

1-1-1990

The Last Trusteeship: Palau's Struggle for Self-Determination Under the United Nations International Trusteeship System

Ruth C. Slocum

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/twlj>



Part of the [International Law Commons](#)

Recommended Citation

Ruth C. Slocum, *The Last Trusteeship: Palau's Struggle for Self-Determination Under the United Nations International Trusteeship System*, 10 B.C. Third World L.J. 165 (1990), <http://lawdigitalcommons.bc.edu/twlj/vol10/iss1/7>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Third World Law Journal by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

THE LAST TRUSTEESHIP: PALAU'S STRUGGLE FOR SELF-DETERMINATION UNDER THE UNITED NATIONS INTERNATIONAL TRUSTEESHIP SYSTEM

I. INTRODUCTION	166
II. AN HISTORICAL PERSPECTIVE ON THE TRUSTEESHIP.....	169
A. <i>Strategic Importance</i>	169
B. <i>Colonial History, the Mandate System, and the International Trustee- ship System</i>	170
C. <i>The Trusteeship Agreement</i>	171
III. THE MOVEMENT TOWARDS DECOLONIZATION	173
A. <i>General Assembly Resolutions 1514 and 1541</i>	173
B. <i>Towards Self-Government</i>	174
C. <i>The Fragmentation of the Trust Territory and the Drafting of the Palauan Constitution</i>	176
IV. THE CURRENT CRISIS.....	177
A. <i>The Plebiscites and the Compact — Constitution Conflict</i>	177
1. <i>Gibbons v. Salii</i>	179
2. <i>The Political and Economic Crisis</i>	182
3. <i>The Constitutional Amendment</i>	183
4. <i>Fritz v. Salii</i>	185
B. <i>United States Congressional Action</i>	187
V. THE FUNCTION OF THE UNITED NATIONS IN DETERMINING THE PO- LITICAL STATUS OF PALAU	187
A. <i>The Role of the Security Council</i>	187
B. <i>International Court of Justice Precedent</i>	191
C. <i>An Analysis of the Trusteeship Using the Criteria Established by the United Nations Charter and General Assembly Resolution 1541</i>	192
VI. CONCLUSION.....	195

We fought for them, we've got them, we should keep them. They are necessary for our safety. I see no other course.

Congressman F. Edward Hebert, 1945¹

It is easier perhaps to increase the Federal appropriation year by year than to promote an active policy of economic development. For the Micronesians, on the other hand, such a trend is socially damaging and politically disastrous. No people, proud and conscious of the quality of its inheritance, can acquiesce in the proposition that it should become the pensioner of another.

Micronesian Report on Future Political Status, 1969²

I. INTRODUCTION

The Republic of Palau, an isolated archipelago of Micronesia, must choose between sovereignty or dependence. Either option may prove costly. Palau is one of four districts that make up the Trust Territory of the Pacific Islands (TTPI).³ In addition to Palau, the trust territory includes the Northern Mariana Islands, the Federated States of Micronesia, and the Marshall Islands. The United States serves as administering authority or "trustee" of the TTPI under the United Nations Charter (Charter) and the Trusteeship Agreement for the Former Japanese Mandated Islands (Trusteeship Agreement).⁴

Each of the TTPI districts, except Palau, has negotiated a separate agreement with the United States towards ending the trusteeship and gaining new political status. The Northern Mariana Islands have accepted commonwealth status,⁵ while the Federated

¹ See D. MCHENRY, *MICRONESIA: TRUST BETRAYED* 66 (1975).

² *FUTURE POLITICAL STATUS COMMISSION, REPORT TO THE CONGRESS OF MICRONESIA* 14-15 (1969) [hereinafter *REPORT*] (available at the International Legal Studies Library of Harvard Law School).

³ Palau lies approximately 600 miles east of the Philippines. The archipelago is made up of twenty-two islands of which only eight are habitable. H. BARNETT, *BEING A PALAUAN* 2 (1960).

⁴ U.N. CHARTER art. 76; Trusteeship Agreement for the Former Japanese Mandated Islands, Apr. 2-July 18, 1947, United States-U.N. Security Council, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 [hereinafter *Trusteeship Agreement*].

⁵ Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, H.R.J. Res. 549, 94th Cong., 1st Sess. (1975); S.J. Res. 107, 94th Cong., 1st Sess. (1975); Pub. L. No. 94-241, 90 Stat. 263 (1976) [hereinafter *Covenant*].

States of Micronesia and the Marshall Islands have approved a "Compact of Free Association" with the United States.⁶ Under the terms of this agreement, the United States provides continued financial assistance to the islands in return for control over security and defense matters. The United States needs the Palauan islands for military purposes, particularly if the current Philippine bases are lost.⁷

Although the people of Palau have voted upon several versions of a Compact of Free Association on six separate occasions, a Compact has never been approved. If the current Compact is approved, Palau will receive desperately needed economic assistance of approximately 460 million dollars from the United States over the next fifteen years.⁸ In return, the United States stands to secure a valuable strategic base in the Pacific. The Compact allows the United States to take an unlimited amount of land for military operations and also to operate nuclear vessels in the region.⁹

The Compact is popular with many Palauans because it will provide immediate grant aid to what is otherwise a subsistence economy. Approval of the Compact, however, may also mean the loss of large tracts of scarce Palauan land and result in the extreme militarization of the islands. Palau has become a battleground between pro-Compact islanders and a group of activists who fear the political, social, and environmental consequences of the Compact. The center of the ongoing legal controversy is the conflict between specific anti-nuclear provisions of Palau's Constitution and the Compact provisions which allow American nuclear vessels to transit Palauan waters.¹⁰ Since the Compact would allow nuclear substances in Palau, the Palauan Constitution requires that seventy-five percent

⁶ Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986). The Federated States of Micronesia approved the Compact by a majority of 79% while the Marshall Island approving majority was only 58%. S. REP. No. 403, 99th Cong., 2d Sess. 42, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 6207, 6231 [hereinafter SENATE REPORT].

⁷ See *infra* notes 22 and 23; Admiral William Crowe, Chairman of the U.S. Joint Chiefs of Staff Committee said that Palau would be "one of the first or priority areas [sic] that we have to look at" in case of the loss of the Philippine bases. From a statement of Mr. Alcalay before the Trusteeship Council on May 12, 1988, U.N. Doc. T/PV.1650 at 8.

⁸ 135 CONG. REC. H 3200 (daily ed. June 27, 1989) (statement of Rep. de Lugo) [hereinafter de Lugo Statement].

⁹ Compact of Free Association Between the Government of the United States and the Government of Palau, §§ 321-323, reprinted in Pub. L. No. 99-658, tit. II, § 201, 100 Stat. 3672, 3695 (1986) [hereinafter Compact]; *Gibbons v. Salii*, No. 8-86, slip op. at 31 (Palau App. Div. Sept. 17, 1986) (on file at Boston College Third World Law Journal Office).

¹⁰ Compact, *supra* note 9, at § 324.

of the population approve the Compact.¹¹ Palau's current political status remains that of trust territory because this required seventy-five percent majority has never been achieved in a plebiscite.

In addition to Palauan approval of the Compact, the U.N. Charter specifies that the U.N. Security Council must sanction any "alteration or amendment" to the Trusteeship Agreement.¹² Recent actions by the United States suggest an attempt to circumvent this provision of the Charter and unilaterally terminate the trusteeship.¹³ It is likely, however, that unilateral termination of the trusteeship would violate international law.¹⁴ The need for United Nations approval may subject American policy in Palau and the other TTPI districts to scrutiny by the international community.

This Note examines the progress of Palau from colonial possession to self-governing state. Although this process is not complete, Palau's transformation is significant because it has occurred under the United Nations Trusteeship System. The goals of the trusteeship system are to "promote the political, economic, social, and educational advancement of the trust territories towards self-government or independence"¹⁵ Whether or not the United States has successfully met these goals, and the degree of protection afforded Palau by the international trusteeship regime, is the ultimate focus of this Note.

Part II of this Note presents an historical perspective on the Pacific Trusteeship and the strategic importance of the region. Part III examines the movement towards decolonization and the beginnings of self-government in the TTPI. Part IV describes the current crisis in Palau and the legal battles recently fought to protect the Palauan Constitution. Part V concludes with an examination of the role of the United Nations in determining Palau's future political status. Much of the information presented in this Note is of an historical nature. The history and development of Palau and of the TTPI are central to the question of whether the United States has met its obligations towards the trust territory under the Charter.

¹¹ PALAU CONST. art. XIII, § 6; art. II § 11.

¹² U.N. CHARTER art. 83, para. 1.

¹³ See Letter to the Editor-in-Chief from Roger S. Clarke (June 10, 1987), *reprinted in* 81 AM. J. INT'L L. 927, 929 (1987) [hereinafter Clarke Letter].

¹⁴ *Id.*; Marston, *Termination of Trusteeship*, 18 INT'L & COMP. L.Q. 1, 28-31 (1969).

¹⁵ U.N. CHARTER art. 76.

