as " 'due process of law,' 'seaworthiness,' 'equal protection of the law,' 'good faith' or 'restraint of trade,' which courts interpret every day."[26] Prior decisions as to when a treaty is self-executing have held the language of the treaty to be the standard by which to measure the intent to establish a self-executing treaty, but the circuit court did not rely upon the methodology of prior courts in adjudicating plaintiffs' claims. The only cases cited by the court in its discussion of self-execution were *Pauling v. McElvoy*[27] and *Diggs v. Shultz.*[28] *Pauling* was construed by the *Saipan* court as not barring a finding that the Trusteeship Agreement was self-executing since the strategic considerations in-

22. Trusteeship Agreement, *supra* note 8, at art. 3.

23. *Id.* at art. 6 (emphasis added).

24. *Id.* at art. 7.

25. 502 F.2d at 97. The court of appeals reached this conclusion by applying four criteria; *see* text accompanying note 46 *infra.*

26. *Id.* at 99.

27. 164 F. Supp. 390 (D.D.C. 1958).

28. 470 F.2d 461 (D.C. Cir. 1972), *cert. denied,* 411 U.S. 931 (1973). *See* text accompanying notes 60-62 *infra.*

volved in *Pauling* were not present in *Saipan*.[29] *Diggs* merely established the principle that international agreements may, in some limited instances, grant standing in United States courts. Although cases which are more relevant to the issue of treaty self-execution do exist,[30] it is understandable that they were not discussed by the *Saipan* court. When faced with a similar fact pattern, most other courts have reached a result opposite to that reached in *Saipan*.[31]

In *Sei Fujii v. State*,[32] a case very similar to *Saipan*, the California Supreme Court determined that Articles 55 and 56 of the United Nations Charter were not self-executing:

> Article 55 declares that the United Nations "shall, *promote*: . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," and in Article 56 the member nations "*pledge* themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." Although the member nations have obligated themselves to cooperation with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.[33]

The language which the *Saipan* court construed as expressing an intent of self-execution is no more specific than the language found to express an opposite intent in *Sei Fujii*. The word "promote" is also found in Article 6 of the Trusteeship Agreement[34] and Article 73 of the Charter.[35] While the "sacred trust" outlined in Article 73 may appear to be more sanctified than the "pledge" examined by the *Sei Fujii* court, it certainly has no greater specif-

29. *See* text accompanying note 14 *supra*.

30. *See* Haiti v. Immigration and Naturalization Service, 343 F.2d 466 (2d Cir. 1965); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952). *See generally* Camacho v. Rodgers, 199 F. Supp. 155 (S.D.N.Y. 1961); Rice v. Sioux City Memorial Park Cemetary, 245 Iowa 147, 60 N.W.2d 110 (1953); *cf.* Clark v. Allen, 331 U.S. 503 (1947); Nielsen v. Johnson, 279 U.S. 47 (1928); Hauenstein v. Lynham, 100 U.S. 483 (1879).

31. *Id.*

32. 38 Cal. 2d 718, 242 P.2d 617 (1952).

33. *Id.* at 722, 242 P.2d at 621 (emphasis added).

34. Trusteeship Agreement, *supra* note 8, at art. 6, paras. 2-4. *See* text accompanying note 23 *supra*.

35. *See* text accompanying note 21 *supra*.

icity of meaning.[36] Although the requirements for treaty self-execution[37] are far from clear, the Agreement clearly seems not to manifest such an intent.[38]

Not only does *Sei Fujii*, which is in the mainstream of precedent,[39] dictate a contrary result in *Saipan*, but Articles 6 and 7 of the Trusteeship Agreement seem to manifest a contrary intent as well. Standing in stark contrast to the enigmatic language of Articles 6 and 7 is the unequivocal directive of Article 8 which guarantees that "[t]he administering authority shall ensure equal treatment to the Members of the United Nations and their nationals in the administration of justice."[40] Apparent from Articles 6 and 7, which concern the rights of Mircronesians, as opposed to Article 8, which concerns the treatment of United Nations members, is that the United States was given greater leeway in dealing with the Micronesians than in dealing with United Nations members. Therefore, the ambiguity of Articles 6 and 7 was not merely the result of poor writing but rather of a conscious effort to use cryptic, non-binding terms. While Article 8 speaks directly to the administration of justice for other United Nation members,[41] Article 7 does not include justice in its list of designated freedoms for the people of the Trust Territory.[42] Article 6 requires only that the administrating authority "promote" or "foster" the general welfare of the inhabitants.[43] If the *Saipan* court had applied the standard test for determining whether there was an intent to make a binding obligation upon the United States for the benefit of the people living in the Trust Territory, the weight of evidence would have dictated a contrary result. It would then have been superfluous to consider whether the lan-

36. For a discussion on the history of the concept of a sacred trust, see H. HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIPS 277-85 (1948); Comment, *Self-Executing Treaties*, 10 TEXAS INT'L L.J. 138, 144 n.46 (1975).

