Gibbons v. Salii, 1 ROP Intrm. 333 (1986)

YUTAKA M. GIBBONS, GABRIELLA NGIRMANG, JAMES ORAK, and RIKRIK SPIS,
Plaintiffs/Appellees/Cross-Appellants

v.

LAZARUS SALII, President of the Republic, in his official capacities, POLITICAL EDUCATION COMMITTEE, and REPUBLIC OF PALAU,
Defendants/Appellants/Cross-Appellees.

CIVIL APPEAL NO. 8-86
Civil Action No. 101-86

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: September 17, 1986

Counsel for Plaintiffs/Appellees/Cross-Appellants: Anne E. Simon and Roman Bedor
Counsel for Defendants/Appellants/Cross-Appellees: Attorney General Philip Isaac and Arnold Liebowitz.

BEFORE: MAMORU NAKAMURA, Chief Justice; LOREN A. SUTTON, Associate Justice; EDWARD C. KING,[1] Associate Justice.

NAKAMURA, Justice.

This appeal from the Summary Judgment order entered by the Trial Court on July 10, 1986, requires us to determine whether the Compact of Free Association, and the ⊥334 subsidiary agreements (hereinafter "Compact"), between the Republic of Palau and the United States was ratified pursuant to, and is otherwise in conformity with, the Constitution of the Republic of Palau.

Defendants below, President Lazarus Salii, the Palau Political Education Committee and the Republic of Palau, appeal that portion of the Trial Court's judgment on count 1 which granted Plaintiffs' Motion for Partial Summary Judgment holding that a 75% approval vote was required to ratify the Compact. Plaintiffs below, Yutaka M. Gibbons, Gabriela Ngirmang, James Orak and Rikrik Spis, cross-appeal that portion of the Trial Court's judgment granting Defendants' Motion for Summary Judgment on count 2 (premature implementation); count 3 (inadequacies in the

[1] The Honorable Edward C. King is the Chief Justice of the Supreme Court of the Federated States of Micronesia.

political education program and irregularities in voting procedures); count 4 (deficiencies in the Compact referendum enabling act, Republic of Palau Public Law No. 2-14 (hereinafter "RPPL No. 2-14"); and count 5 (conflict between Palau Constitution, article XIII, section 7 and the Compact provisions regarding military defense sites).

I. FACTS

On January 10, 1986, the Compact was signed by President Lazarus E. Salii on behalf of the Republic of Palau and Ambassador Fred M. Zeder on behalf of the United States. The Compact was then approved by 2/3 majority vote of each house of the Olbiil Era Kelulau as required by article II, section 3 of the Palau Constitution. On February 21, 1986, a national referendum was held with 72.19% of the voters approving the Compact.[2]

⊥335 On February 25, 1986, President Salii certified the results of the referendum in a letter to Ambassador Zeder. Shortly thereafter, the Compact was sent to the United States Congress for consideration.

On May 20, 1986, plaintiffs filed a three count complaint seeking a declaratory judgment and injunctive relief. Approximately one month later, on June 16, 1986, plaintiffs amended their complaint to add two new counts.

Succinctly stated, plaintiffs allege in count 1 that sections 312, 313, 324, and 331 of the Compact conflict with article II, section 3 and article XIII, section 6 of the Palau Constitution in that these Compact sections 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 Palau territory without first obtaining 75% voter approval.

Plaintiffs also contend in count 1 that section 461(c) of the Compact and the subsidiary agreement pertaining to that section violate article II, section 3 and article XIII, section 6 by defining the jurisdictional area of Palau as smaller than the constitutionally defined territory. As a result, plaintiffs claim that the Compact provides no limitation upon United States nuclear activities in the remaining area.

In count 2, plaintiffs allege that defendants prematurely implemented the Compact by

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[2] This is the third Compact referendum. The first occurred on February 10, 1983, with 62% voting approval for the Compact and as whole and 53% voting approved on the separate question concerning that Compact's provisions on harmful substances. This Court's Trial Division held that the Compact had not been approved as required by the nuclear control provisions because of the failure to obtain 75% voter approval on the separate question. Palau Const. art. XIII, § 6; art. II, § 3. *Gibbons v. Remeliik*, Civ. No. 67-83 (Tr. Div. August, 1983); *see also Koshiba v. Remeliik*, Civ. No. 17-83 (Tr. Div. Jan., 1983) (pre-referendum challenge to proposed ballot language).