II. AN HISTORICAL PERSPECTIVE ON THE TRUSTEESHIP

A. *Strategic Importance*

Since World War II, the United States has maintained a strong military presence in Micronesia.¹⁶ Between 1942 and 1944, some of the costliest battles of the war were fought in the region.¹⁷ The territory remains militarized. For example, the American base at Kwajalein atoll in the Marshall Islands represents an American investment of over two billion dollars¹⁸ and continues to be a splash-down point for missile tests;¹⁹ Guam has been used for the deployment of over 400 nuclear warheads; and two-thirds of Tinian Island in the Northern Mariana Islands has been set aside for military purposes.²⁰

Micronesia is critically situated between two important American allies, Australia and Japan, and United States control of the region is considered to be of great strategic importance.²¹ The strategic importance of Palau, in particular, is directly linked to the fate of American bases on the Philippines.²² If the American presence on the Philippines is imperiled, Palau is considered to be an excellent "fallback" option in the region.²³ Palau's Malakal Harbor is one of the widest in the region and has been discussed as a possible post for Trident submarines.²⁴ Thus, the strategic importance of

¹⁶ U.S. bases at Hawaii, American Samoa, Australia, Okinawa, Japan, Korea, and the Philippines dot the Pacific and Pacific "Rim" area. Wittwer, *Island Nation Wins a Round in Fight for an Anti-Nuclear Constitution*, RESIST NEWSL., June-July 1988, at 3.

¹⁷ The battle at Saipan left over 13,000 dead and wounded. The battle at Pelelieu, in Palau, cost 1,864 American lives and left 6,459 wounded. Over 5,000 Micronesians were killed during the War. D. MCHENRY, *supra* note 1, at 54.

¹⁸ H.R. REP. No. 188, 99th Cong., 1st Sess. 3, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2746, 2927 [hereinafter HOUSE REPORT].

¹⁹ Kwajalein Missile Base is along a perfect trajectory from Vandenburg Air Force Base in California. "Dummy" ballistic missiles are easily recovered from the atoll's shallow lagoon. Armstrong, *Strategic Underpinnings of the Legal Regime of Free Association: The Negotiations for the Future Political Status of Micronesia*, 7 BROOKLYN J. INT'L L. 179, 195 (1981).

²⁰ Wittwer, *supra* note 16, at 3.

²¹ An American presence is necessary for purposes of "strategic denial," that is preventing an enemy power from gaining a toehold in the region and protecting crucial sealanes. HOUSE REPORT, *supra* note 18, at 2750. This policy is an important part of the Compact. Compact, *supra* note 9, § 311.

²² Wittwer, *supra* note 16, at 3.

²³ *Id.*; de Lugo Statement, *supra* note 8, at H3203.

²⁴ American Friends Service Committee, Briefing Paper on Self-Determination for Belau (Palau), at 5 (Aug. 8, 1987) [hereinafter Briefing Paper]. The Department of Defense has also considered using 32,000 acres of Babelthaup, one of Palau's main islands, as a Marine training facility and maneuver area. D. MCHENRY, *supra* note 1, at 71.

Palau and of Micronesia has, in many ways, dictated its history. Foreign powers, mindful of strategic concerns, have long controlled the region.

B. *Colonial History, the Mandate System, and the International Trusteeship System*

Palau has a long colonial history. The Spanish discovered the islands in 1543 and ruled the inhabitants until the end of the Spanish-American War.²⁵ Germany then purchased Spain's interests in the Pacific and controlled the region until her defeat in World War I.²⁶ After the war, under the Covenant of the League of Nations Mandate System, Japan was named as Mandatory for Micronesia and tightly controlled the islands in the years leading up to World War II.²⁷

After World War II, the League of Nations Mandate System was transformed into the International Trusteeship System under chapters XI, XII, and XIII of the U.N. Charter. The Charter identified as trust territories League of Nations Mandates, territories detached from enemy states during the war, and other territories voluntarily placed under trusteeship.²⁸ Eleven trust territories were placed under the International Trusteeship System through individual agreements between the administering authority member state and the United Nations.²⁹

The American victory over the Japanese left the United States in control of Micronesia at the end of the war. The United States government had to decide at this time whether to place the area under the new trusteeship system or to annex it. As a signatory of the U.N. Charter and the Atlantic Charter, the United States would

²⁵ H. BARNETT, *supra* note 3, at 2.

²⁶ Robbins, *United States Trusteeship for the Territory of the Pacific Islands*, 1947 DEP'T ST. BULL. 783, 784.

²⁷ Article 23 of the Covenant of the League of Nations bound members to "undertake to secure just treatment of the native inhabitants of the territories under their control" and to refrain from military fortification. Japan heavily fortified the islands prior to the war in contravention of the Covenant. Robbins, *supra* note 26, at 784-85.

²⁸ U.N. CHARTER art. 77, para. 1.

²⁹ The British assumed trusteeship of Tanganyika, the British Cameroons and British Togoland. The French administered French Togoland and the French Cameroons. Other territories were Belgian Ruanda-Urundi; Italian Somaliland; Australian Nauru and New Guinea; and Western Samoa which was administered by New Zealand. U.N. DEPT. OF PUBLIC INFORMATION, *THE UNITED NATIONS AND DECOLONIZATION*, 1980, at 8, U.N. Doc. DPI/678-80-41551 (1980) [hereinafter *DECOLONIZATION*].

have had difficulty annexing the Pacific territory.³⁰ Many American representatives, however, preferred direct annexation of Micronesia to the trusteeship arrangement.³¹ This was the view of Congressman Mike Mansfield, who stated:

I would prefer to have the United States assume complete and undisputed control We need these islands for our future defense, and they should be fortified wherever we deem it necessary. We have no concealed motives because we want these islands for one purpose only and that is national security. Economically they will be a liability, socially they will present problems, and politically we will have to work out a policy of administration. No other nation has any kind of claim to the mandates. No other nation has paid the price we have³²

The State Department took the view that to exempt Micronesia from the new trusteeship system would lead to “reservations of other nations until the non-aggrandizement plan of the Atlantic Charter would become a mockery.”³³ The latter view prevailed and the U.N. Security Council approved the Trusteeship Agreement on April 2, 1947.³⁴

The Trusteeship Agreement was unique in that the territory was designated a “strategic” trust unlike any other U.N. trust territory. Instead of supervision by the Trusteeship Council and the General Assembly, the American negotiators requested that the Security Council have oversight of the TTPI. This arrangement has had far-reaching repercussions.

C. *The Trusteeship Agreement*

The trusteeship provided the United States with a legitimate and convenient method of protecting its national security interest

³⁰ Hills, *Compact of Free Association for Micronesia: Constitutional and International Law Issues*, 18 INT'L LAW. 583, 592 (1984); Atlantic Charter, Joint Declaration by the President of the United States and the Prime Minister of the United Kingdom, August 14, 1941, (55 Stat. 1603; Executive Agreement Series 236). The declaration states: “[The United States and the United Kingdom] seek no aggrandizement, territorial or other . . . they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned.”

³¹ Hills, *supra* note 30, at 591.

³² 93 CONG. REC. 8733 (1947) (cited in Hills, *supra* note 30, at 591).

³³ H. NUFER, MICRONESIA UNDER AMERICAN RULE: AN EVALUATION OF THE STRATEGIC TRUSTEESHIP 1947–1977 at 27 (1978).

³⁴ Trusteeship Agreement, *supra* note 4.

in Micronesia.³⁵ The Trusteeship Agreement, however, had to meet the scrutiny of the United Nations and the international community. The history of the drafting of the Trusteeship Agreement provides evidence of the tensions within the international community over what would be required of an administering authority and what degree of sovereignty was due to the peoples of non-self-governing territories.

The first United States draft of the Trusteeship Agreement provided merely that the United States would promote “the development of the inhabitants of the trust territories towards self-government.”³⁶ The absence of the words “or independence” was noted by the representative of the Soviet Union and the draft was amended.³⁷ The United States, upon agreeing to add the independence clause, insisted on including the words “as may be appropriate to the particular circumstances . . .” to follow the clause.³⁸ The United States Representative added:

In accepting article 6 [of the Trusteeship Agreement] as modified in order to include the objective of independence of the trust territory, the United States feels that it must record its opposition, not to the principle of independence, to which no people could be more consecrated than the people of the United States, but to the idea that in this case independence could be achieved in the foreseeable future.³⁹

Under the Trusteeship Agreement, as adopted, the United States as administering authority has the right to establish bases, erect fortifications, station and employ armed forces, and make use of volunteer forces and facilities in the territories.⁴⁰ The terms of the strategic trusteeship also allow the United States to close specified areas for security reasons and suspend reports to or visits from the Trusteeship Council of the United Nations or General Assembly in the closed areas.⁴¹ The United States has administered the TTPI under these terms for more than four decades.

³⁵ Hills, *supra* note 30, at 592.

³⁶ 2 U.N. SCOR Supp. (No. 8) 69, U.N. Doc. S/281 (1947). See generally Clarke, *Self Determination and Free Association for Micronesia — Should the United States Terminate the Pacific Islands Trust?* 21 HARV. INT'L L.J. 1, 6–7 n.29 (1980).

³⁷ 2 U.N. SCOR (113th mtg.) 415 (1947).

³⁸ 2 U.N. SCOR (116th mtg.) 474 (1947).

³⁹ *Id.*

⁴⁰ Trusteeship Agreement, *supra* note 4, art. 13.

⁴¹ *Id.*

III. THE MOVEMENT TOWARDS DECOLONIZATION

A. *General Assembly Resolutions 1514 and 1541*

During the 1960s, world public opinion sharpened against the continued control of dependent territories by larger powers.⁴² Between 1957 and 1962, seven of the eleven trust territories attained independence or chose to join an adjacent independent state.⁴³ The United Nations led the international movement towards decolonization.

