Three Insular Cases and the Taiwan Status

by Richard W. Hartzell

This article discusses the international legal status of Taiwan by reference to three US Supreme Court cases. Our discussion begins with DeLima v. Bidwell, (1901):

In this and the following cases, which may be collectively designated as the 'Insular Tariff Cases,' the dates here given become material:
In July, 1898, Porto Rico was invaded by the military forces of the United States under General Miles.

On August 12, 1898, during the progress of the campaign, a protocol was entered into between the Secretary of State and the French Ambassador on the part of Spain, providing for a suspension of hostilities, the cession of the island, and the conclusion of a treaty of peace. 30 Stat. at L. 1742.

On October 18 Porto Rico was evacuated by the Spanish forces.

On December 10, 1898, such treaty was signed at Paris (under which Spain ceded to the United States the island of Porto Rico), was ratified by the President and Senate February 6, 1899, and by the Queen Regent of Spain March 19, 1899. 30 Stat. at L. 1754.

On March 2, 1899, an act was passed making an appropriation to carry out the obligations of the treaty.

On April 11, 1899, the ratifications were exchanged, and the treaty proclaimed at Washington.

On April 12, 1900, an act was passed, commonly called the Foraker act, to provide temporary revenues and a civil government for Porto Rico, which took effect May 1, 1900. [182 U.S. 1, 3] Messrs. Frederic R. Coudert, Jr., Charles F.

Adams, and Paul Fuller for plaintiffs in error.

This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a 'foreign country' within the meaning of the tariff laws.

Whether these cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a 'foreign country' at the time the sugars were shipped, since the tariff act of July 24, 1897 (30 Stat. at L. 151, chap. 11), commonly known as the Dingley act, declares that 'there shall be levied, collected, and paid upon all articles imported from foreign countries' certain duties therein specified. A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States.

> **Reference for the Taiwan status issue:**
> A foreign country is distinguished here from a foreign territory under the dominion of the United States. As the inhabitants of both are aliens to the USA, the difference is a class originated from a foreign country and a class originated from a foreign territory under dominion of the US Military Government, or successor civilian government if an organic act is authorized like the first one called the Foraker Act for Puerto Rico. In the case of Puerto Rico, it is a US possession unlike the Cuba cession. Today, Puerto Rico is actually a part of the US Customs Territory, but other cessions such as the USVI or Saipan still are not.

The Eliza, 2 Gall. 4, Fed. Cas. No. 4,346; Taber v. United States, 1 Story, 1, Fed. Cas. No. 13,722; The Adventure, 1 Brock, 235, 241, Fed. Cas. No. 93.

The status of Porto Rico was this: The island had been for some months under military occupation by the United States

as a conquered country, when, by the 2d article of the treaty of peace between the United States and Spain, signed December 10, 1898, and ratified April 11, 1899, Spain ceded to the United States the island of Porto Rico, which has ever since remained in our possession, and has been governed and administered by us. If the case depended solely upon these facts, and the question were broadly presented whether a country which had been ceded to us, the cession accepted, possession delivered [182 U.S. 1, 181] and the island occupied and administered without interference by Spain or any other power, was a foreign country or domestic territory, it would seem that there could be as little hesitation in answering this question as there would be in determining the ownership of a house deeded in fee simple to a purchaser who had accepted the deed, gone into possession, paid taxes, and made improvements without let or hindrance from his vendor.

But it is earnestly insisted by the government that it never could have been the intention of Congress to admit Porto Rico into a customs union with the United States, and that, while the island may be to a certain extent domestic territory, it still remains a 'foreign country' under the tariff laws, until Congress has embraced it within the general revenue system.

We shall consider this subject more at length hereafter, but for the present call attention to certain cases in this court and certain regulations of the executive departments which are supposed to favor this contention.

In United States v. Rice, 4 Wheat. 246, 4 L. ed. 562, which was an action of debt brought by the United States upon a bond for duties upon goods imported into Castine, in the district (now state) of Maine, during its temporary occupation by the British troops in the war of 1812, it was held the action would not lie, though Castine was subsequently evacuated by the enemy and restored to the

United States. The court said that, by the military occupation of Castine, the enemy acquired a possession which enabled him to exercise the fullest rights of sovereignty; that the sovereignty of the United States was suspended, and our laws could be no longer rightfully enforced there, or be obligatory upon the inhabitants; that by the surrender the inhabitants passed under a temporary allegiance to the British government, and were only bound by the laws of that government, and that Castine was during this period to be deemed a foreign port; that goods brought there were subject to duties which the British government chose to impose, and were in no correct sense imported into the United States; and that the subsequent evacuation by the enemy did not change the character of the transaction, since the goods were not liable to American duties when imported. In that case the character of the port, as foreign or [182 U.S. 1, 182] domestic was held to depend upon the question of actual occupation, and the right of the defendant determinable by the facts then existing, and, further, that the subsequent reoccupation of the port by the United States was ineffectual to change the right of the defendant or to vest a new right in the United States.