37. There seems to be little doubt that the technical difference between a "treaty" and an "agreement" is immaterial. *See* H. KELSEN, THE LAW OF THE UNITED NATIONS 330-35 (1951); Marston, *Termination of Trusteeship*, 18 INT'L & COMP. L.Q. 1, 7-10 (1969); Parry, *The Treaty Making Power of the United Nations*, 26 BRIT. Y.B. INT'L L. 108, 127 (1949).

38. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 177-85 (1943); 2 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1454-66 (2d rev. ed. 1945); 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 302-16 (1970). For authorities which present a more extensive treatment of this problem, see note 14 *supra*.

39. *See* cases cited at note 30 *supra*.

40. Trusteeship Agreement, *supra* note 8, at art. 8, para. 2.

41. *Id.*

42. *See* text accompanying note 24 *supra*.

43. *See* text accompanying note 23 *supra*.

guage is capable of interpretation, for while it may be true that the language involved is no more obscure than the domestic cliches cited by the court,[44] that is not the relevant issue. In domestic cases the only question is whether the language admits of interpretation while in an international context an equally important consideration is whether it was meant to be interpreted at all.

The court determined that "[t]he extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to [four] contextual factors."[45] These factors are: (1) the purposes and objectives of the creators of the agreement, (2) the existence of appropriate domestic institutions and procedures for direct implementation, (3) the existence of alternative enforcement methods that are both available and feasible, and (4) the social consequences of a finding as to self-execution.[46] Unfortunately, the court cited these criteria without analyzing their application. Even accepting the court's criteria as a viable test, application of the four factors seems to almost preclude a finding that the Agreement is not self-executing.

While the United States may have manifested an intent to protect the people of Micronesia, protection was not the purpose of the United States in signing the Agreement. Indeed, a far different purpose is evidenced in the classification of the territory as a "strategic trust," a unique entity in international law. Because of its strategic value, the area was removed from the jurisdiction of the General Assembly and placed under the auspices of the Security Council. By use of its veto power in the Security Council, the United States can block any outside interference in its administration of the area.[47] There is no evidence that judicial review was even a corollary objective of the Agreement, for with the exception of "freedom of conscience," even the most basic rights are "subject . . . to the requirements of public order and security."[48]

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44. 502 F.2d at 99.

45. *Id.* at 97.

46. *Id. See generally* M. McDOUGAL, A. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER, PRINCIPLES OF CONTENT AND PROCEDURE (1967).

47. *See* E. HAAS, ATTEMPT TO TERMINATE COLONIALISM: ACCEPTANCE OF THE UNITED NATIONS TRUSTEESHIP SYSTEM in D. KAY, THE UNITED NATIONS POLITICAL SYSTEM 281, 287 (1967). *See also* L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS (3d rev. ed. 1969); R. RUSSELL & J. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER (1958). *See generally* Pauling v. McElvoy, 164 F. Supp. 390 (D.D.C. 1958).

48. Trusteeship Agreement, *supra* note 8, at art. 7.

The second determinant, that of the existence of appropriate domestic procedures and institutions for direct implementation, hinges on the appropriateness of the domestic procedures and institutions. The Territorial Trust Code indicates that courts of the United States are not an appropriate forum.