On December 14, 1960 the U.N. General Assembly issued Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples.⁴⁴ This resolution was issued in part due to the international community's decision that Charter principles were being applied too slowly.⁴⁵ The declaration states that the subjection of people to alien subjugation, domination, and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter, and is an impediment to the promotion of world peace and co-operation.⁴⁶ Further, the declaration provides that

[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom⁴⁷

The declaration also specifies that inadequacy of political, economic, social, or educational preparedness should not serve as a pretext for delaying independence.⁴⁸

One day after the passage of Resolution 1514 (XV), the General Assembly adopted Resolution 1541 (XV) which provided that a non-self-governing territory "can be said to have attained full measure of self-government by independence, integration with an indepen-

⁴² DECOLONIZATION, *supra* note 29, at 4.

⁴³ *Id.* at 3.

⁴⁴ G.A. Res. 1514, 15 U.N. GAOR, Supp. (no. 16) 66, U.N. Doc. A/4684 (1960).

⁴⁵ DECOLONIZATION, *supra* note 29, at 13-16.

⁴⁶ *Id.*

⁴⁷ G.A. Res. 1514, *supra* note 44, at para. 5.

⁴⁸ *Id.* at para. 3.

dent state, or by *free association* with an independent state.”⁴⁹ The resolution declares that free association

. . . should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which . . . retains for the people of the territory . . . the freedom to modify the status through the expression of their will by democratic means and through constitutional processes.

The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.⁵⁰

The resolution makes clear that a freely associated territory should 1) have a right to determine its internal constitution; 2) be allowed to choose its political status freely without compulsion; and 3) retain the right to become independent at a later time.⁵¹ The people of the TTPI were clearly influenced by the notion of free association described in Resolution 1541.⁵² In addition to resolutions, a U.N. Special Committee was formed to oversee the process of decolonization.⁵³ The United States was subject to the scrutiny of the Committee because of its “colonial” stance in Guam, the Virgin Islands, American Samoa, and also the Trust Territories.⁵⁴

B. *Towards Self-Government*

For the first two decades of the trusteeship, American policy towards the TTPI was characterized by non-interference or “benign

⁴⁹ Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, G.A. Res. 1541, 15 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/4684 (1960) (emphasis added).

⁵⁰ *Id.*

⁵¹ Macdonald, *Termination of the Strategic Trusteeship: Free Association, the United Nations, and International Law*, 7 BROOKLYN J. INT'L L. 235, 241 (1981).

⁵² See REPORT, *supra* note 2, at 17–19.

⁵³ The Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples was created under General Assembly Resolution 1654, 16 U.N. GAOR Supp. (No. 17) 65, U.N. Doc. A/5100 (1962).

⁵⁴ de Smith, *Options for Micronesia: A Potential Crisis for America's Pacific Trust Territory*, N.Y.U. CENTER FOR INT'L STUD. POL'Y PAPERS 1, 20 (1969).

neglect.”⁵⁵ The changing international climate, however, made it difficult for the United States to continue this policy. In response to international criticism, a commission headed by Harvard economist Anthony Solomon was formed to suggest a new United States policy.⁵⁶

This new policy, articulated in the Solomon Report, suggested the infusion of 42.1 million dollars over a four year period (1965–1968), as well as “American style” education and the encouragement of self-rule.⁵⁷ The TTPI budget increased from 5.25 million dollars in 1960 to 48 million dollars in 1970.⁵⁸ The effect of this increased aid was the growth of a large bureaucracy. Little was done, however, to stimulate the local economy.⁵⁹

The Congress of Micronesia (COM) was formed in 1965 as a step toward Micronesian self-government.⁶⁰ In 1967, the COM formed its own Future Political Status Committee, headed by Lazarus Salii who would later become Palauan President. The Committee issued a report in 1969 which recommended that the TTPI and the United States pursue a relationship of free association.⁶¹ The report defined free association by the language used in General Assembly Resolution 1541 (XV).⁶²

⁵⁵ R. TRUMBULL, *PARADISE IN TRUST* 147–50 (1959). Later, as Micronesians began considering the history of the American presence in Micronesia they would note about this period: “Till recent years American officials commonly believed it was best that Micronesian people should continue to follow the way of life of their ancestors. This point of view had a sad irony for a large number of Micronesians who had to maintain such a way of life on islands strewn with unexploded bombs and other debris of the Second World War or in places to which they had been moved to permit testing of nuclear weapons in the vicinity of their traditional homes.” REPORT, *supra* note 2, at 12.

⁵⁶ H. NUFER, *supra* note 33, at 57–58.

⁵⁷ The Solomon Report did not fail to note the “necessity” of continued U.S. control over the region. Epstein, *Indigenous Attempts to Protect the Environment: A Pacific Island Case*, 17(2) J. ENVTL. SYSTEMS 131, 140 (1987–1988).

⁵⁸ *Id.* at 140–41.

⁵⁹ H. NUFER, *supra* note 33, at 128.

⁶⁰ N. MELLER, *THE CONGRESS OF MICRONESIA* 195–96 (1969).

⁶¹ REPORT, *supra* note 2, at 17. The final report, issued in 1969, considered three status options for Micronesia; independence, integration into the United States (e.g. commonwealth status or statehood), or free association. In compiling information for the document, the Commission held hearings throughout the territories and visited Guam, American Samoa, Nauru, Puerto Rico, and the American Virgin Islands to compare independent islands and American territories. The report criticized U.S. policies which had not helped to economically develop the TTPI and also noted the lack of progress towards replacing American personnel with Micronesians. REPORT, *supra* note 2, at 7.

⁶² *Id.* at 18. For discussion of free association, see generally, Broderick, *Associated Statehood — A New Form of Colonization*, 17 INT’L & COMP. L.Q. 368, 402 (1968).

The Micronesian Committee insisted that "the basic ownership of these islands rests with Micronesians . . . [as] does the basic responsibility for governing them."⁶³ The Committee members also recognized, however, that their islands were strategically important and were willing to allow the United States a measure of control over external military affairs in return for financial assistance.⁶⁴ Independence was listed as the Committee's second choice of political status after free association. The accompanying financial hardship of independence was the primary reason why this was not the Committee's top choice of political status.⁶⁵ The Committee's report also stated the need for a Micronesian Constitution. The Committee determined that "the essence of self-government [is] that the people governed be empowered to adopt and to amend [this] basic document of government."⁶⁶

C. The Fragmentation of the Trust Territory and the Drafting of a Palauan Constitution

In the 1970s, as political status negotiations continued, there was increasing political fragmentation among the TTPI districts.⁶⁷ Although the Congress of Micronesia pursued a status of free association for the entire region, the people of the Northern Mariana Islands sought a separate, more permanent relationship with the United States.⁶⁸ In 1975, the Northern Mariana Islands signed a Commonwealth agreement with the United States.⁶⁹ The division of the trust territory continued as each district sought to best protect their own particular interests.

In 1978, Palau rejected a constitution of the Federated States of Micronesia (FSM) in large part due to fear that Palauan resources would be alienated and used ineffectively if Palau joined the FSM.⁷⁰ Instead, Palau began framing its own constitution toward the end of 1978. The legislative history of this document has become critical to the resolution of some of the current legal controversies.

⁶³ REPORT, *supra* note 2, at 18.

⁶⁴ *Id.*

⁶⁵ *Id.* at 46. The Commission noted as an advantage of independence that "it would be easiest to persuade the United Nations to terminate the Trusteeship Agreement . . . [a] strong case would have to be made for any other alternative." *Id.* at 45.

⁶⁶ *Id.* at 42.

⁶⁷ HOUSE REPORT, *supra* note 18, at 2748-49.

⁶⁸ *Id.*

⁶⁹ *Id.*; Covenant, *supra* note 5.

⁷⁰ Epstein, *supra* note 57, at 146.

The Palauan Constitution contains several anti-nuclear provisions which have effectively prevented ratification of a Compact of Free Association. These provisions appear in articles II and XIII of the Constitution. Article XIII, section 6 states:

Harmful substances such as nuclear . . . weapons intended for use in warfare, nuclear power plants, and waste materials therefrom, shall not be used, tested, stored, or disposed of within the territorial jurisdiction of Palau without the express approval of *not less than three-fourths* . . . of the votes cast in a referendum submitted on this specific question.⁷¹

Article II, section 3 provides a similar requirement of a three-fourths majority to approve any agreement between the Republic of Palau and another sovereign nation "which authorities [sic] use, testing, storage or disposal of nuclear . . . weapons intended for use in warfare."⁷² These anti-nuclear constitutional provisions express the Palauan fear that their islands will once again become a battlefield as well as their knowledge of the fate of neighboring Marshall Islanders who suffered the nuclear "experiments" of the 1960s.⁷³ Because the United States seeks to use Palau as a military facility, these constitutional provisions conflict with Compact provisions allowing American vessels to transit Palauan jurisdiction.

IV. THE CURRENT CRISIS

A. *The Plebiscites and the Compact-Constitution Conflict*

Both the terms of the U.N. Charter and the Trusteeship Agreement require that the new political status of a trust territory be determined according to the "freely expressed" wishes of the people.⁷⁴ To date, the people of the Republic of Palau have voted in six plebiscites to determine their choice of political status.⁷⁵ Although a Compact has never received three-fourths of the vote, the Government of Palau and the United States administration have declared a Compact to be "approved" on several occasions. The Palauan traditional leader *Ibedul* Yutaka Gibbons and others who

⁷¹ PALAU CONST. art. XIII, § 6 (emphasis added).

⁷² *Id.* art. II, § 11.

⁷³ Epstein, *supra* note 57, at 146-47.

⁷⁴ Trusteeship Agreement, *supra* note 4, art. 6, para. 1; U.N. CHARTER art. 76.