A case, somewhat to the converse of this, was that of Fleming v. Page, 9 How. 603, 13 L. ed. 276, which was an action against the collector at Philadelphia, to recover back duties upon merchandise imported from Tampico, in Mexico, during a temporary military occupation of that place by the United States. It was held that, although Tampico was within the military occupation of the United States, it had not ceased to be a foreign country, in the sense in which these words are used in the acts of Congress. In delivering the opinion of the court Mr. Chief Justice Taney observed: 'The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war.

But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. . . . While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy when he surrenders to a force which he is unable to resist.'

This was clearly a sufficient reason for disposing of the case adversely to the importer, but the learned Chief Justice proceeded to put the case upon another ground, that 'there was no act of Congress establishing a custom house at Tampico, nor authorizing the appointment of a collector; and consequently there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo in the manner directed by law, where the voyage is from one port of the United States to another;' that the only [182 U.S. 1, 183] collector was one appointed by the military commander, and that a coasting manifest granted by him could not be recognized in the United States as the document required by law when the vessel is engaged in the coasting trade, nor exempt the cargo from the payment of duties. He states that this construction of the tariff laws had been uniformly given by the administrative department of the government, and cited the case of Florida, after it had been ceded to the United States and the military forces had taken possession of Pensacola: 'That is, that, although Florida had by cession actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic by act of Congress. And it appears that this decision was sanctioned at the time by the Attorney General of the United States, the law officer of the government. And, although not so directly applicable to the case before us, yet the decisions

of the Treasury Department in relation to Amelia island and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the later case, after a customhouse had been established by law [2 Stat. at L. 418, chap. 14], at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the seacoast. The department, in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly acquired country as a domestic port from which the coasting trade might be carried on, unless it had been previously made so by act of Congress.'

While we see no reason to doubt the conclusion of the court, that the port of Tampico was still a foreign port, it is not perceived why the fact that there was no act of Congress establishing a customhouse there, or authorizing the appointment of a collector, should have prevented the collector appointed by the military commander from granting the usual documents required to be issued to a vessel engaged in the coasting trade. A collector, though appointed by a military commander, may be presumed to have the ordinary power of a collector under an [182 U.S. 1, 184] act of Congress, with authority to grant clearances to ports within the United States, though, of course, he would have no power to make a domestic port of what was in reality a foreign port.

It is not intended to intimate that the cases of United States v. Rice and Fleming v. Page are not harmonious. In fact, they are perfectly consistent with each other. In the first case it was merely held that duties could not be collected upon goods brought into a domestic port during a temporary occupation by the enemy, though the enemy subsequently evacuated it; in the latter case, that the temporary military occupation by the United States of a foreign port did not

make it a domestic port, and that goods imported into the United States from that port were still subject to duty. It would have been obviously unjust in the Rice Case to impose a duty upon goods which might already have paid a duty to the British commander. It would have been equally unjust in the Fleming Case to exempt the goods from duty by reason of our temporary occupation of the port without a formal cession of such port to the United States.

The next case is that of Cross v. Harrison, 16 How. 164, 14 L. ed. 889. This was an action of assumpsit to recover back moneys paid to Harrison while acting as collector at the port of San Francisco, for tonnage and duties upon merchandise imported from foreign countries into California between February 2, 1848,-- the date of the treaty of peace between the United States and Mexico,-- and November 13, 1849, when the collector appointed by the President (according to an act of Congress passed March 3, 1849) entered upon his duties. Plaintiffs insisted that, until such collector had been appointed, California was and continued to be after the date of the treaty a foreign territory, and hence that no duties were payable as upon an importation into the United States. The plaintiffs proceeded upon the theory, stated in the dictum in Fleming v. Page, that duties had never been held to accrue to the United States in her newly acquired territories until provision was made by act of Congress for their collection, and that the revenue laws had always been held to speak only as to the United States and its territories existing at the time when the several acts were passed. The collector had [182 U.S. 1, 185] been appointed by the military governor of California, and duties were assessed, after the treaty, according to the United States tariff act of 1846. In holding that these duties were properly assessed, Mr. Justice Wayne cited with apparent approval a dispatch written by Mr. Buchanan, then Secretary of State, and a circular letter issued by the Secretary of the Treasury, Mr. Robert J. Walker, holding that from the necessities of the case the military government established in California did

not cease to exist with the treaty of peace, but continued as a government de facto until Congress should provide a territorial government. 'The great law of necessity,' says Mr. Buchanan, 'justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest.' These letters will be alluded to hereafter in treating of the action of the executive departments.