The second Compact referendum took place on September 4, 1984, and, again, failed to garner 75% voter approval with only 67% of the electorate voting in favor of the Compact.

President Salii's certification of the Compact referendum results to Ambassador Zeder on February 25, 1986. Plaintiffs contend in count 3 that the political education program required by RPPL No. 2-14 was inadequately and unfairly carried out. Count 4 states that RPPL No. 2-14 deprives plaintiffs of their due process rights and right to vote by providing for misleading ballot language and by establishing a *per se* inadequate length of time for the political education program. Plaintiffs further allege in count 4 that RPPL No. 2-14 is defective in not requiring a separate ballot question concerning the Compact sections involving nuclear substances. Lastly, plaintiffs allege in count 5 that the Government of Palau cannot comply with the constitutional prohibition in article XIII, section 7 concerning the exercise of the power of eminent domain for the benefit of a foreign entity and, at the same time, supply land to the United States in accordance with sections 321 and 322 of the Compact and the subsidiary agreement for those sections.

In the interim between the filing of plaintiffs' original complaint and amended complaint, defendants moved for summary judgment on all counts. Thereafter, plaintiffs moved ⊥336 for partial summary judgment with respect only to count 1 of their amended complaint. Oral arguments were heard on July 1, 1986.

On July 10, 1986, the Trial Court entered an oral ruling granting defendants' Motion for Summary Judgment on counts 2 through 5 but denying it as to count 1 and granting Plaintiffs' Motion for Partial Summary Judgment on count 1. Both parties filed timely notices of appeal on the adverse judgments and, on July 14, 1986, we granted Defendants' Motion to Expedite Appeal. On August 27, 1986, after briefing was completed by both parties, oral arguments were heard. Except for count 4, we now affirm the decision of the Trial Court.

II. JURISDICTION

At the outset, we hold that we have constitutional and statutory jurisdiction to determine this appeal. Palau Const. art. X, § 5; 14 PNC § 1001. We further hold that plaintiffs have standing to sue because their rights to vote under article II, section 3 and article XIII, section 6 of the Constitution are at issue. These claims are ripe for adjudication because if we fail to consider them now and the Compact goes into effect, their claims would be forever lost.

Moreover, we conclude that it is our judicial obligation and duty to construe treaties such as the Compact even if our decision has far reaching political ramifications.

> [T]he courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts . . . [w]e cannot shirk this responsibility merely because our decision may have significant political overtones.

Japan Whaling Association v. American Cetacean Society, US___, 54 U.S.L.W. 4929, 4931 (U.S. June 30, 1986); *see also Remeliik v. The Senate*, Civ. Act. No. 62-81, (T.T. High Ct. Aug. 1981), *citing, United States v. Nixon*, 418 U.S. 700, 703, 94 S. Ct. 3090, 41 L.Ed.2d Ld 1039 (1974) ("It has been well-settled that '[it] is emphatically the province and duty of the judicial

department to say what the law is.'"); *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). The judiciary is the "ultimate interpreter of the Constitution." Palau Const. art. X, § 5, *Remeliik v. The Senate, supra*.

III. THE NUCLEAR CONTROL PROVISIONS

⊥337 We first consider whether section 324 of the Compact authorizes the United States to engage in activities which under Palau Constitution's nuclear control provisions, article II, section 3 and article XIII, section 6, must be approved by 75% of the voters in a referendum. We shall then move to plaintiffs' claims that other Compact sections -- specifically, sections 312 and 331 which allow the United States to invite the armed forces of other nations into Palau and section 461(c) which defines the jurisdictional territory of Palau for Compact purposes -- require 75% voter approval under article II, section 3 and article XIII, section 6.

Article II, section 3 of the Palau Constitution states:

> Major governmental powers including but not limited to defense, security, or foreign affairs may be delegated by treaty, compact, or other agreement between the sovereign Republic of Palau and another sovereign nation or international organization, provided such treaty, compact, or agreement shall be approved by not less than two-thirds (2/3) of the members of each house of the Olbiil Era Kelulau and by a majority of the votes cast in a nationwide referendum conducted for such purpose, provided, that any such agreement which authorizes use, testing, storage, or disposal of nuclear, toxic chemical, gas or biological weapons intended for use in warfare shall require approval of not less than three-fourths (3/4) of the votes cast in such referendum.