⁷⁵ For a discussion of the use of plebiscites to exercise self-determination, see Hirayasu, *The Process of Self-Determination and Micronesia's Future Political Status*, 9 U. HAW. L. REV. 487, 501 (1987).

oppose the Compact have challenged these conclusions in a series of lawsuits.⁷⁶

In the first plebiscite on February 10, 1983, the ballot contained two separate questions. The first asked voters whether or not they approved the Compact, and the second asked them to specifically approve the entry of nuclear substances into Palau under the constitutional provision. Sixty-two percent of the voters approved of the Compact while fifty-three percent voted in favor of the separate nuclear question.⁷⁷ Based upon this return, the Palauan government and the United States administration declared the Compact approved.⁷⁸ This conclusion was challenged in *Gibbons v. Remeliik*.⁷⁹ In *Remeliik*, the trial division of the Palau Supreme Court held that the Compact had not been approved as required by the Constitution because of the failure to obtain three-fourths of the vote on the separate nuclear question.⁸⁰

A second plebiscite was held on September 4, 1984 and yielded sixty-seven percent in favor of the Compact.⁸¹ Following this failure, the Compact was amended to accommodate the language in the Palauan Constitution which forbids the use, testing, storage, and disposal of nuclear substances on Palau.⁸² The Senate report accompanying the revised Compact stated that the new version resolved any conflict between the Constitution and the United States' security responsibility.⁸³ Following these changes, a two-thirds majority of each house of the Palau National Congress, the *Olbiil Era Kelulau* approved the Compact. The third national plebiscite was held on February 21, 1986, and seventy-two percent of the population voted in favor of the revised Compact.⁸⁴ On February 25, President Salii declared that the Compact had been approved and certified the referendum results to American Ambassador Zeder who forwarded them to the American Congress for consideration.⁸⁵

⁷⁶ Clan leaders, such as the *Ibedul*, wield tremendous power on the islands even against elected representatives in the Congress of Palau. R. TRUMBULL, *supra* note 55, at 143.

⁷⁷ *Gibbons v. Salii*, No. 8-86, slip op. at 1, n.2 (Palau App. Div., Sept. 17, 1986).

⁷⁸ *Gibbons v. Remeliik*, Civ. No. 67-83 (Tr. Div. August, 1983).

⁷⁹ *Gibbons v. Salii*, slip op. at 1, n.2.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Compact, *supra* note 9.

⁸³ SENATE REPORT, *supra* note 12, at 6230-31.

⁸⁴ *Gibbons v. Salii*, slip op. at 2.

⁸⁵ *Id.*; Note, *Compacts of Free Association in the Trust Territory of the Pacific Islands: Plebiscite in the Republic of Palau*, 29 HARV. INT'L L.J. 149, 154, n.32 (1988). President Reagan informed the Congress by letter that: "On February 21, 1986, the Compact was approved by the

1. *Gibbons v. Salii*

On May 20, 1986, *Ibedul Gibbons* along with a number of other islanders filed *Gibbons v. Salii* to challenge the constitutionality of the Compact ratification. The *Gibbons* complaint alleged that Compact sections 312, 313, 324, and 331 concerning security and defense relations conflict with article II, section 3 and article XIII, section 6 of the Palauan Constitution.⁸⁶ The *Gibbons* plaintiffs alleged that these Compact provisions allow the United States, or nations designated by the United States, to bring nuclear substances, including nuclear weapons and nuclear propelled ships and aircraft, into Palauan territory without first obtaining seventy-five percent of the vote as required by the Constitution.⁸⁷

The Compact provision at the heart of the controversy is section 324 which provides:

the Government of Palau assures the Government of the United States that in carrying out its security and defense responsibilities under the Title, *the Government of the United States has the right to operate nuclear capable or nuclear propelled vessels and aircraft within the jurisdiction of Palau without either confirming or denying the presence or absence of such weapons within the jurisdiction of Palau.*⁸⁸

The *Gibbons* court considered whether the words “use” and “store” of article II and article XIII of the Palauan Constitution prohibit the activity the Compact describes.⁸⁹ After determining that the Constitution was ambiguous on these questions, the court looked to the legislative history of the Constitution. The court’s lengthy examination of this history provides a clear view of the tension between Palauan legislators and the American representatives.

The Standing Committee Report of the Palau Constitutional Convention sets forth the purpose of the anti-nuclear provisions of the Constitution:

The Committee felt that the environment of [Palau] . . . is a public trust of which all citizens, living and yet unborn, are beneficiaries. As a trustee, [Palau] is obligated to act in a manner best calculated to assure the protection of the air, water, and

Palauan people . . . I urge the Congress to approve the Compact of Free Association for Palau.” SENATE REPORT, *supra* note 12, at 6237–38.

⁸⁶ *Gibbons v. Salii*, slip op. at 2–3.

⁸⁷ *Id.*

⁸⁸ Compact, *supra* note 9, § 324 (emphasis added).

⁸⁹ *Gibbons v. Salii*, slip op. at 7–9.

other natural resources from pollution, impairment, or destruction

The Committee . . . felt that harmful substances should be specifically prohibited, unless the people decide otherwise in a referendum The intent of this Proposal [No. 91] is to prevent the introduction of harmful substances, including but not limited to radioactive materials . . . into [Palau] unless approved by three-quarters of the registered voters in a referendum submitted on the specific question.⁹⁰

During the Constitutional Convention, American Ambassador Peter Rosenblatt sent a cable to the Convention regarding the proposal: "As drafted proposal 91 might effectively prevent U.S. warships and aircraft from transiting Palau either in time of peace or war. We urge that this proposal be dropped Unless deleted or amended, the proposed language would create problems of the utmost gravity for the U.S."⁹¹ The Convention refused to amend the proposal and it was adopted into the Palau Constitution as article XIII, section six.⁹² The Convention also inserted almost identical language into Proposal 364 relating to international agreements. Proposal 364 was adopted as article II, section three of the Constitution.⁹³

The first constitutional plebiscite took place July 9, 1979. Ninety-two percent of voters approved the draft Constitution.⁹⁴ However, concern that negative American reaction to the Constitution would upset the Compact negotiations led to the repeal of the Palauan Constitutional Convention's enabling legislation.⁹⁵ The repeal effectively nullified the returns of the first constitutional plebiscite.⁹⁶ The Palau Constitutional Drafting Commission then undertook to "reconcile, void and eliminate any conflicting inconsistencies or incompatibilities" between the Constitution and the proposed free association agreement.⁹⁷ The Drafting Commission proposed changes to article XIII, section 6 that allowed American nuclear vessels and aircraft to transit Palauan waters without requiring the three-fourths voter approval. Changes to article II, section 3 also included the removal of the three-fourths majority

⁹⁰ *Id.* at 10.

⁹¹ *Id.* at 12.

⁹² *Id.*

⁹³ *Id.* at 13.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 13-14.

requirement as well as a reduction in the majority of votes needed in each house of the legislature.

A referendum on the new version of the Constitution took place on October 23, 1979 and obtained only thirty-one percent of the vote.⁹⁸ A telex to Ambassador Rosenblatt from Mr. Roman Tmetuchl, Chairman of the Palau Political Status Commission stated:

The revised Constitution of Palau, which was defeated at referendum on October 23, accommodated free association. The revisions were proposed to give the people of Palau an opportunity to choose between a Constitution compatible with the draft compact of free association and a Constitution declared incompatible with the compact by the United States government in its policy statement of April 30, 1979. By rejecting the revised Constitution, the people have spoken clearly in expressing their support of a Constitution which prohibits transit of American warships through Palauan waters and use of Palauan land by American military units.⁹⁹

Following the defeat of the revised version of the Constitution, the Palauan legislature reinstated the language of the first draft. This document was approved by seventy-eight percent of the voters in a plebiscite on July 9, 1980.¹⁰⁰

After examining this telling legislative history, the *Gibbons* court concluded that the public debate on the Constitution was "based upon the assumption that both article XIII, section 6 and article II, section 3 circumscribed the right of the Republic of Palau to authorize United States warships to transit Palau[n] waters."¹⁰¹ The court held that the nuclear control provisions of article XIII and article II apply to any international agreement which is entered into by Palau¹⁰² and that the words "use" and "store" cannot be construed so narrowly as to allow nuclear vessels to transit Palauan waters.¹⁰³

⁹⁸ *Id.* at 15-16.

⁹⁹ *Id.* at 16.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 20.

¹⁰² *Id.* at 21.

¹⁰³ *Id.* at 22. As a subsidiary issue, the *Gibbons* decision considered the constitutionality of the Compact provisions which give the United States the right to take Palauan land. Article XIII, section 7 of the Palauan Constitution prohibits the taking of property by eminent domain for "the benefit of a foreign entity." Section 322 of the Compact gives the United States the right to "establish and use defense sites in Palau . . . [and] designate for this purpose land and water areas and improvements which shall come into force simultaneous with this Compact." The Palauan government must deliver the land within sixty days of the request. The *Gibbons* court did not hold that section 322(b) of the Compact was unconstitu-

2. The Political and Economic Crisis

After the *Gibbons* decision and prior to the fourth plebiscite, the Palauan government stepped up the campaign of political education about the Compact. The means and tactics used in this "education" campaign have been arguably one-sided. As will be shown below, the Palauan government's interest in approving the Compact is primarily economic.