> Unless and until the Congress of the United States provides for an appeal to a court created by an Act of Congress, the decisions of the Appellate Division of the High Court shall be final.[49]

There is now pending before the Congress of the United States and the citizens of the Trust Territory a "Covenant to establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States."[50] If this Covenant is approved by fifty-five per cent of the citizens eligible to vote in the referendum and by the United States Congress, it will establish a self-governing commonwealth with a District Court for the Northern Mariana Islands.[51] However, the Covenant would not become fully effective until at least 1981 when the Trusteeship Agreement expires.[52] Until such time, the Territorial Trust Code denies the appropriateness of the United States district courts as a forum. The rationale of the concurring opinion in *Saipan* is also weakened by this section of the Territorial Trust Code, since it precludes outside judicial review. Judge Trask rejected the majority view that the Agreement was self-executing, but found that there was sufficient implementing legislation to execute the Agreement.[53] Since the Territorial Trust Code is the most significant of that "implementing legislation,"[54] the argument is flawed.

The third criterion, the lack of alternative methods of enforcement, is the first one which the court could legitimately rely on in finding the Agreement to be self-executing. Most possible alternative forums are unquestionably inadequate or unavailable. The United Nations could not serve as an alternative forum for adjudicating the rights of these people because of the unique

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49. 6 T.T.C. § 357 (1970).

50. 14 INT'L LEG. MAT'S 344 (1975). Saipan and Tinian are the two major islands in the Northern Marianas group.

51. *See* Supplemental Brief for the Federal Respondents in Opposition to Petition for Certiorari at 2, People of Saipan v. United States Dep't of Interior, 420 U.S. 1003 (1975).

52. *Id.* at 3.

53. 502 F.2d at 103 (Trask, J., concurring).

54. Judge Trask cites Dep't of the Interior Order No. 2918 as the crux of the implementing legislation, *id.*, but 6 T.T.C. § 357 (1970) was passed pursuant to that Order.

nature of a strategic trust.[55] While all other trusteeship agreements are subject to the control of the United Nations General Assembly, Article 83 of the United Nations Charter provides that

> [a]ll functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.[56]

Thus, the executive branch of the United States government maintains a veto power over any Security Council action affecting the administration of the Trust Territory by the executive branch of the United States. The International Court of Justice is not a viable alternative forum because "[o]nly states may be parties in cases before the court."[57] It cannot adjudicate matters pertaining to the Trust Territory since it is not a "state."[58] This leaves the High Court of the Trust Territory as the only alternative to the United States judiciary. The circuit court found this to be a viable alternative forum and, based on the doctrine of comity, dismissed the action with the proviso that if the High Court were to find itself unable to adjudicate claims against the High Commissioner then the petitioners could refile in the District Court of Hawaii.[59] The *Saipan* court based its belief that the High Court of the Trust Territory could adjudicate this case on the decision of *Diggs v. Shultz*.[60] In *Diggs*, citizens of Rhodesia sought to enjoin American importation of chromite and other metals from Rhodesia pursuant to United Nations Security Council Resolution 232. The United States had removed itself from participation in the boycott following passage of the Byrd Amendment.[61] The

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55. *See* note 47 and accompanying text *supra*.

56. U.N. CHARTER, *supra* note 18, at art. 83.

57. I.C.J. STAT. art. 34 § 1. *See generally* R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964).

58. A member nation is also precluded from bringing an action on behalf of the Micronesians in the International Court of Justice to enforce the Trusteeship Agreement. *See* South West Africa, Second Phase, [1966] I.C.J. 6.

59. 502 F.2d at 100.

60. 470 F.2d 461 (D.C. Cir. 1972). *See generally* Comment, *Congressional Power to Abrogate the Domestic Effect of a United Nations Treaty Commitment: Diggs v. Shultz*, 13 COLUM. J. TRANSNAT'L L. 168 (1974); 14 VA. J. INT'L L. 185 (1973); 9 TEXAS INT'L L.J. 114 (1974).

61. 50 U.S.C. § 98h-1 (Supp. I, 1971) provides:

> Notwithstanding any other provisions of law . . . the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a

court in *Diggs* found that the appellants had standing to raise the issue in the United States district court.

> [T]o persons situated as are appellants, United Nations action constitutes the only hope; and they are personally aggrieved and injured by the dereliction of any member state which weakens the capacity of the world organization to make its policies meaningful.[62]

The court in *Saipan* expressed hope that the High Court would find itself able to adjudicate the rights of plaintiffs arising under the Trusteeship Agreement because that document, according to the court's rationale, is the only protection the Micronesians have against alleged abuse.[63] The court also suggested that the High Court reconsider its opinion that it lacks authority to review the actions of the High Commissioner acting within the scope of his duties.[64] The determination of whether the High Court is a viable alternative to United States district courts is dependent upon the High Court's reversal of its former stance.