Article XIII, section 6 of the Palau Constitution provides:

> Harmful substances such as nuclear, chemical, gas, or biological 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 (3/4) of the votes cast in a referendum submitted on this specific question.

A. Issues of Interpretation

Read separately, these nuclear control provisions appear clearly and unambiguously to apply to every proposed use, testing, storage or disposition of the weapons and waste materials identified in those provisions. When the two are considered together, however, a possible ambiguity arises. Defendants argue that the presence of these two similar provisions establishes that such provisions have different ⊥338 purposes and application. Specifically, defendants argue that article XIII, section 6 relates only to activities undertaken directly by the Government of the Republic of Palau or its agents, and not to an international agreement authorizing actions by another sovereign nation or international organization.

Defendants then argue that the absence of an express ban of nuclear power plants in article II, section 3 means that the Republic of Palau need not obtain 75% voter approval to enter into a compact authorizing nuclear powered military vessels of another nation to operate within Palau waters.

A third question of interpretation becomes apparent when the language of section 324 of the Compact is considered in conjunction with these constitutional nuclear control provisions. Section 324 of the Compact provides:

> In the exercise in Palau of its authority and responsibility under this Title, the Government of the United States shall not use, test, store or dispose of nuclear, toxic chemical, gas or biological weapons intended for use in warfare and the Government of Palau assures the Government of the United States that in carrying out its security and defense responsibilities under this 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.

The words "use" and "storage" have a broad range of meanings.[3] Logically, the sentence structure in section 324 ⊥339 in which the United States agrees in the first clause not to "use" or "store" nuclear weapons, juxtaposed with the second clause allowing the United States the right to "operate" vessels carrying nuclear weapons within the jurisdiction of Palau, attributes relatively narrow meanings to "use" and "store."[4] The apparent symmetry of the language in section 324 of the Compact with that of the pertinent constitutional provisions requires that we carefully consider whether the constitutional words "use" and "store" have the same narrow meaning as those words in the Compact and, hence, are compatible with an agreement that vessels carrying nuclear weapons and capable of firing them may operate within the jurisdiction

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[3] The Random House Dictionary of the English Language, 1573-74 (unabridged ed. 1966), identifies some 26 meanings of the word "use". The first of these is "to employ for some purpose". We note that the nuclear powers have long contended that their principal purpose in maintaining nuclear weapons is to deter the opposition from initiating military aggression. M. Bundy, G. Kennan, R. McNamara, G. Smith, Nuclear Weapons and the Atlantic Alliance, 60 Foreign Affairs 753 (1983). Under this view, it is not necessary to fire or detonate nuclear weapons to use them. Their use is deterrence and such weapons are being used wherever they are.

Similarly, vessels carrying nuclear weapons are "storing" them under an expansive use of that term. The Random House Dictionary, supra, at 1401-02.

[4] The defendants do not dispute that § 324 is intended by the parties to confirm the right of the United States to carry nuclear weapons into the jurisdiction of Palau. This is inherent in the term "nuclear capable." Moreover, the affidavit of Rear Admiral Eugene Carroll, Jr., U.S. Navy, retired, confirms that it is a standard practice for deployments of United States military forces and nuclear capable vessels to include nuclear weapons. This affidavit is uncontradicted in the record.

of Palau.

B. Constitutional History

It has long been recognized that, in cases involving interpretation of ambiguous constitutional provisions, courts may resort to "preceding facts, surrounding circumstances and other forms of extrinsic evidence, to ensure that the provisions are interpreted in consonance with the purposes contemplated by the framers of the constitution and the people adopting it." *Remeliik v. The Senate, supra, citing, Knowlton v. Moore*, 178 U.S. 41, 20 S. Ct. 747, 44 L. Ed. 960 (1900). We shall consider here not only the records of the Constitutional Convention but also the interplay between the drafting of the Compact and the Constitution, and the various constitutional plebiscites.

1. The Constitutional Convention – Members of the Palau Constitutional Convention were selected by the people of Palau in a special election. The Convention commenced on January 28, 1979, and remained in session until April 2 of that year.