Several government actions were noted by the United Nations visiting mission as evidence of possible coercion.¹⁰⁴ On November 17, 1986, two weeks before the fourth plebiscite, the Palauan Minister of Social Services issued a memorandum to the directors of all government bureaux. The document stated that all government personnel were expected to campaign vigorously for the Compact and that those choosing "to campaign otherwise shall be reported to me [Nobuo Swei, Minister] at once It is no longer tolerable for civil service employees to oppose the system while remaining in it and enjoying all the benefits due dedicated employees."¹⁰⁵ This memorandum was later tempered by a letter from the Minister of State to all government employees informing them that they were free to vote as they wished without fear of retaliation.¹⁰⁶ The vote of the fourth plebiscite showed sixty-five percent of voters in favor of the Compact. On June 30, 1987, a fifth plebiscite was held which showed sixty-seven percent of the vote in favor of the Compact.

At this time, economic difficulties became paramount.¹⁰⁷ Immediately following the June 30 plebiscite, President Sali

tional on its face. The court did note, however, that there is a constitutional threat inherent in the provision. *Id.* at 31-36.

¹⁰⁴ *Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, August 1987*, U.N. TCOR Supp. (No. 3), U.N. Doc. T/1920 at 3 (1987) [hereinafter August U.N. Mission Report].

¹⁰⁵ *Id.* at 31.

¹⁰⁶ *Id.* at 33.

¹⁰⁷ The severe economic problems confronting Palau appear to be caused by the Palauan government's mismanagement of funds and also by political corruption. In 1981, President Sali began negotiations with a British corporation, International Power Systems Co. Ltd. (IPSECO) to build a large power plant in Palau. The plant was eventually built and financed by a consortium of international banks. There is strong evidence that Sali and several other top Palauan officials accepted bribes totalling \$975,000 from the contractor who eventually built the plant. To date, the power plant sits idle, IPSECO is bankrupt, and the banks have won a judgment against Palau in the U.S. District Court for the Southern District of New York to pay the thirty-two million dollar debt. CONG. Q., (March 18, 1989) at 875-76; *See Morgan Guaranty Trust v. Republic of Palau*, 680 F.Supp. 99 (S.D.N.Y. 1988).

nounced the furlough of two-thirds of all government employees.¹⁰⁸ This action had an immediate effect upon the population because a large proportion of all workers are employed by the state.¹⁰⁹ President Salii cited extreme financial difficulties as the reason for the furlough.¹¹⁰ The nearly 1,000 furloughed workers began what can be characterized as a reign of terror against the constitutional activists. The unemployed workers perceived the activist minority as the cause of all financial difficulty on Palau since they had effectively blocked the Compact approval.¹¹¹ Demonstrations, death threats, and fire bombings were directed against the proponents of the Constitution.¹¹²

3. The Constitutional Amendment

Facing crisis, the Palauan government sought a new means of ratifying the Compact without the necessary three-quarters vote. A constitutional amendment was proposed. On July 19, 1987, the *Olbiil Era Kelulau* passed RPPL 2-30 which provided that "for purposes of avoiding inconsistencies between the Compact . . . and the Constitution . . . [the nuclear control provisions of the Constitution] shall not apply to the Compact . . ."¹¹³ On August 4, 1987, the proposed constitutional amendment was approved by seventy percent of the voters in a national referendum.¹¹⁴

The sixth Compact referendum was held on August 21 and secured seventy-three percent of the vote, which pursuant to the "amended" Constitution, was sufficient to approve the Compact.¹¹⁵ This conclusion was immediately challenged in the suit *Merep v. Salii*.¹¹⁶ The *Merep* plaintiffs alleged that the amendment process

¹⁰⁸ August U.N. Mission Report, *supra* note 104, at 3.

¹⁰⁹ As of 1977, the government economy employed 75% of all wage-earners. Epstein, *supra* note 57, at 144.

¹¹⁰ August U.N. Mission Report, *supra* note 104, at 3.

¹¹¹ *Id.*

¹¹² Briefing Paper, *supra* note 24, at 4.

¹¹³ The proposed amendment goes on to provide that if the amendment is approved by a majority vote in an August 4 referendum, a referendum on the Compact will be held on August 21, 1987. *Fritz v. Salii*, No. 161-87 slip op. at 3 (Sup. Ct. of Palau, Trial Div., Mar. 22, 1988).

¹¹⁴ *Fritz v. Salii*, slip op. at 5.

¹¹⁵ *Id.*

¹¹⁶ *Merep v. Salii*, No. 139-87 (Sup. Ct. of Palau, Trial Div., Aug. 18, 1987).

did not follow the correct constitutional procedure and was therefore void.¹¹⁷

Violence in Palau continued to escalate. On August 25, Mamora Nakamura, Chief Justice of the Palau Supreme Court, recused himself from the *Merep* case because of death threats against himself and his family.¹¹⁸ On August 29, in response to the growing violence, *Ibedul* Gibbons announced the signing of a Memorandum of Understanding with President Salii which included the stipulation that the *Merep* suit be dropped.¹¹⁹

On August 31, busloads of Palauan women arrived at the courthouse to refile the suit, now named *Ngirmang v. Salii*.¹²⁰ Leading plaintiffs, Gloria Gibbons and Gabriela Ngirmang, asserted that they would stand up for their rights even if others could not.¹²¹ On September 7, the night before a hearing on the government's motion to dismiss, Bedor Bins, father of one of the plaintiffs and of lawyer Roman Bedor, was assassinated.¹²²

On September 9, the plaintiffs withdrew their case. The trial court Judge Robert Hefner noted at the time of the withdrawal: "There are indications in the record and in the proceedings in this matter that the Dismissal signed by the Plaintiffs may not be voluntary. There are indications that the Dismissal was brought about by intimidation through the use of violence."¹²³

On March 31, 1988, after securing counsel from the Center for Constitutional Rights in New York, the Palauan women filed a Motion to Set Aside the Dismissal. In granting the motion, the judge noted that the "previous dismissal was neither voluntary nor of their own free will, but, to the contrary was procured by violence, intimidation and threats . . . so intense and pervasive as to vitiate the consent."¹²⁴

¹¹⁷ *Id.*

¹¹⁸ A replacement, Robert Hefner, Chief Judge of the Commonwealth Court of the Northern Mariana Islands, heard the case. Stark, *Palau — A challenge to the Rule of Law in Micronesia*, 62 AUST. L.J. 564 (1987).

¹¹⁹ *Fritz v. Salii*, slip op. at 11.

¹²⁰ It is not coincidental that the suit was pressed by women. The matrilineal birth line in Palau affords elder women of noble lineage great respect and deference. The authority and strength of Palauan women has become important in the current crisis in Palau. H. BARNETT, *supra* note 3, at 18–20.

¹²¹ Ngirmang's house was fire-bombed shortly after the suit was filed. *Ngirmang v. Salii*, Memorandum of Law in Support of Plaintiff's Motion to Set Aside Stipulated Dismissal, Civil Action 161–87, at 2–3 (on file at Boston College Third World Law Journal Office).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Plaintiff Rafaela Sumang describes the events leading up to the withdrawal of the

4. *Fritz v. Sali*

The suit, now captioned *Fritz v. Sali*, was heard by the trial division of the Palau Supreme Court to determine the constitutionality of the amendment procedure.¹²⁵ In addressing the plaintiffs' arguments, the decision by Judge Hefner details the two amendment procedures in the Palauan Constitution. Under article XIV, entitled Amendments, a proposed amendment must be adopted by not less than three-quarters of each house of the *Olbiil Era Kelulau* and must be approved by a majority of the voters in not less than three-fourths of the states in the next general election.¹²⁶ The government defendants in *Fritz* conceded that this lengthy procedure was not followed.¹²⁷

Instead, the government defendants relied upon article XV, section 11. This provision, entitled "Transition," specifically addresses amendments made necessary to avoid inconsistency with the Compact.¹²⁸ Article XV does not specify the procedure for the proposal of an amendment or the timing of a referendum as does article XIV.¹²⁹ It provides only that an amendment be approved by a majority of the votes in three-fourths of the states.¹³⁰ The government argued that since the amendment was to avoid inconsistency with the Compact, the lesser standards of article XV were justly utilized.¹³¹

Judge Hefner found that the use of article XV procedures was improper because no "inconsistency" between the Compact and the Constitution existed.¹³² The nuclear control provisions provide a means by which nuclear materials can enter Palau — a three-quarters majority vote; therefore, both the Compact and the Constitu-

suit: "I saw organized groups of furloughed government workers marching on foot or driving in cars and trucks to the court. One of the vehicles was a van wrapped in black cloth that was parked at the court. Written on the front of the van was '73% Majority Give Us Justice' on the passenger side, it said 'Black September Rest in Peace.'" *Ngirmang v. Sali*, Affidavit of Rafaela Sumang, (on file at Boston College Third World Law Journal Office).

¹²⁵ *Fritz v. Sali*, No. 161-87 slip op. at 3 (Sup. Ct. of Palau, Trial Div., Mar. 22, 1988).

¹²⁶ Article XIV provides that amendments can be proposed by a Constitutional Convention, popular initiative (petition signed by 25% of voters) or by a resolution adopted by not less than three-fourths of the members of each house of the *Olbiil Era Kelulau* Article XIV (b)(c). PALAU CONST., art. XIV; art. XV.

¹²⁷ *Fritz v. Sali*, slip op. at 18.