The fourth determinant considered by the court was the overall social consequences of self-execution. Examination of the social consequences of an international agreement is contrary to the basic governmental scheme of separation of powers, under which the judiciary may determine the constitutionality of a document and the intent of its drafters. Courts do not otherwise examine the document to determine the wisdom behind it. It was recognized as early as 1821 in *The Amiable Isabella*[65] that a court's power to interpret treaties is limited.

> Communist-dominated country or area . . . for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provision of law.

62. 470 F.2d at 465.

63. *See* 502 F.2d at 99. The High Court had previously held it could not adjudicate rights based on the Trusteeship Agreement itself. Alig v. Trust Territory of the Pacific Islands, 3 T.T.R. 603, 615-16 (High Court 1967).

64. 502 F.2d at 99-100. The High Court relied on 6 T.T.C. § 252(2), which states:

> The Trial Division of the High Court shall not have jurisdiction under the foregoing Section 251 of: . . . (2) Any claim based on an act or omission of an employee of the Government, exercising due care, in the execution of a law or regulation, whether or not such law or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of any agency or employee of the Government, whether or not the discretion involved be abused.

65. 19 U.S. (6 Wheat.) 1 (1821).

> We are to find out the intention of the parties, by just rules of interpretation, applied to the *subject matter*; and having found that, our duty is to follow it, so far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.[66]

Allowing the social consequences of treaties to become an accepted criterion for judicial interpretation would be a new development in the field of treaty interpretation.[67] Hopefully, the concept will not receive wide judicial acceptance. History indicates that people eventually rebel when ruled as a colony without the right of self-determination.[68] If this be the case, the practice of considering the political and social consequences of treaty self-execution would be in the interests of the United States. By giving the Micronesians a judicial rather than an administrative forum to adjudicate their rights, further bad feelings toward the United States could possibly be forestalled.

IV. COMITY

The doctrine of comity was relied upon by the *Saipan* court to refer the case back to the High Court of the Trust Territory. Traditionally, the doctrine has been applied in two situations. The original doctrine dealt with the relationship between states and the federal government.[69] The United States Supreme Court, in *Younger v. Harris*,[70] enunciated the principle as

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National

66. *Id.* at 71.

67. *Compare* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 147 (1965).

68. Fortunately the potential for rebellion in Micronesia is no longer great due to the promise of commonwealth status. However, this promise antedates the *Saipan* decision. *See* text accompanying note 50 *supra*. Commentators have been almost unanimous in their criticism of the treatment of the people living in the Trusteeship area by the United States. *See* S. DESMITH, MISCROSTATES AND MICRONESIA (1970); E. KAHN, A REPORTER IN MICRONESIA (1966); Quigg, *Coming of Age in Micronesia*, 47 FOR. AFF. 493 (1969); Green, *America's Strategic Trusteeship Dilemma: Its Humanitarian Obligations*, 9 TEXAS INT'L L.J. 19 (1974); Metelski, *Micronesia and Free Association; Can Federalism Save Them?*, 5 CAL. W. INT'L L.J. 162 (1974); Mink, *Micronesia, Our Bungled Trust*, 6 TEXAS INT'L L.F. 181 (1970); Note, *A Macrostudy of Micronesia: The Ending of a Trusteeship*, 18 N.Y.L.F. 139 (1972).

69. *See* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839) (the earliest application of this concept).

70. 401 U.S. 37 (1971).

> Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[71]

A second application of the doctrine of comity has developed, which is based on the relationship of the United States to foreign governments.[72]

The Trust Territory is neither a state nor a foreign sovereignty. Nevertheless, the *Saipan* court applied the doctrine, holding that the High Court is "the judicial branch of a political entity possessing many of the attributes of an independent nation."[73] Such a finding fails to take into account the true nature of the High Court and its relationship with the Department of the Interior. As one commentator has written, "[t]he Judiciary is independent of the High Commissioner [only] to the extent that the Chief Justice and the two Associate Justices (all Americans) are appointed by and responsible to the Secretary of the Interior."[74] Pursuant to Department of the Interior Order No. 2918, these "judges" serve at the pleasure of the Secretary of the Interior.[75] Consequently, this tribunal resembles a judicial arm of the Department of the Interior more closely than an independent judiciary. The interlocking nature of the High Court and the Department of the Interior did not deter the *Saipan* court in its finding that the High Court could adequately protect the rights of the Micronesians, unless that court found otherwise.