Article XIII, section 6 of the Palau Constitution originated out of draft proposal 91. According to the Committee on General Provisions, the general intent of proposal ⊥340 91 was to safeguard the environment of Palau[5] by making the introduction of nuclear or harmful substances very difficult:

> The Committee felt that the environment of Belau which includes but is not limited to the land, sea, and air, is a public trust of which all citizens, living and yet unborn, are beneficiaries. As a trustee, Belau is obligated to act in a manner best calculated to assure the protection of the air, water, and other natural resources from pollution, impairment, or destruction. Belau, as trustee, is further obligated to secure the fundamental and inalienable rights of all public citizens to live in a healthful environment.
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> The Committee, in recognition of the foregoing principles, 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 Belau unless approved by three-fourths of the registered voters in a referendum submitted on the specific question.

Standing Committee Report No. 29 (March 3, 1979) at 1-2 (hereinafter "Standing Committee Report" is denoted by "SCR").

The recorded floor commentary regarding proposal 91 is sparse, its sponsors stating only that "rigid requirement for approval was intended to prohibit harmful substances in Palau."

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[5] "Palau" and "Belau" are synonymous. "Palau" is commonly used in English; "Belau" in the Palauan language.

Thirty-sixth Day Summary Journal of the Constitutional Convention (March 4, 1979) at 8.

There is, however, no indication anywhere in the journals that the Constitutional Convention ever wavered in its intent, as expressed in SCR No. 29, to place the people of Palau in control over the introduction of nuclear substances.

2. The Rosenblatt Cable -- The proposed prohibition against nuclear substances soon came to the attention of the parties involved in negotiating the Compact. On March 15, 1979, Palau Status Negotiations Committee Chairman Roman Tmetuchl wrote to the United States Ambassador Peter Rosenblatt inviting comments on various proposals under consideration by the Convention. In a March 22, 1979 cabled response, ⊥341 Ambassador Rosenblatt expressed gratitude for "the opportunity thus presented to work with the Palau Constitutional Convention to avert possible obstacles in the path of the close future political relationship which we are now fashioning in the status negotiation."

Ambassador Rosenblatt's cable also conveyed a lengthy message suggesting revision or deletion of numerous proposals then under consideration by the Convention. As to proposal 91[6], the views of the United States were as follows:

> The United States has made clear that any prohibition against nuclear or conventional weapons, to which U.S. cannot agree in the Compact, would leave the U.S. unable effectively to assume responsibility for the security and defense of any area. 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 (as was done in the Marshall Islands). If the leadership of the Convention do requests [sic], the U.S. is prepared to work with it in drafting alternative language. Unless deleted or amended, the proposed language would create problems of the utmost gravity for the U.S. (emphasis added).

3. The Convention's Response -- The Rosenblatt cable was distributed to the Convention delegates. Despite their awareness of the concerns expressed by the United States, the Convention delegates declined to make any changes in proposal 91 to accommodate those concerns.[7] Indeed, not only did the ⊥342 Convention delegates retain substantially the same

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[6] The Rosenblatt cable refers to draft two(2) of proposal 91 which at the time stated: "[T]hat radioactive materials, toxic chemical, nerve gas, biological, or other harmful substances intended for military use may not be used, tested, stored or disposed of within the territorial jurisdiction of Palau without the express approval of three-quarters of the registered voters in a referendum on this specific question." *Id.* at 4.

[7] After Ambassador Rosenblatt'sRosenblatt's cable, Convention delegates made only minor editing changes in the language of proposal 91 as it became article XIII, section 6. The only differences between article XIII, section 6 and the version of proposal 91 addressed in the cable are: (1) the words "nuclear"nuclear . . . weapons"weapons" and "nuclear"nuclear power plants, waste materials therefrom,""" now replace "radioactive materials""radioactive materials"; (2) substitution of "use"use in warfare"warfare" instead of "military use""military use"; and (3) modification of the voter approval requirement from "three-fourths"three-fourths (3/4) of all

language for article XIII, section 6, but after receipt of cable they also inserted nearly identical substance control language in proposal 364 relating to international agreements. Until that time proposal 364, which eventually became article II, section 3, had been silent on nuclear or other harmful substances.

This first draft of the constitution, then, represented a commitment by the Constitutional Convention to stand firm against requests for changes to assure the United States the right of transit in or out of Palau territory with nuclear propelled vessels, aircraft or weapons.