The court further held in this case that, 'after the ratification of the treaty, California became a part of the United States, or a ceded, conquered, territory;' that, 'as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage;' that (p. 193, L. ed. 901) 'the territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . . That the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty, or from its ratification, . . . and that, until Congress legislated for it, the duty upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison.' [182 U.S. 1, 186] To the objection that no collection districts had been established in California, and in apparent dissent from the views of the Chief Justice in Fleming v. Page, he added (p. 196, L. ed. 902): 'It was urged that our revenue laws covered only so much of the territory of the United States as

had been divided into collection districts, and that out of them no authority had been given to prevent the landing of foreign goods or to charge duties upon them, though such landing had been made within the territorial limits of the United States. To this it may be successfully replied that collection districts and ports of entry are no more than designated localities within and at which Congress had extended a liberty of commerce in the United States, and that so much of its territory as was not within any collection district must be considered as having been withheld from that liberty. It is very well understood to be a part of the laws of nations that each nation may designate, upon its own terms, the ports and places within its territory for foreign commerce, and that any attempt to introduce foreign goods elsewhere, within its jurisdiction, is a violation of its sovereignty: It is not necessary that such should be declared in terms, or by any decree or enactment, the expressed allowances being the limit of the liberty given to foreigners to trade with such nation.'

The court also cited the cases of Louisiana and Florida, and seemed to take an entirely different view of the facts connected with the admission of those territories from what had been taken in Fleming v. Page. The opinion, which is quite a long one, establishes the three following propositions: (1) That under the war power the military governor of California was authorized to prescribe a scale of duties upon importations from foreign counties to San Francisco, and to collect the same through a collector appointed by himself, until the ratification of the treaty of peace. (2) That after such ratification duties were legally exacted under the tariff laws of the United States, which took effect immediately. (3) That the civil government established in California continued, from the necessities of the case, until Congress provided a territorial government.

It will be seen that the three propositions involve a recognition of the fact that California became domestic

territory [182 U.S. 1, 187] immediately upon the ratification of the treaty, or, to speak more accurately, as soon as this was officially known in California. The doctrine that a port ceded to and occupied by us does not lose its foreign character until Congress has acted and a collector is appointed was distinctly repudiated with the apparent acquiescence of Chief Justice Taney, who wrote the opinion in Fleming v. Page, and still remained the Chief Justice of the Court. The opinion does not involve directly the question at issue in this case: whether goods carried from a port in a ceded territory directly to New York are subject to duties, since the duties in Cross v. Harrison were exacted upon foreign goods imported into San Francisco as an American port; but it is impossible to escape the logical inference from that case that goods carried from San Francisco to New York after the ratification of the treaty would not be considered as imported from a foreign country.

The practice and rulings of the executive departments with respect to the status of newly acquired territories, prior to such status being settled by acts of Congress, is, with a single exception, strictly in line with the decision of this court in Cross v. Harrison, 16 How. 164, 14 L. ed. 889. The only possessions in connection with which the question has arisen are Louisiana, Florida, Texas, California, and Alaska. We take these up in their order.

By article 2, 2, of the Constitution, the President is given power, 'by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur;' and by article 6, 'this Constitution and the laws [182 U.S. 1, 195] of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land.' It will be observed that no distinction is made as to the question of supremacy between laws and treaties, except that both are controlled by the Constitution. A law requires the assent of both houses of

Congress, and, except in certain specified cases, the signature of the President. A treaty is negotiated and made by the President, with the concurrence of two thirds of the senators present, but each of them is the supreme law of the land.

As was said by Chief Justice Marshall in United States v. The Peggy, 1 Cranch, 103, 110, 2 L. ed. 49, 51: 'Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress.' And in Foster v. Neilson, 2 Pet. 253, 314, 7 L. ed. 415, 435, he repeated this in substance: 'Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.' So in Whitney v. Robertson, 124 U.S. 190 , 31 L. ed. 386, 8 Sup. Ct. Rep. 456: 'By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing.' To the same effect are the Cherokee Tobacco, 11 Wall. 616, sub nom. 207 Half Pound Papers Smoking Tobacco v. United States, 20 L. ed. 227, and the Head Money Cases, 112 U.S. 580 , sub nom. Edye v. Robertson, 28 L. ed. 798, 5 Sup. Ct. Rep. 247.

One of the ordinary incidents of a treaty is the cession of territory. It is not too much to say it is the rule, rather than the exception, that a treaty of peace, following upon a war, provides for a cession of territory to the victorious party. It

was said by Chief Justice Marshall in American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 542, 7 L. ed. 242, 255; 'The Constitution confers absolutely upon the government [182 U.S. 1, 196] of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty.' The territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress.

It follows from this that by the ratification of the treaty of Paris the island became territory of the United States, although not an organized territory in the technical sense of the word.