V. THE DOCTRINE OF INCORPORATION—AN ALTERNATIVE APPROACH

The concept of incorporation originated in the Supreme Court holding in *Martin v. Hunter's Lessee*[76] and was expanded by Justice Harlan in his dissenting opinion in *Downes v. Bidwell*:

> The Constitution speaks not simply to the States in their organized capacities, but to all peoples, whether of States or territories, who are subject to the authority of the United States.[77]

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71. *Id.* at 44.

72. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Hilton v. Guyot, 159 U.S. 113 (1895).

73. 502 F.2d at 100.

74. Quigg, *supra* note 68, at 497 n.1. *See* Dep't of the Interior Order No. 2918, *supra* note 8, at pt. IV.

75. *See* note 8 *supra*.

76. 14 U.S. (1 Wheat.) 304, 324-25 (1816).

77. 182 U.S. 244, 378 (1901) (Harlan, J., dissenting). The actual concept of territories

The degree of protection which the United States Constitution provides the citizens of a territory under United States domination is dependent upon whether the territory is incorporated or unincorporated.[78] If the area is unincorporated, only the most fundamental constitutional protections are granted to the inhabitants. If the territory is incorporated, all provisions of the Constitution apply.[79] Although there are no clear criteria for determining when a territory is incorporated,[80] Justice White suggested a general test as to whether American authority showed an intent to make the area "an integral part of the United States."[81] The United States expressed its intention in regard to the Trust Territory of the Pacific Islands in exactly those terms when accepting the draft revisions of the Trusteeship Agreement. The minutes of the session reported:

> An amendment was proposed by the Representative of the Union of Soviet Socialist Republics to delete the words "*as an integral part of the United States.*" Upon accepting this amendment at the 116th Meeting of the Security Council, the United States representative said *inter alia*: "In agreeing to this modification my Government feels that it should affirm for the record that its authority in the trust territory is not to be considered in any way lessened thereby."[82]

The parallelism of the words is not what is crucial in the determination of when an intent to incorporate a territory has been expressed. The crucial factor is the degree of control exercised. If

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being incorporated into the United States first appears explicitly in the *Insular Cases*. Dooley v. United States, 183 U.S. 151 (1901), Downes v. Bidwell, 182 U.S. 244 (1901), Dooley v. United States, 182 U.S. 222 (1901), and Delima v. Bidwell, 182 U.S. 1 (1901).

Originally, the doctrine of incorporation only applied to organized territories, *i.e.*, those for which Civil governments had been established by an "Organic Act of Congress." United States v. Standard Oil Co. of California, 404 U.S. 558, 559 n.2 (1971) (per curiam). Saipan is an unorganized territory since its administration was entrusted to the Secretary of the Interior, a representative of the executive branch of the United States. The Court in *Standard Oil of California* found the distinctions between "organized" and "unorganized" territories to be immaterial.

78. *See* Downes v. Bidwell, 182 U.S. at 291 (White, J., concurring).

79. Note, *United States Constitution and American Samoa*, 9 J. INT'L L. & ECON. 325, 333 (1974).

80. *See generally* Balzac v. Porto Rico, 258 U.S. 298 (1922); Dowell v. United States, 221 U.S. 325 (1911); Coudert, *The Evolution of the Doctrine of Incorporation*, 26 COLUM. L. REV. 823 (1926) for numerous tests that have been applied.

81. Downes v. Bidwell, 182 U.S. at 299 (White, J., concurring). Justice White is the author of the doctrine of incorporation.

82. U.S. DEP'T OF STATE, 1 FOREIGN RELATIONS OF THE UNITED STATES 275 (1947) (emphasis added).

such a degree of control is exercised as to effectively express an intent to incorporate the Trust Territory into the United States, it is sufficient to entitle the Micronesians to the full protection of the United States Constitution. Such an intention was clearly manifested by the United States when it maintained "full powers of administration, legislation, and jurisdiction"[83] over the Trust Territory. This intention is probably sufficient to incorporate the Trust Territory into the United States and even if it were not, the people of the area would still be entitled to fundamental constitutional protection.[84]

Two considerations might have prevented the *Saipan* court from finding the Trust Territory to be incorporated into the United States. The first is an historical judicial reluctance to so hold without explicit legislation expressing such an intention.[85] But finding such an intention from all of the documents establishing a strategic trust would be a more viable solution than finding that the same documents established a self-executing treaty. The second consideration is that the Trust Territory is technically not an American possession; the United States is merely a trustee. The district court found this difference to be immaterial when determining the applicability of the Administrative Procedure Act.[86] The court of appeals impliedly agreed with that finding through their partial affirmation of the lower court.[87] Therefore, this consideration would not seem to present a problem.