4. The First Constitutional Plebiscite -- On July 9, 1979, the first draft constitution was approved by 92% of the voters. The Palau Legislature, however, concerned about Compact negotiations with the United States, repealed the Constitutional Convention's enabling legislation and, as a consequence, effectively canceled the results of the first constitutional plebiscite. Despite strong objection, the Trust Territory High Court upheld the Legislature's action and the constitutional drafting process began anew. *See Alfonso v. Silmai*, Civ. Act. No. 71-79 (T.T. High Court Tr. Div. July 1979).

5. The Second Constitutional Plebiscite -- After the first constitutional referendum was declared void, the Legislature created the Palau Constitutional Drafting Commission. The Drafting Commission was assigned to "reconcile, void and eliminate any conflicting inconsistencies or incompatibilities" between the invalidated constitution and the proposed political status of free association with the United States. P.L. No. 6-8-18.

The Drafting Commission maintained officially that "the Constitutional Convention never intended to restrict th[e] right of transit," Report to the Palau Legislature from the Palau Constitutional Drafting Commission (August 21, 1979) at 4. However, the Drafting Commission cited no basis for that view and its proposed amendments were admittedly motivated by its recognition that the original constitutional language could be viewed as prohibiting transit: "For example, a nuclear powered submarine transiting Palauan waters could be considered to be using a nuclear reactor and storing the nuclear missiles it routinely carries on board." *Id.* at 3. (original emphasis).

The Drafting Commission proposed substantial ⊥343 alterations in both article II, section

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registered voters"voters" to "three-fourths"three-fourths (3/4) of all votes cast"."

3,[8] and article XIII, section 6.[9] These revisions were designed, the Drafting Commission reported, to assure that "the harmful substances ban did not impact upon the transit of ships and of aircraft since, in the United States' view, these rights are essential to the exercise of its defense and security rights under . . . the Draft Compact of Free Association." *Id*. at 1.

This report, and the proposed amendments, show that the sole purpose of the Drafting Commission's proposed changes for the nuclear control provisions was to provide the ⊥344 government of Palau with the power to authorize United States nuclear powered vessels or vessels carrying nuclear missiles to operate in the territory of Palau without obtaining 75% voter approval.

The Drafting Commission's version of the constitution was put before the people of Palau in a second plebiscite held on October 23, 1979. It obtained only 31% of the vote.

The import of this negative vote was apparent. In an October 26, 1979, telex message to Ambassador Rosenblatt and other Micronesian and United States officials, Mr. Roman Tmetuchl, then Chairman of the Palau Political Status Commission conducting Compact negotiations with the United States, acknowledged:

> 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

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[8] The changes proposed by the Drafting Commission for article II, section 3 are shown as follows (highlighted and bracketed items show deletions; additions are underlined): Section 3. Major governmental powers [including but not limited to] of defense[,] and security [, or foreign affairs] may be delegated by treaty, compact, or other agreement between the sovereign Republic of Palau and another sovereign nation or international organization, provided such treaty, compact or agreement shall be approved by not less than [two-thirds (2/3)] one-half (½) of the members of each house of the Olbiil Era Kelulau and by a majority of the votes cast in a nationwide referendum conducted for such purpose[,]. [Provided that any such agreement which authorizes use, testing, storing or disposal of nuclear, toxic chemical, gas or biological weapons for use in warfare shall require approval of not less than three-fourths (3/4) of the votes cast in such referendum.]

[9] The Drafting Commission's proposed revision of article XIII, section 6 reads: Harmful substances such as nuclear, chemical, gas or biological 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 three-fourths (3/4) of the votes cast in a referendum submitted on this specific question.] and waste materials from nuclear power plants shall not be tested, detonated, discharged or disposed of within the jurisdiction of Palau.

Other than for transit and port visits of ships, and transit and overflight of aircraft, the use or storage of harmful substances such as radioactive, toxic chemical or biological materials intended for use in warfare, and the use or testing of nuclear power plants are prohibited within the jurisdiction of Palau.

> 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.

6. The Third Constitutional Plebiscite -- The Drafting Commission's version of the constitution having been soundly rejected, the Palau Legislature reinstated the language of the nuclear control provisions as these provisions appeared in the first draft constitution. The third draft constitution, virtually identical with the first, was submitted to and approved by 78% of the voters on July 9, 1980. The third draft constitution became the supreme law of the land on January 1, 1981.