But whatever be the source of this power, its uninterrupted exercise by Congress for a century, and the repeated declarations of this court, have settled the law that the right to acquire territory involves the right to govern and dispose of it. That was stated by Chief Justice Taney in the Dred Scott Case.

In the more recent case of National Bank v. Yankton County, 101 U.S. 129 , 25 L. ed. 1046, it was said by Mr. Chief Justice Waite that Congress 'has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states.' Indeed, it is scarcely too much to say that there has not been a session of Congress since the territory of Louisiana was purchased, that that body has not enacted legislation based upon the assumed authority to govern and control the territories. It is an authority which arises, not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the states to act upon the [182 U.S. 1, 197] subject. Under this power Congress may deal with territory acquired by treaty; may

administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a state upon an equality with other states; it may sell its public lands to individual citizens, or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, and is subject to the disposition of Congress.

We are therefore of opinion that at the time these duties were levied Porto Rico was not a foreign country within the meaning of the tariff laws, [Note #1] but a territory of the United States, that the duties were illegally exacted, and that the plaintiffs are entitled to recover them back.

(Note #1: Four Justices dissented from the majority opinion in DeLima v. Bidwell, primarily based on the distinction of “unincorporated” vs. “incorporated” territory, as explained in the Downes v. Bidwell ruling. In later years, this recognition of any “unincorporated territory” as “foreign,” unless otherwise delineated by specific acts of Congress, has come to be the prevailing interpretation.)

Reference for the Taiwan status issue:

In Neely v. Henkel, we learn that the Cuba cession was foreign territory with its sovereignty held in trust by the United States Military Government. Categorically, it is not a dependent territory of the USA like Puerto Rico but both were under administrative authority of peace treaty. The Cuba cession was treated as a separate foreign entity within the treaty-making powers but Puerto Rico was not able to conduct its own foreign trade affairs despite also being categorically a separate custom territory.

Quote

Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own,

under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

It is true that as between Spain and the United States -- indeed, as between the United States and all foreign nations-Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

In his message to Congress of December 6th, 1898, the President said that, 'as soon as we are in possession of Cuba and have pacified the island, it will be necessary to give aid and direction to its people to form a government for themselves,' and that, 'until there is complete tranquility in the island and a stable government inaugurated, military occupation will be continued.' Nothing in the treaty of Paris stands in the way of this declared object, and nothing existed, at the date of the passage of the act of June 6th, 1900, [Note #2] indicating any change in the policy of our government as defined in the joint resolution of April 20th, 1898. [Note #3] In reference to the declaration, in that resolution, of the purposes of the United States in relation to Cuba, the President in his annual message of December 5th, 1899, said that the pledge contained in it 'is of the highest

honorable obligation, and must be sacredly kept.' Indeed, the treaty of Paris contemplated only a temporary occupancy and [180 U.S. 109, 121] control of Cuba by the United States. While it was taken for granted by the treaty that, upon the evacuation by Spain, the island would be occupied by the United States, the treaty provided that, 'so long as such occupation shall last,' the United States should 'assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property.' It further provided that any obligations assumed by the United States, under the treaty, with respect to Cuba, were 'limited to the time of its occupancy thereof,' but that the United States, upon the termination of such occupancy, should 'advise any government established in the island to assume the same obligations.'

Source: Neely v. Henkel, (1901)

(Note #2: This refers to Article 5270 of the Revised Statutes of the United States regarding extradition between the government of the United States and any foreign government, as amended by Congress June 6th, 1900.)

(Note #3: On the 20th day of April, 1898, Congress passed a joint resolution, the preamble of which recited that the abhorrent conditions existing for more than three years in the island of Cuba, so near our own borders, had shocked the moral sense of the people of the United States, had been a disgrace to civilization, and demanding that Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. In the following days, the Congress passed a formal declaration of war against the Kingdom of Spain.)

Reference for the Taiwan status issue:

The attempts to establish a Cuban republic were null as the dominion of the USA had not been terminated in the April 11,

1899 Treaty of Paris. Upon cession, American dominion by US Military Government was dejurely established. The status condition is reminiscent of a self-governing dominion in that the Cuba cession was defacto independent but not dejure. Both dependent territory and self-governing dominion are a colonial status, but the self-governing dominion is not bound within the sphere of the treaty-making powers and foreign affairs powers of the USA. These are handled separately by a High Commissioner or other delegated official of administrative authority over the foreign territory. The USA was still a supreme authority over Cuban territory.

Quote

It cannot be doubted that when the United States enforced the relinquishment by Spain of her sovereignty in Cuba, and determined to occupy and control that island until there was complete tranquility in all its borders and until the people of Cuba had created for themselves a stable government, it succeeded to the authority of the displaced government so far at least that it became its duty, under international law and pending the pacification of the island, to protect in all appropriate legal modes the lives, the liberty, and the property of all those who submitted to the authority of the representatives of this country.