¹²⁸ *Id.*

¹²⁹ *Id.* at 17-18.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 28.

tion can stand at the same time and are not per se inconsistent.¹³³ The trial court also ruled that the article XV provisions were subsidiary to the more specific article XIV provisions and therefore subject to them.¹³⁴ This finding was based upon the language of article XIV that prescribes the more specific procedure for an amendment to the Constitution without excepting the article XV amendments.¹³⁵ The judge stated that the framers of the Palauan Constitution inserted the high standards and requirements into article XIV “[i]n order to provide stability to the Constitution and to ascertain that there is sufficient support for any amendment proposed”¹³⁶ Article XIV provides no exception to these exacting procedures.¹³⁷ Judge Hefner’s decision not only nullified the results of the referendum but his finding of consistency between the Compact and the Constitution ruled out the possible future use of article XV to amend the Constitution.¹³⁸

The lower court decision was appealed. The appellate division of the Palauan Supreme Court confirmed the lower court’s ruling that article XV is subject to the more specific provisions of article XIV and cannot be read by itself.¹³⁹ The appellate justices, however, did not agree with the finding that the Compact and Constitution were “consistent.”¹⁴⁰ Instead, they concluded that because the Constitution prohibits nuclear substances absent a seventy-five percent majority, a percentage they characterized as “well nigh impossible,” it cannot stand alongside the Compact.¹⁴¹ The appellate court’s ruling allows the use of article XV for the purpose of amending the nuclear provisions of the Constitution. The appellate court decision leaves open the door to amend the Constitution, using article XV procedures at any time.¹⁴² The nuclear control provisions of the Palauan Constitution may soon be amended so that the current Compact which allows nuclear substances into Palau can be approved by a simple majority of voters.¹⁴³

¹³³ *Id.* at 28–29.

¹³⁴ *Id.* at 23.

¹³⁵ *Id.* at 24.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 29–30; Fritz v. Salii, No. 161–87 slip op. at 13 (Sup. Ct. of Palau, Appellate Div., Aug. 8, 1988) [hereinafter Fritz II].

¹³⁹ Fritz II at 25–26.

¹⁴⁰ *Id.* at 13.

¹⁴¹ *Id.* at 3.

¹⁴² *Id.* at 17.

¹⁴³ The OEK has recently passed enabling legislation for a seventh plebiscite to occur in

B. U.S. Congressional Action

The terms of the Compact require American congressional approval in the form of a joint resolution.¹⁴⁴ On March 8, 1989, Congressman Ron de Lugo, along with sixty-three Republican and Democratic co-sponsors, introduced House Joint Resolution 175.¹⁴⁵ This bill amends the Compact by providing additional funding for law enforcement, medical facilities, and a special prosecutor and auditor for Palau.¹⁴⁶ The bill also provides funds to settle Palau's large debt for a failed power plant project.¹⁴⁷ Congress views the measure as a favorable compromise between Palau and the United States, and, despite concern about the past violence in Palau, has passed the legislation.¹⁴⁸

V. THE FUNCTION OF THE UNITED NATIONS IN DETERMINING THE POLITICAL STATUS OF PALAU

A. *The Role of the Security Council*

Now that Congress has approved the Compact and once it is ratified by a constitutional majority of the Palauan people, the issue of formal termination of the Trusteeship Agreement under the U.N. Charter must be addressed.¹⁴⁹ Because the TTPI is the sole strategic trusteeship, the process of U.N. termination is without precedent. The usual process for termination of a trusteeship agreement is that a recommendation from the Trusteeship Council is forwarded to the General Assembly for a formal resolution.¹⁵⁰

Because the TTPI is a strategic trusteeship, however, the role of the General Assembly has been replaced by the Security Council. The controlling provision of the U.N. Charter is article 83 which

early 1990. BELAU UPDATE NEWSL. Nov. 27, 1989 (on file at Boston College Third World Law Journal Office).

¹⁴⁴ Compact, *supra* note 9, § 101 (d)(1)(B); § 411.

¹⁴⁵ H.J. Res. 175, 101st Cong. 1st Sess., 135 CONG. REC. E689 (daily ed. Mar. 8, 1989).

¹⁴⁶ *Id.*

¹⁴⁷ See *supra* note 107.

¹⁴⁸ See CONG. Q. (daily ed. June 10, 1989) at 1421; CONG. Q. (daily ed. Nov. 4, 1989) at 297; BELAU UPDATE NEWSL., *supra* note 143.

¹⁴⁹ The lack of congressional concern over the necessary approval of the U.N. in terminating the trusteeship is demonstrated by the lack of mention of the role of the U.N. in the congressional debates and such statements in the Congressional Quarterly as: "Once Palau ratifies the compact it will cease to be a U.N. trusteeship under the paternal administration of the United States." CONG. Q. (daily ed. Aug. 19, 1989) at 2184-85.

¹⁵⁰ Clarke Letter, *supra* note 13, at 929.

states: "All 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."¹⁵¹

At the time the Trusteeship Agreement was drafted, the American negotiators made clear that approval by the Security Council was necessary before termination of the trusteeship.¹⁵² Ambassador Warren Austin, United States representative to the Security Council, stated that the Trusteeship Agreement "is in the nature of a bilateral agreement between the United States . . . and the Security Council . . . [and] no amendment or *termination* can take place without the approval of the Security Council."¹⁵³

This position has been continuously affirmed. In February 1986, the British representative to the U.N. Visiting Mission to Observe the Plebiscite in Palau stated in response to allegations that the United States might circumvent the Security Council: "It is simply not true that there is any attempt to bypass the Security Council. The United Nations mission has made it clear both to political leaders and at public meetings that the termination of the trusteeship will have to be decided by the Security Council."¹⁵⁴

The Security Council has delegated to the Trusteeship Council the authority to inquire into the conditions of the TTPI and the Trusteeship Council submits an annual report to the Security Council.¹⁵⁵ The Trusteeship Council has sent teams of observers and submitted reports on the TTPI since the Trusteeship began. In May 1986, the Trusteeship Council passed resolution 2183 (LIII) which states:

[The Trusteeship Council,]

Conscious of the responsibility of the Security Council in respect of the strategic areas as set out in [a]rticle 83, para. 1 of the Charter,

1. *Notes* that the peoples of the Northern Mariana Islands, the Marshall Islands, the Federated States of Micronesia, and Palau have freely exercised their right to self-determination in plebiscites observed by the visiting missions of the Trusteeship Coun-

¹⁵¹ U.N. CHARTER art. 83, para.1 (emphasis added). This language is identical to that of article 85 relating to trusteeship agreements for non-strategic trust territories except that the role of the Security Council is replaced by the General Assembly. U.N. CHARTER art. 85, para. 1.

¹⁵² Clarke Letter, *supra* note 13, at 931-32.

¹⁵³ *Id.*; 2 U.N. SCOR (23rd mtg.) at 475-76 (1947) (emphasis added).

¹⁵⁴ Clarke Letter, *supra* note 13, at 931.

¹⁵⁵ HOUSE REPORT, *supra* note 18, at 2929.

cil and have chosen free association with the United States of America¹⁵⁶

The Trusteeship Council goes on to say that it “[c]onsiders that the Government of the United States has satisfactorily discharged its obligations under the terms of the Trusteeship Agreement and that it is appropriate for that Agreement to be terminated”¹⁵⁷ The final portion of the resolution requests that the Secretary General circulate the resolution to the Security Council for consideration.¹⁵⁸

Although this Trusteeship Council resolution is without force and clearly contemplates the role of the Security Council in terminating the trusteeship, recent events suggest that the United States may seek to bypass the Security Council.¹⁵⁹ The most likely reason for a decision to avoid the Security Council would be fear of a Soviet veto. The likelihood of a veto is great, not only because of the Soviet propensity for exercising the veto but also because the USSR has consistently voiced opposition to the United States’ policy towards the TTPI.¹⁶⁰

Recent actions *vis a vis* the other three TTPI districts provide the best evidence of the United States’ intent to unilaterally terminate the Trusteeship Agreement. Because the other three districts have already approved separate agreements with the United States, they are one step beyond Palau in the process of termination. On October 24, 1986, the U.N. Secretary General circulated a letter from the United States Permanent Representative.¹⁶¹ The letter referred to Trusteeship Council Resolution 2183 (LIII) and informed the Secretary General that:

. . . as a consequence of consultations held between the United States Government and the Government of the Marshall Islands, agreement was reached that 21 October [1986] is the date upon which the Compact of Free Association with the Marshall

¹⁵⁶ T.C. Res. 2183(L111), 53 U.N. TCOR Supp. (No. 3) at 14, U.N. DOC. T/1901 (1986).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; This resolution is without force and is believed by some to be evidence that the Trusteeship Council members are unwilling or unable to hold the U.S. accountable to the Trusteeship Agreement. UNITED METHODIST OFFICE FOR THE UNITED NATIONS NEWSL., Spring 1988, at 2–3 (on file at Boston College Third World Law Journal Office); The current members of the Trusteeship Council are China, France, USSR, UK, and USA. The voting procedure in the Council is one member, one vote. All decisions are made by a majority vote. *Id.*; U.N. CHARTER art. 86.

¹⁵⁹ Clarke Letter, *supra* note 13, at 929. For a description of the functions of Trusteeship Council see chapters XII and XIII of the U.N. Charter.

¹⁶⁰ HOUSE REPORT, *supra* note 18, at 2930.

¹⁶¹ Clarke Letter, *supra* note 13, at 929; U.N. Doc. S/18424 (1986).