C. Application to the Issues

The intentions of the committees and delegates when drafting, revising and voting on the nuclear control provisions are apparent. They intended to subject any "introduction of harmful substances" to a vote by the people of Palau. SCR No. 29, *supra*. To the extent that the convention journals might otherwise have left any uncertainty, the swirling forces outside, and subsequent to, the Convention swept away that ⊥345 uncertainty. By the time the people of Palau approved this Constitution, they had witnessed, and participated in, an extraordinary struggle over deletion or retention of that language. Those activities themselves confirmed and solidified the meaning of the nuclear control provisions.

The definitive events to which we refer include: concern by the United States, as reflected in the Rosenblatt cable, that proposal 91 might effectively prevent United States warships from transiting Palau waters; subsequent retention by the Palau Constitutional Convention of the language objected to by the United States and insertion of that same language into the provisions restricting the right of the Palau government to enter into compacts with other nations; the Palau electorate's overwhelming 92% approval of the first draft constitution; the Legislature's action in canceling the results of the first Constitutional plebiscite and establishing a Drafting Commission to "reconcile" the proposed constitution with the political status of free association; the Drafting Commission's explicit report explaining that its amendments of the nuclear control provisions were intended to assure that United States warships and aircraft could transit Palau waters and airspace; the solid rejection of the Drafting Commission's proposed constitution with only 31% voter approval; the cable sent by the Chairman of the Palau Status Negotiations Commission to Ambassador Rosenblatt acknowledging that the solid rejection of the revised constitution was an expression by the people of Palau for support of a "Constitution which prohibits transit of American warships through Palauan waters"; and, in the third constitutional plebiscite, the 78% voter approval of essentially the original constitution.

Too much has happened. It is now too late to go back and simply declare, as the Republic of Palau and the United States have attempted to do, that the nuclear control provisions which were the focus of all these events actually never did and, do not now, have any bearing on

the right of the Republic of Palau to authorize the United States to transit Palau waters with nuclear powered or nuclear capable ships or aircraft.

To the contrary, these events leave no doubt that uppermost in the minds of the electorate and other key actors in this constitutional drama was the understanding that the language of the nuclear control provisions would subject the right of transit by nuclear vessels, and any proposed introduction of harmful substances, to a vote by the people of Palau. For good or for ill, those supporting voter control for transit activities were the victors.

⊥346 Defendants suggest that we should employ a pragmatic approach in deciding the meaning of the nuclear control provisions. In essence, what defendants ask is that we review the wisdom of the Convention delegates and voters in approving article II, section 3 and article XIII, section 6. This we may not do. It is our constitutional duty to uphold the letter and the spirit of these provisions which have been so repeatedly and resoundingly approved by the people of Palau. With this mandate in mind, we return to the issue previously outlined.

1. Both Nuclear Control Provisions Apply -- As discussed previously, proposal 91 of the Palau Constitutional Convention eventually became article XIII, section 6 of the Constitution. It was proposal 91 which prompted the Rosenblatt communication and sparked the debate concerning transit and compatibility with the political status of free association. Plainly, all recognized at that time that proposal 91 was applicable to the government of Palau's authority to allow the United States to engage in defense activities under the Compact.

When similar nuclear control language was inserted in proposal 364, the forerunner of article II, section 3, such language was still retained in proposal 91. The addition to proposal 364 demonstrated explicitly that the nuclear control provisions were intended to apply to the Compact. The addition of the nuclear control language to proposal 364 did not subtract language from proposal 91 and there is no indication in the Convention records that this addition was intended to do so.

Moreover, the Drafting Commission, in its attempt to reconcile the proposed constitution with the status of free association, revised article XIII, section 6 as well as article II, section 3 in order to assure a right of transit without 75% voter approval.

Thus, at all times up through the third Constitutional plebiscite, public debate 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 waters. There simply is no constitutional history suggesting that article XIII, section 6 was thought to be inapplicable to the type of international agreements enumerated in article II, section 3.