Source: Neely v. Henkel, (1901)

Reference for the Taiwan status issue:

Examining the prevailing interpretation in Downes v. Bidwell, it is clear that a cession treated as foreign territory under US dominion has self-governing dominion issues of treaty-making powers which are handled separately by the foreign territory itself. For example, the WTO membership status for the foreign territory like Taiwan cession is a good start, and is in complete alignment with this principle.

This separate customs territory of SFPT cession is not a status of an independent country. The separate WTO trade status

would be expected to be most commonly seen in regard to US possessions, trust territories, or any self-governing dominions. The foreign territory of Taiwan cession is treated as separate customs territory, or a foreign state equivalent, but it is still a sub-sovereign by facts of cession.

The Taiwan cession is held under the benign dominion of the US Military Government in SFPT. As a condition of having its sovereignty held in trust, it is a Taiwan Relations Act (TRA) status equivalency of a trust territory in Article 3 of SFPT. The notion of Taiwan being annexed or politically part of the PRC was flat out rejected by Senator Helms' legislation on WTO ascension of Taiwan.

Quote

(2) the United States should be prepared to aggressively counter any effort by any WTO member, upon the approval of the General Council of the WTO of the terms and conditions of the accession of the People's Republic of China to the WTO, to block the accession of Taiwan to the WTO.

Source: Accession of Taiwan to the World Trade Organization, Public Law 106-286, Enacted 10 October 2000

http://www.taiwandocuments.org/pl106-286.htm

Reference for the Taiwan status issue:

The Taiwan Relations Act is law. A relevant clause was inserted by Senator Helms in his official capacity and in light of the TRA oversight powers of SFPT administrative authority controlled by the treaty clauses and international organization clauses. It is critical to grasp the juncture of the Shanghai Communiques with the TRA clauses here:

Quote

(d) Membership in international financial institutions and other international organizations

Nothing in this chapter may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial

institution or any other international organization.

Source: Taiwan Relations Act, United States Code Title 22 Chapter 48 Sections 3301 – 3316, Enacted 10 April 1979
http://www.taiwandocuments.org/tra01.htm

Reference for the Taiwan status issue:

Despite the continuation of the ROC in some organizations, the USA does not even presently support the Taiwan cession in any international organization requiring (of those joining or acceding to membership) to have dejure sovereign status.

Taiwan was only able to join the WTO with US support. At the same time, support for Taiwan's application for WHO as an observer status also mandated by US law, (although more properly Taiwan should be admitted to the WHO as an Associate Member under the USA). Again, US law requires no support of Taiwan as a sovereign entity but treats it as sub-sovereign with separate membership in international organizations. In practice, self-governing dominion status is operational in international organizations for Taiwan, so this analysis exactly dovetails with everything stated so far in Hartzell's overview and commentary.

Creation of a separate customs territory applies to all cession categories of unincorporated territory as set out by the Downes v. Bidwell ruling. The US Constitution has no conflicts with this SFPT issue of Taiwan cession as a self-governing dominion of military government under the Insular Cases. The fiscal authority is also separated from the US Treasury:

> The WTO status of the Taiwan cession as *a separate customs territory held under dominion by the United States Military Government* can be directly derived from the judicial precedent in Downes v. Bidwell. That insular case issue was fully satisfied by the military powers and derivative legal instruments and policies for holding such as a dejure self-governing dominion of military government, therefore it directly follows that the Taiwan cession is qualified as unincorporated territory and has the

unalienable basic (or "undefined") civil rights protections thereof.

Quote

The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress, and in the decisions of this court.

Source: Downes v. Bidwell, (1901)

Reference for the Taiwan status issue:

There is too much common confusion about the status of Union territory and territory newly acquired by peace treaty:

Quote

The question of the legal relations between the states and the newly acquired territories first became the subject of public discussion in connection with the purchase of Louisiana in 1803. This purchase arose primarily from the fixed policy of Spain to exclude all foreign commerce from the Mississippi. This restriction became intolerable to the large number of immigrants who were leaving the eastern states to settle in the fertile valley [182 U.S. 244, 252] of that river and its tributaries. After several futile attempts to secure the free navigation of that river by treaty, advantage was taken of the exhaustion of Spain in her war with France, and a provision inserted in the treaty of October 27, 1795, by which the Mississippi river was opened to the commerce of the United States. 8 Stat. at L. 138, 140, art. 4. In October, 1800, by the secret treaty of San Ildefonso, Spain retroceded to France the territory of Louisiana. This treaty created such a ferment in this country that James Monroe was sent as minister extraordinary with discretionary powers to co-operate with Livingston, then minister to France, in the purchase of New Orleans, for which

Congress appropriated $2,000,000. To the surprise of the negotiators, Bonaparte invited them to make an offer for the whole of Louisiana at a price finally fixed at $15,000,000.