Islands enters into force. Furthermore, I am pleased to inform you that the Compact of Free Association with the Federated States of Micronesia and the Commonwealth Covenant with the Northern Mariana Islands will enter into force on 3 November 1986.¹⁶²

The letter further stated that the Secretary General would be informed "of arrangements for entry into force of the Compact of Free Association with Palau once accord had been reached on the effective date of that agreement."¹⁶³ The letter refers only to the "entry into force" of the Compact and not the termination of the Trusteeship Agreement.¹⁶⁴

On November 3, 1986, however, President Reagan issued Proclamation 5564 "Placing into Full Force and Effect the Covenant with the Commonwealth of the Northern Mariana Islands, and the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands."¹⁶⁵ This document states that the United States has fulfilled its obligations under the Trusteeship Agreement with respect to these three TTPI districts.¹⁶⁶ Although released in November 1986, this document was not sent to the United Nations until April 14, 1987.¹⁶⁷ When the document was delivered to the United Nations on it was noted that "in compliance with Presidential proclamation [5564] . . . this is the final report of the United States of America to the Trusteeship Council . . ." with respect to the three TTPI districts.¹⁶⁸

If the United States should act unilaterally, as these actions suggest, it will likely draw the criticism of the international community. Most commentators agree that the consent of the United Nations is necessary for termination of the trusteeship.¹⁶⁹ The Australian commentator Geoffrey Marston, writing in 1969, on termination of trusteeship stated:

. . . all the trusteeship agreements were instruments concluded between the Administering Authority on the one hand and the United Nations Organization through its appropriate organ on

¹⁶² Clarke Letter, *supra* note 13, at 929.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 930. See Presidential Proclamation No. 5564, Nov. 3, 1986, 51 Fed. Reg. 40,399 (1986).

¹⁶⁶ Clarke Letter, *supra* note 13, at 930.

¹⁶⁷ *Id.*; U.N. Doc. T/1909 (1987).

¹⁶⁸ *Id.*

¹⁶⁹ Marston, *supra* note 14, at 31; Clarke letter, *supra* note 13; de Lugo Statement, *supra* note 8, at H3223.

the other. They have, therefore, a consensual basis They are drafted in the format of international treaties, they have been recorded in the United Nations Treaty Series and it has never been maintained by the States that they are other than what they purport to be, namely, instruments governed by the rules of international law.¹⁷⁰

Marston details the form of consent necessary for the termination of the trusteeship agreements. He maintains that the form of consent is governed by the specific provisions of the U.N. Charter under which the agreements were made. Thus, a General Assembly resolution agreeing to termination would have to be by a two-thirds majority of the Members present and voting according to article 19 of the Charter. This has been the practice with the termination of all of the trusteeship agreements.¹⁷¹ Likewise, termination of the strategic trusteeship calls for an affirmative vote of nine Members of the Security Council, including the concurring votes of the permanent members, as prescribed by Article 27 (3) of the Charter.¹⁷²

B. *International Court of Justice Precedent*

Trusteeship Agreements and their predecessors, the League of Nations Mandates, have consistently been interpreted by the International Court of Justice (ICJ) as treaties, and as such require a consensual basis for termination.¹⁷³ An analogy to the action of the Union of South Africa towards South West Africa (Namibia) has been frequently drawn to determine the legality of unilateral termination. Prior to World War II, South West Africa was a mandate held by the Union of South Africa under the League of Nations. At the close of the war, the Union of South Africa refused to place the territory under the newly created International Trusteeship System. Instead, South Africa attempted to incorporate the territory as an integral part of the Union of South Africa.¹⁷⁴ The ICJ, in the *International Status of South West Africa*¹⁷⁵ case, unanimously held that "the Union of South Africa acting alone does not possess the com-

¹⁷⁰ Marston, *supra* note 14, at 11.

¹⁷¹ Macdonald, *supra* note 52, at 255; Opinion of the Legal Council of the United Nations to the Trusteeship Council, 29 U.N. GAOR, Supp. (No. 4) 23, U.N. Doc. A/9604 (1974), reprinted in [1974] U.N. JUR. Y.B. 181.

¹⁷² Marston, *supra* note 14, at 13.

¹⁷³ *Id.* at 11; The International Status of South-West Africa Cases, [1950] I.C.J. Reports 128, 158.

¹⁷⁴ [1950] I.C.J. Reports 128, 134–36.

¹⁷⁵ [1950] I.C.J. Reports 128.

petence to modify the international status of the territory of South West Africa.”¹⁷⁶ In a separate opinion, Judge McNair stated in this case that “there can be no doubt that the Mandate, which embodies international obligations, belongs to the category of treaty or convention.”¹⁷⁷

Members of the ICJ have specifically addressed the question of whether trusteeship agreements are treaties. In the *Case Concerning the Northern Cameroons*, the ICJ proceeded on the basis that the trusteeship agreements were subject to the law of treaties.¹⁷⁸ Judge Fitzmaurice stated in a separate opinion:

. . . the Trust Agreement was concluded by . . . a resolution of the United Nations Assembly, and it has been common ground throughout the present case that the sole entities formerly parties to it were the Administering Authority [U.K.] on the one hand, and the United Nations represented by the General Assembly on the other¹⁷⁹

With this precedent in the ICJ and the risk of unfavorable international criticism, the United States must closely consider the wisdom of sidestepping the process for formal termination.

C. *An Analysis of the Trusteeship Using the Criteria Established by the United Nations Charter and General Assembly Resolution 1541*

If the issue of termination comes before the Security Council, and assuming *arguendo* that the Soviet Union does not immediately veto the proposition, the merits of the Compact will be closely reviewed. The basic objectives of the International Trusteeship System embodied in article 76 of the Charter will likely guide the Security Council’s consideration. Thus, the question of whether the United States has helped to “promote the political, economic, social, and educational advancement of the trust territories towards self-government or independence . . .” will be paramount.¹⁸⁰ The success of the United States towards achieving these goals is mixed.

The Charter charges the administering authority with political development. The judicial and political battles waged in Palau’s courts and legislature are ironically the best evidence that this

¹⁷⁶ *Id.* at 144; Macdonald, *supra* note 52, at 259–60.

¹⁷⁷ [1950] I.C.J. Reports 128, 158.

¹⁷⁸ *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom) Preliminary Objections* [1963] I.C.J. Reports 15; Marston, *supra* note 14, at 11.

¹⁷⁹ [1963] I.C.J. Reports 15, 113; Macdonald, *supra* note 52, at 257.

¹⁸⁰ U.N. CHARTER art. 76.

Charter goal has been met. The formation of the Congress of Micronesia and the funding and encouragement of Micronesian representatives to consider political status demonstrates an American commitment to the principal of self-determination. The reality of the United States' actions, however, belies this encouragement. The failure to respect the decisions of Palauan legislators and judges who have sought to protect Palau's Constitution demonstrates the value which the United States has placed upon the Palauan democracy which it originally fostered.

The Charter also charges the administering authority with economic development. As noted above, the economic pressure in Palau is immense. Critics have made the allegation that the United States has purposefully kept the islands at a level of subsistence so as to rob them of the power of true self-determination. This assertion is also common among the islanders themselves. As Representative Santos Olikong, speaker of the Palau National Congress, recently stated to the Trusteeship Council:

The [United States] has used its position as Palau's major source of funding to put great pressure on Palau to enter into free association. The Compact is held up to our people as the only solution to our financial problems.

[T]he [United States] is eager for Palau to enter into free association so that [its] past failure to meet its obligations under the Trusteeship Agreement will become moot and no longer subject to scrutiny.¹⁸¹

The failure of the United States to lift the Palauan economy above the subsistence level is particularly serious as the islands were self-sufficient under their Japanese administrators.¹⁸²

In addition to Charter provisions, the Security Council may also look to Resolution 1541 (XV), as it contains specific guidance on free association. The core principles of Resolution 1541 require that a freely associated state 1) maintain the right to determine its internal constitution; 2) be allowed to choose its political status freely without compulsion; and 3) retain the right to become independent at a later time.¹⁸³

Palau has clearly exercised its right to determine an internal constitution. Despite efforts to circumvent the protections of the

¹⁸¹ U.N. Doc.T/PV. 1650 (May 12, 1988).

¹⁸² This economic development, however, did not always benefit the Micronesians who worked long days for the benefit of foreign interests. Hirayasu, *supra* note 75, at 490.

¹⁸³ See *infra* note 52 and accompanying text.

Constitution, Palau's judiciary has carefully protected this document.¹⁸⁴ The decision of the appellate division of the Palau Supreme Court in *Fritz v. Salii* is a possible inroad into the protections of the Constitution. It is unlikely, however, that the Security Council would find fault with the basic protections within the Constitution or the integrity of the document.

Resolution 1541 also states that free association "should be the result of a free and voluntary choice by the peoples of the territory concerned through informed and democratic processes."¹⁸⁵ The allegations of coercion and the threats towards opponents of the Compact raise serious questions about the voluntary choice afforded the Palauan population. However, the Trusteeship Council has sanctioned each plebiscite despite evidence of government pressure.¹⁸⁶

Resolution 1541 also dictates that a freely associated state must maintain the right to choose independence should it so desire. While provisions exist for the unilateral termination of the Compact by Palau, there are important exceptions to this provision.¹⁸⁷ Section 311 pertaining to Security and Defense Relations cannot be terminated unilaterally by Palau.¹⁸⁸ This section of the Compact gives the United States the right to deny the territorial jurisdiction of Palau to all other military forces in perpetuity.¹⁸⁹ As these defense provisions are the core of the Compact, it seems clear that Palau has not been granted the "freedom to modify the status" of free association.