Pertinent also is the fact that this Court's Trial Division has twice ruled, in a context involving a proposed Compact, on the nature of the specific question requirement emanating from article XIII, section 6 of the Constitution. In ⊥347 *Koshiba v. Remeliik*, Civ. Act. No. 17-83 (Tr. Div. Aug. 1983), language insisted upon by the United States for the "specific question" was held inadequate to comply to the requirements of RPPL No. 1-43 which was enacted to

conform to the then upcoming Compact referendum with the requirements of article II, section 3 and article XIII, section 6. Additionally, in *Gibbons v. Remeliik, supra*, at note 1, the Compact was held to be invalid because the specific question required by article XIII, section 6 of the Constitution did not receive 75% approval.

It is noteworthy that in both the afore-mentioned cases, neither party even attempted to argue that the article XIII, section 6 requirement of a specific question did not apply to the Compact approval process.

Although our foregoing analysis demands the conclusion that article XIII, section 6 applies to international agreement like the Compact, there is another logical reason for such a conclusion. Defendants concede that, in absence of 75% voter approval, the government is barred by article XIII, section 6 from using nuclear power plants within the jurisdiction of Palau. Yet if defendants were correct that article XIII, section 6 does not apply to international agreements and that article II, section 3 has no bearing on use of nuclear power plants, the anomalous result which flows from defendants' argument is that the government of Palau could authorize other nations to carry on activities within the jurisdiction of Palau that the government itself cannot.

For the reasons stated above, we hold that both of the constitutional nuclear control provisions, including the specific question requirement of article XIII, section 6, apply to any international agreements which is entered into by the Republic of Palau and which falls within the activities and subjects regulated by those provisions.

2. Nuclear Powered Vessels Are Covered By Article XIII, Section 6 -- We find no basis for exempting nuclear powered vessels from the article XIII, section 6 voter approval requirement for nuclear plants. We note that SCR No. 67 (Mar. 21, 1979) specifically stated that under proposal 91 "military ships powered by nuclear reactors could not pass within 200 miles of Palau . . ." *Id.* at 1. Although SCR No. 67, written by the Committee on Style and Arrangement, betrays a lack of familiarity with the then current status and details of proposal 91, and is laced with internal inconsistencies, the existence of such an unchallenged statement in the Convention record strongly suggests that it is an accurate statement of intent. In combination with the rest of the constitutional ⊥ 348 history discussed above, that unchallenged statement confirms the underlying intent of proposal 91.

We, therefore, hold that the government of Palau may not agree to the operation of nuclear propelled vessels in Palau waters without prior approval of "three-fourths of the votes cast in a referendum submitted on [the] specific question" in accordance with article XIII, section 6 of the Constitution.

3. "Use" and "Store" -- Finally, we conclude that the prohibitory words "use" and "store", as employed in article II, section 3 and article XIII, section 6, may not be construed so narrowly as would be necessary for these same words in Compact section 324 to constitutionally permit the United States to "operate nuclear capable . . . vessels and aircraft within the jurisdiction of Palau."

In each of the three constitutional plebiscites, it is apparent that the people of Palau perceived themselves to be voting on the question of "transit" by nuclear vessels. The people were not making the fine, and at times, distorted distinctions in syntax which are necessary to uphold defendants' position on section 324. Specifically, the nuclear control provisions approved by the people left no room for the government of Palau to enter into an agreement with any nation, and particularly the United States, which allowed that nation to operate nuclear capable or nuclear powered vessels in the waters of Palau unless the agreement obtained prior 75% voter approval.

Specifically, we hold that the four verbs, "use, test, store or dispose of," in the nuclear control provisions were meant to be a brief summation of all that could possibly be done with nuclear substances--in short, a general prohibition against the introduction of nuclear substances into Palau. Accordingly, these four verbs prohibit transit of nuclear powered vessels or vessels equipped with nuclear missiles. As a result, simple propulsion under nuclear power is a "use" of nuclear power plant and, if such a "use" occurs within the territorial jurisdiction of Palau, this "use" is prohibited by article XIII, section 6 of the Constitution. Additionally, carriage of a nuclear missile is a "use" and a "storage" within the meaning of both nuclear control provisions. In sum, we hold that the Republic of Palau may not enter into an international agreement permitting these "use" and "store" operations without first obtaining 75% voter approval under both nuclear control provisions.

⊥349 In so holding, we are fully aware that there is, under international law, a generally recognized right of innocent passage under which the surface vessels of one nation may pass through the waters of another. Article I, section 4 of the Palau Constitution expressly preserves the internationally recognized right of innocent passage, stating:

> Nothing in this Article [defining Palau's territorial boundaries] shall be interpreted to violate the right of innocent passage and the internationally recognized freedom of the high seas.