Source: Downes v. Bidwell, (1901)

Reference for the Taiwan status issue:

Retrocession of Louisiana from Spain to France was the first American experience with the incorporation of newly acquired territories by treaty cession:

Quote

Owing to a new war between England and France being upon the point of breaking out, there was need for haste in the negotiations, and Mr. Livingston took the responsibility of disobeying his instructions, and, probably owing to the insistence of Bonaparte, consented to the 3d article of the treaty, which provided that 'the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.' [8 Stat. at L. 202.] This evidently committed the government to the ultimate, but not to the immediate, admission of Louisiana as a state, and postponed its incorporation into the Union to the pleasure of Congress.

Source: Downes v. Bidwell, (1901)

Reference for the Taiwan status issue:

A notable issue of peace treaty cessions is that the US Constitution forbids any direct dealings with foreign states by its territories in the Union or federal areas. Any cession with political status of a US possession or as a dependent territory are not allowed to conduct their own foreign affairs.

Quote

This case may be considered as establishing the principle that, in dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so, not because the territories comprised a part of the government established by the people of the states in their Constitution, but because the Federal government is the only authorized organ of the territories, as well as of the states, in their foreign relations. By art. 1, 10, of the Constitution, 'no state shall enter into any treaty, alliance, or confederation, . . . [or] enter into any agreement or compact with another state, or with a foreign power.' It would be absurd to hold that the territories, which are much less independent than the states, and are under the direct control and tutelage of the general government, possess a power in this particular which is thus expressly forbidden to the states.

Source: Downes v. Bidwell, (1901)

Quote

We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire.' There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes [182 U.S. 244, 280] of life, shall become at once citizens of

the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that 'the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible . . . to the enjoyment of all the rights, advantages, and immunities of citizens of the United States;' in the case of Mexico, that they should 'be incorporated into the Union, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States;' in the case of Alaska, that the inhabitants who remained three years, 'with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights,' etc; and in the case of Porto Rico and the Philippines, 'that the civil rights and political status of the native inhabitants . . . shall be determined by Congress.' In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.

Source: Downes v. Bidwell, (1901)

Reference for the Taiwan status issue:

There is no automatic conveying of American citizenship upon the inhabitants of newly acquired cessions. Their legal interim nationality of their territorial status is defined by the customary law of war until their permanent status as a state in the Union. Their road to American citizenship is based upon many assessments of their suitability to our system of government. For example, the US citizenship of Puerto Rico is by collective naturalization of Congress. The citizenship of Saipan nationals is by Presidential proclamation. The non-voting nationality of American Samoa is by a legal clause in INA definitions. The US nationality of Filipinos was officially terminated by exclusion outside the Rules of Chargeability in their organic act as a self-governing dominion. The US federal government is a democratic government of the people of the Union and is accountable to them only. The annexation issues of overseas territory not contiguous to the lower 48 states presented new issues and so the doctrine of unincorporated territory was

created to replace the previously automatic political status of an incorporated territory conferred by treaty provision status of past French cessions like Louisiana. The new default of any territory obtained by treaty cession was “unincorporated territory,” which is now also called “insular status.”

Quote

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.

We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are in- [182 U.S. 244, 283] dispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,--whether they shall be introduced into the sisterhood of states or be permitted to form independent governments,--it does not follow that in the meantime, a waiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. Yick Wo v. Hopkins, 118 U.S. 356 , 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Fong Yue Ting v. United States, 149 U.S. 698 , 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; Lem Moon Sing, 158 U.S. 538, 547 , 39 S. L. ed. 1082, 1085, 15 Sup. Ct. Rep. 962; Wong Wing v. United States, 163 U.S. 228 , 41 L. ed. 140, 16 Sup. Ct. Rep. 977. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect.

Source: Downes v. Bidwell (1901)

Quote

Incidentally I have heretofore pointed out that the arguments of expediency pressed with so much earnestness and ability concern the legislative, and not the judicial, department of the government. But it may be observed that, even if the disastrous consequences which are foreshadowed as arising from conceding that the government of the United States may hold property without incorporation were to tempt me to depart from what seems to me to be the plain line of judicial duty, reason admonishes me that so doing would not serve to prevent the grave evils which it is insisted must come, but, on the

contrary, would only render them more dangerous. This must be the result, since, as already said, it seems to me it is not open to serious dispute that the military arm of the government of the United States may hold and occupy conquered territory without incorporation for such length of time as may seem appropriate to Congress in the exercise of its discretion. The denial of the right of the civil power to do so would not, therefore, prevent the holding of territory by the United States if it was deemed best by the political department of the government, but would simply necessitate that it should be exercised by the military instead of by the civil power.