While this discussion has primarily addressed the Palauan situation, the United States will probably not attempt to terminate the TTPI piecemeal.¹⁹⁰ A discussion of the merits of each TTPI district agreement is beyond the scope of this paper. There is serious doubt, however, as to whether the acquisition of the Northern Mariana Islands as sovereign United States territory under the commonwealth agreement will be acceptable.¹⁹¹

¹⁸⁴ See *infra* notes 69 to 142 and accompanying text.

¹⁸⁵ G.A. Res. 1541, *supra* note 49.

¹⁸⁶ August U.N. Mission Report, *supra* note 104, at 3.

¹⁸⁷ Compact, *supra* note 9, art. IV; art. V.

¹⁸⁸ *Id.*

¹⁸⁹ de Lugo Statement, *supra* note 8, at H3203.

¹⁹⁰ HOUSE REPORT, *supra* note 18, at 2930.

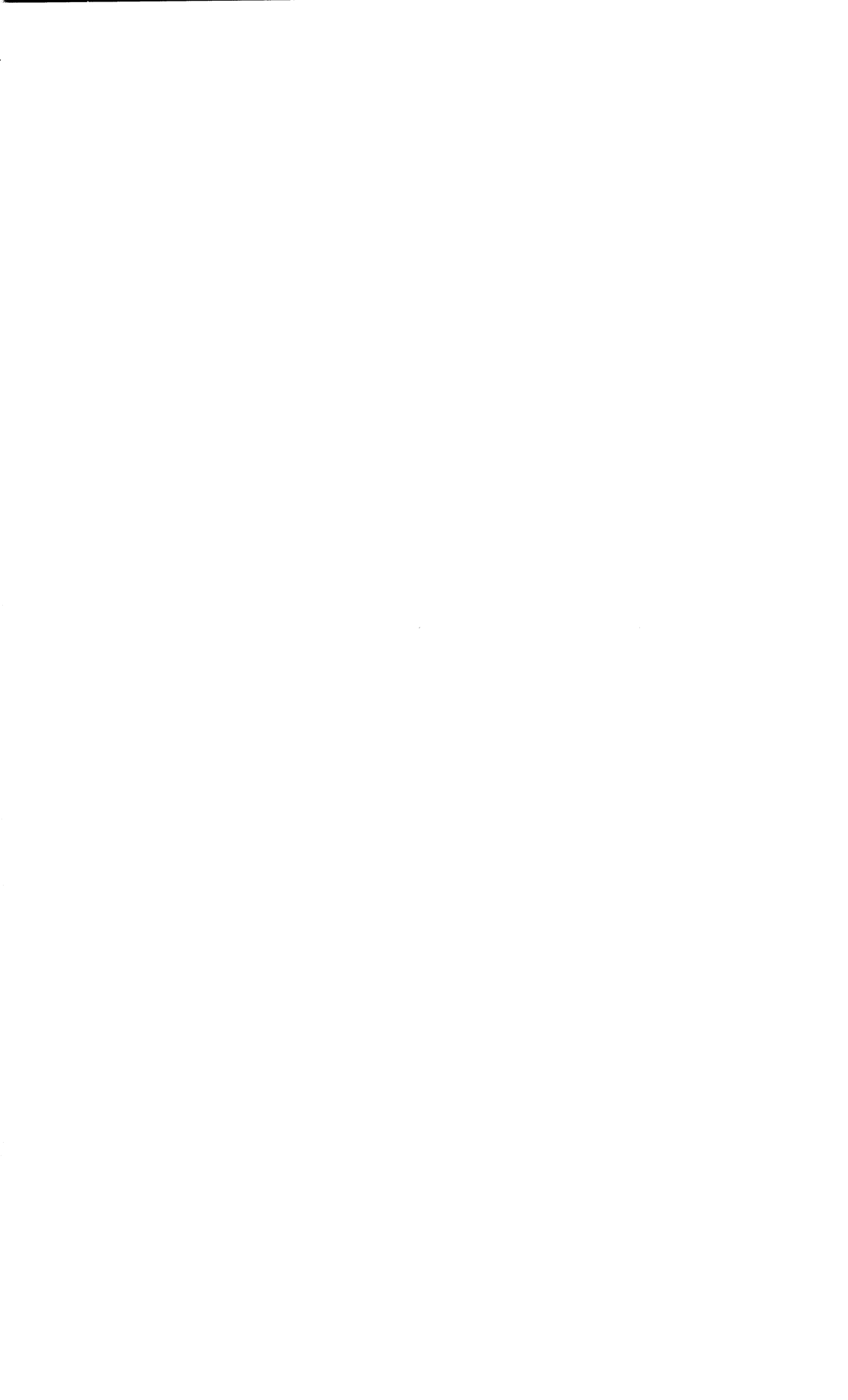
¹⁹¹ *Id.* Some commentators, however, do not see that the commonwealth status of the Northern Mariana Islands should impede U.N. approval. See Hirayasu, *supra* note 75, at 515-17.

If, however, the Security Council were to judge the Pacific Trusteeship by the criteria of the United Nations Charter and General Assembly Resolution 1541, it appears unlikely that the Security Council would sanction termination of the trusteeship under the terms of the current Compact for Palau.

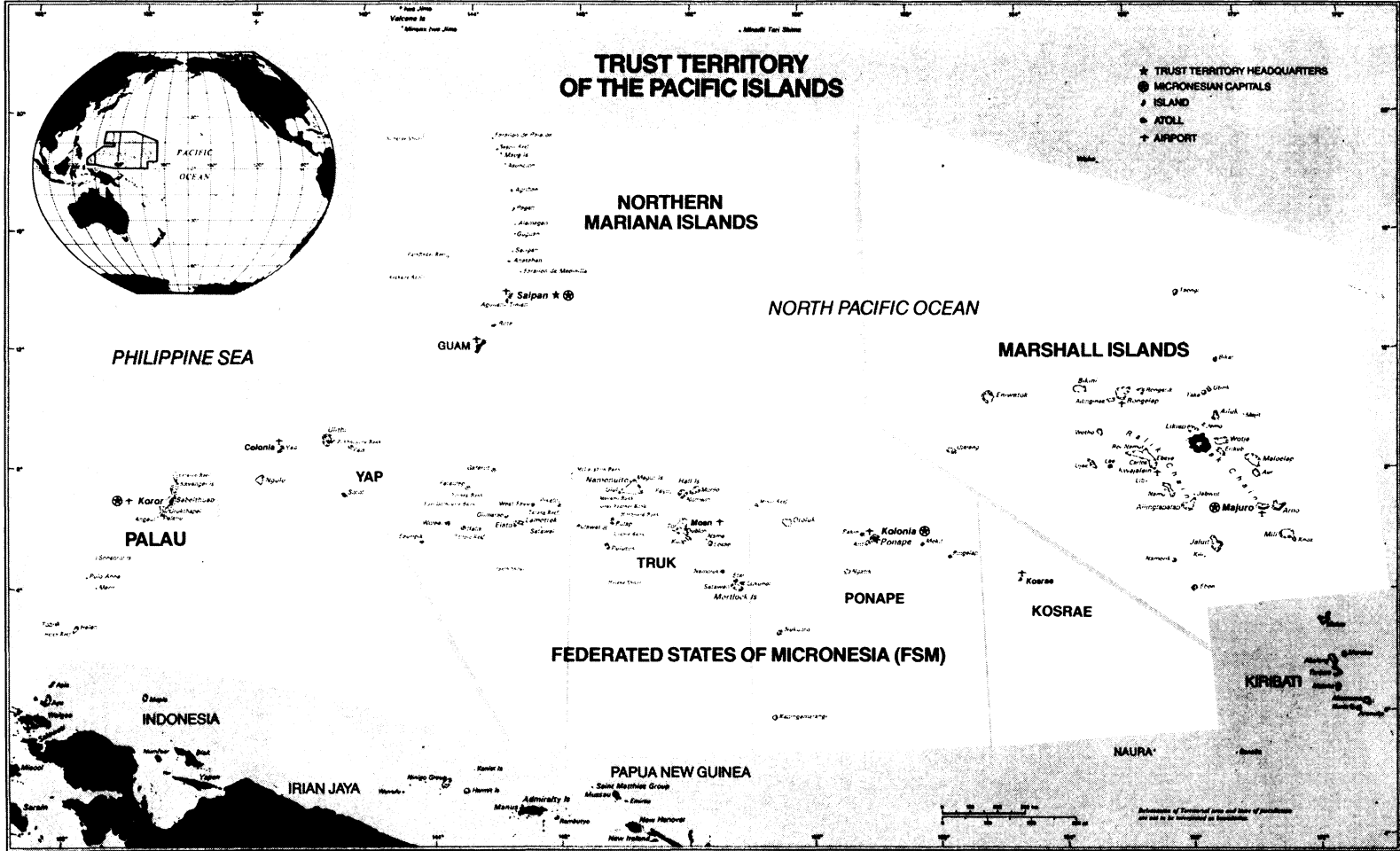
VI. CONCLUSION

The struggle for self-determination in Palau is evidence that Palauans have taken to heart the lessons of democracy and constitutional government taught by the United States. The American model has been held up to this island territory as a worthy example. The manner in which our government chooses to terminate this trusteeship will convince the beneficiaries of this island trust of the ultimate value of the model of government which we have taught to them. The importance of the International Trusteeship System lies in the degree of protection which will be afforded Palauans should the United States attempt to circumvent the international regime which it helped to create.

Ruth C. Slocum



Source: Office of Micronesian Status Negotiations, U.S. Dept. of State.



APPENDIX