If the people of Saipan have rights arising under the Constitution, would federal courts then take appellate jurisdiction? It is firmly established that federal courts have the power to review and correct actions of federal officials[88] such as the High Commissioner, a Department of the Interior appointee. The fact that the Trust Territory Code explicitly precludes United States judicial review undoubtedly influenced the circuit court in holding that a United States district court would be able to adjudicate claims arising out of the Trusteeship Agreement only if the High Court

83. Trusteeship Agreement, *supra* note 8, at art. 3.

84. Downes v. Bidwell, 182 U.S. at 291 (White, J., concurring).

85. Courts have very rarely found territories to be incorporated into the United States. *See* note 79 *supra*.

86. People of Saipan *ex rel.* Guerrero v. United States Dep't of the Interior, 356 F. Supp. at 651. *See* note 10 and accompanying text *supra*.

87. People of Saipan *ex rel.* Guerrero v. United States Dep't of the Interior, 502 F.2d at 95.

88. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

found itself unable to do so. After dismissing the complaint on the basis of comity, the circuit court could not logically hold the actions of the High Court reviewable. But if the rights of the people of the Trust Territory were found to arise out of the United States Constitution pursuant to the doctrine of incorporation rather than out of the Trusteeship Agreement, then judicial review by the federal courts would be appropriate. As Professor Louis Jaffe has written:

> When the statute explicitly provides that the action shall not be revised or reviewed in any forum whatever, the statutory intention to exclude review is clear and will, *in the absence of constitutional infirmity*, be respected.[89]

Although Professor Jaffe was speaking in reference to administrative agencies, the interlocking nature of the Department of the Interior and the High Court of the Trust Territory, coupled with the constitutional infirmities resulting from this relationship, makes his findings pertinent to the instant situation.

VI. Conclusion

It is evident that the *Saipan* court wanted to guarantee the people of the Trust Territory an adequate forum for judicial review. The court went astray in basing that right on the Trusteeship Agreement. With case law dictating a finding of non self-execution, the court had to establish new criteria for determining that the treaty was self-executing. These criteria led the court to a finding of an available alternative forum, the High Court of the Trust Territory. If the court had applied the doctrine of incorporation instead, the rights of judicial review would have originated from the Constitution. This would not change the outcome of the decision, since NEPA is not incorporated into the Constitution, but it would leave the people of the Trust Territory with a forum for judicial review completely free of the taint of a mere administrative determination.[90]

The probable demise of the strategic trusteeship as an entity in international law negates the importance of the *Saipan* decision.[91] Its lasting significance is as another example of the courts'

89. Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 770 (1958) (emphasis added, footnote omitted).

90. *See* text accompanying notes 74-75 *supra*.

91. The Covenant to establish a commonwealth for the Northern Mariana Islands has been approved by the people of the Northern Mariana Islands and the House of Representatives, but strong opposition has recently surfaced in the Senate. This opposition raises

persistent avoidance of any problem where comity can provide grounds for abstention. As Justice Cardozo said over forty years ago, "[t]he case will not be complicated by a consideration of our power to pursue some other course. The *summum jus* of power, whatever it may be, will be subordinated at times to a benign and prudent comity."[92]

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two questions: whether the Trust Territory can be divided to give commonwealth status to only the Northern Mariana Islands, and whether it is desirable for the United States to form a commonwealth located thousands of miles from the mainland. *See* N.Y. Times, Dec. 9, 1975 at 10, col. 5. *See also* text accompanying notes 50-52 *supra*. The concept of the strategic trusteeship was developed in 1947 by the United States as a compromise between the annexation and free association of Micronesia. This compromise has been generally found to be lacking. *See* Mink, *supra* note 68.

92. Mutual Life Ins. Co. v. Johnson, 293 U.S. 335, 339 (1934).