And to me it further seems apparent that another and more disastrous result than that just stated would follow as a consequence of an attempt to cause judicial judgment to invade the domain of legislative discretion. Quite recently one of the stipulations contained in the treaty with Spain which is now under consideration came under review by this court. By the provision in question Spain relinquished 'all claim of sovereignty [182 U.S. 244, 343] over and title to Cuba.' It was further provided in the treaty as follows:

'And as the island is upon the evacuation by Spain to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, and for the protection of life and property.'

It cannot, it is submitted, be questioned that, under this provision of the treaty, as long as the occupation of the United States lasts, the benign sovereignty of the United States extends over and dominates the island of Cuba. Likewise, it is not, it seems to me, questionable that the period when that sovereignty is to cease is to be determined by the legislative department of the government of the United States in the exercise of the great duties imposed upon it, and with the sense of the responsibility

which it owes to the people of the United States, and the high respect which it of course feels for all the moral obligations by which the government of the United States may, either expressly or impliedly, be bound. Considering the provisions of this treaty, and reviewing the pledges of this government extraneous to that instrument, by which the sovereignty of Cuba is to be held by the United States for the benefit of the people of Cuba and for their account, to be relinquished to them when the conditions justify its accomplishment, this court unanimously held in Neely v. Henkel, 180 U.S. 109 , ante, 302, 21 Sup. Ct. Rep. 302, that Cuba was not incorporated into the United States, and was a foreign country. It follows from this decision that it is lawful for the United States to take possession of and hold in the exercise of its sovereign power a particular territory, without incorporating it into the United States, if there be obligations of honor and good faith which, although not expressed in the treaty, nevertheless sacredly bind the United States to terminate the dominion and control when, in its political discretion, the situation is ripe to enable it to do so. Conceding, then, for the purpose of the argument, it to be true that it would be a violation of duty under the Constitution for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not [182 U.S. 244, 344] intended to be incorporated, the presumption necessarily must be that that department, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the Constitution, and therefore, when the unfitness of particular territory for incorporation is demonstrated, the occupation will terminate. I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution.

But if it can be supposed -- which, of course, I do not think to be conceivable -- that the judiciary would be authorized

to draw to itself by an act of usurpation purely political functions, upon the theory that if such wrong is not committed a greater harm will arise, because the other departments of the government will forget their duty to the Constitution and wantonly transcend its limitations, I am further admonished that any judicial action in this case which would be predicated upon such an unwarranted conception would be absolutely unavailing. It cannot be denied that under the rule clearly settled in Neely v. Henkel, 180 U.S. 109 , ante, 302, 21 Sup. Ct. Rep. 302, the sovereignty of the United States may be extended over foreign territory to remain paramount until, in the discretion of the political department of the government of the United States, it be relinquished. This method, then, of dealing with foreign territory, would in any event be available. Thus, the enthralling of the treaty-making power, which would result from holding that no territory could be acquired by treaty of cession without immediate incorporation, would only result in compelling a resort to the subterfuge of relinquishment of sovereignty, and thus indirection would take the place of directness of action,-a course which would be incompatible with the dignity and honor of the government.

Source: Downes v. Bidwell, (1901)

Reference for the Taiwan status issue:

There is no relinquishment of sovereignty if incorporation does not occur and neither by the military powers holding foreign territory such does not mysteriously render the treaty-making clause ineffective. Self-governing dominions have their autonomy for such treaty-making powers like their British counterparts of that era but it is a treaty status question of the benign dominion that these delegated treaty-making powers can be ultimately exercised or become a source of juridical impedance when seeking any American support in joining international organizations. This insular status can occur within the military power or the civil powers of administrative authority. The current political status of the Taiwan cession is not an internal affair of China, it is an insular affair of the TRA

and SFPT. The final status is part of the Shanghai Communiques and is standard operating procedures in Paragraphs 353 and 354 of (US Army Field Manual) FM 27-10 for finalization of such insular status within the military powers.

Quote

Those rules which regulated the declaration of war and the conduct of war are comprehended under the term Jus Feciale. Some modern writers give to the term a wider signification; and others limit it more closely. Osenbrueggen (De Jure Belli et Pacis Romanorum, p. 20 Lips. 1836) defines the Jus Feciale to be that which prescribed the formulae, solemnities and ceremonial observed in the declaring, carrying on, and terminating a war, and in the matter of treaties. The Romans often used the expression Jus Gentium in a sense which nearly corresponds to the modern phrase Law of Nations, or, as some call it, International Law (Livy, ii.14, vi.1, quod legatus in Gallos, ad quos missus erat, contra jus gentium pugnasset; xxxviii.48; Sallust. Jug. 22). The term Jus Belli (Cic. de Leg. ii.14) is used in the same sense.

Source: http://www.taiwanadvice.com/history/jus.htm

Reference for the Taiwan status issue:

There is far too much confusion not only of the concept of unincorporated territory but of the concept of jus feciale. It is within the above citation that the constitutional role of the High Commissioner is defined. For those military powers of SFPT, it is a matter of the civilian control over the (military) civil affairs of Taiwan cession including issues of civil rights and treaty-making powers of self-governing dominions. It is not a usurpation of the foreign affairs powers of the Dept. of State, but a constitutional firewall between the military and foreign affairs powers of the US Constitution for the SFPT cession of Taiwan. The Dept. of State is never to be an executive agency of administrative authority under separation of powers of the constitutional customary practices. Past customary practice has demonstrated no one should have allowed Kissinger to reign supreme over the cessions in SFPT without the added consent of

the High Commissioner. Because of SFPT Article 2 differences versus Article 3 cessions under the US High Commissioner, the people of Taiwan have seen their basic US Constitutional rights trampled by officials of the Dept. of State for the last 30 years in the name of political expediency. George Kerr even attempted to step into the High Commissioner void of Article 2, but the results were less than should be constitutionally expected of those concerned at the Dept. of State at any point during the last 50 years and especially in the last 20 years of TRA. Thus the appointment of a High Commissioner of the Taiwan cession is an important line of defense for a constitutional right of TRA enhancement for unincorporated territory.

Important Conclusions for the Taiwan status issue:

(1) Appointment of a civilian High Commissioner

The right to this legal position is originated under the DOD jurisdiction by SFPT, regulations, customary laws of war, and rights "enhancement" authority of TRA. The judicial branch has a doctrine of reviewing any executive actions with the highest priority on civil rights of the constitution. Jus feciale of SFPT culminates into such a constitutional position of the High Commissioner of civilians acquiring administrative authority. Jus feciale literally means a ***guardian*** of the Laws of War and Issues of Treaties. Jus means laws and Feciale means guardian, priesthood, protector, and so on. It seems that the very last legal holder of jus feciale was the US Supreme Commander of the US Military Government over Japan. It is time for the civilian control by the High Commissioner and self-governing dominion powers of insular law:

The feciale or protector of SFPT has the constitutional executive powers for the supreme

exercise of treaty powers of administrative authority. He is foremostly responsible for officially convening the **US Court of Taiwan** under Article 2 of the US Constitution. That military commission (or war court) is technically an executive court of the SFPT administrative authority and with federal judicial procedures for US citizens. It is a jus feciale and fundamental Bill of Rights protections under the doctrine of civis romanus sum.

How does this analysis relate to the American Institute in Taiwan? Clearly, the AIT Chairman is an agent of the Dept. of State and their agency of administrative authority is reminiscent of the US v. Tiede (US Court of Berlin) situation. But then, there was a traceable paper trail for such a transfer by the US Military Government to the US Ambassador to West Germany. He still had two separate job titles: US Ambassador and US High Commissioner.

The only other equivalent of High Commissioner is the Dept. of the Interior's Office of Insular Affairs. By default, they will have administrative authority for US possessions, and there is a legal paper trail, even if they don't have all these powers in such cases as Wake Island.

The civilian Office of High Commissioner for the Taiwan cession is under the US Military Government. It is not currently filled nor is it so governed by the Senior Commanding Officer of the Civil Affairs Airborne Brigade Headquarters, USACAPOC in Ft. Bragg, North Carolina.

This High Commissioner position exists as a standard operating procedure of administrative authority US Military Government and was commonplace in any US Trust Territory and in West

Berlin.

(2) Investigation of the Dept. of State

There is going to be some very serious explaining to do for their gross negligence at the Asia Desk at DOS. None of the key individuals have used proper caution but have engaged in reckless political expediency at the expense of the civil rights of the unincorporated territory of Taiwan. It is not even going to be possible to realistically ever claim ignorance or incompetence in any of these issues of SFPT. These officials are truly too professionally competent and have a traceable pattern of political agendas including some DOI Inspector-General investigations linking the Dept. of Interior and the Asia Desk at the Dept. of State. This is why if writs of mandamus are to be sought, they should be directed to the DOD jurisdiction of SFPT. The Inspector-General at DOD has recent history of investigating some Pro-China military officials in Hawaii. It is believed that there are links to the DOS and DOI. *Since the Taiwan cession is TRA qualified as unincorporated territory under USMG, federal investigations by proper authorities (DIA) will be a national security issue.*

For Taiwan, there has been no administrative authority transfer other than that **delegated** to the ROC and reaffirmed by TRA. However, to the extent that this delegated administrative authority is blocking the Taiwanese people’s enjoyment of “fundamental rights” under the US Constitution, it is void.