We also recognize that the right of innocent passage is generally thought available to nuclear powered ships as well as those carrying nuclear substances or weapons.[10] *See, e.g., United Nations Convention on the Law of the Sea* (adopted Apr. 30, 1982) (hereinafter "UNCLOS").

This right of innocent passage, however, neither controls nor affects our decision. The Constitution's nuclear control provisions relate only to the agreements and actions of the Republic of Palau. Whatever rights of innocent passage may be available to the United States, they exist by virtue of international law, not agreement or other affirmative action by the Republic of Palau.

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[10] The right of innocent passage is that which is not "prejudicial to the peace, good order, or society of the nation." UNCLOS, art. 19(1); Convention on the Territorial Sea and the Contiguous Zone (Sept. 10, 1964). We do not here decide whether the right of innocent passage is limited or affected in any way by the Constitution's nuclear control provisions.

We hold that the Compact has not been properly approved because the "specific question" required by article XIII, section 6 for the language of section 324 has not been presented to the voters. Moreover, fewer than three-fourths of the votes in the referendum were cast in favor of the Compact. This lack of required approval for section 324 means that the Compact is not a valid agreement of the Republic of Palau.[11]

⊥350 4. Armed Forces of Other Nations -- Section 312 of the Compact gives the United States the right to "invite the armed forces of other nations to use military areas and facilities in Palau in conjunction with and under the control of United States Armed Forces." Under section 331, the United States would be entitled to "enjoy, as to Palau, all . . . rights and benefits" of various defense treaties or other international security agreements.

These section 331 rights of the United States are "subject to the terms of this Compact" but no terms of the Compact purport to limit the authorizations which the United States may give to other nations to operate within the jurisdiction of Palau.

Accordingly, this combination of sections 312 and 331 of the Compact gives the United States "full authority" for defense matters in or relating to Palau, including the right to invite other armed forces into the jurisdiction of Palau. These rights are not made subject to section 324. Thus, the Compact authorizes, and provides no protection against, operation by other nations acting pursuant to United States authorization, of military vessels and aircraft carrying nuclear weapons, and of nuclear powered vessels within the jurisdiction of Palau. The present provisions in the Compact concerning armed forces of other nations, then, also require prior approval of 75% of the voters of Palau in a referendum held in conformity with the requirements of article II, section 3 and article XIII, section 6 of the Constitution.

5. The Territory Problem -- Finally, plaintiffs contend that an additional violation arises out of disparity between the territory of Palau as defined in the Constitution and in the Compact. The Constitution states that the territory of Palau extends to "two hundred (200) nautical miles from a straight archipelagic baseline." Palau Const. art. I, § 1.

The Compact provides for a 200- mile zone but does not recognize the archipelagic baseline. Thus, the territory of Palau as defined in the Compact is smaller than the territory defined in the Constitution.

⊥351 Plaintiffs argue that the effect of this is that the limitations of section 324 apply only to

[11] The invalidity of the entire Compact because of the unapproved §324 seems mandated by article II, section 3 of the Constitution. Moreover, this international agreement is the product of more than fifteen years of negotiations between two parties, only one of which is before this Court. We have not been presented with information sufficient to permit a serious effort to gauge the relative importance of the various clauses in the Compact. In any event, the constitutional history related in this opinion establishes that §324 was an important, probably crucial, provision of the Compact. There is no occasion here to consider severing only one clause and leaving the balance intact and effective. *See also Gibbons, supra.*

the smaller Compact-defined territory so that the Compact gives the United States complete authority to do as it wishes outside of that area, but still within the constitutionally defined jurisdiction of Palau.

We do not read the Compact that way. Neither the section 312 authorization nor the section 324 limitation defines the area in which it applies. All such sections are presumably co-extensive. Therefore, the limitations of section 324 apply wherever the United States seeks to exercise its authority under the Compact. The territorial disparity does not create another violation of the nuclear control provisions.

6. Nuclear Control Provisions Conclusions --As this case comes to us on appeal from a grant of summary judgment by the court below, we set out here our specific holdings. We hold that the Constitution is supreme in Palau, and that it takes primacy over any Compact or other international agreement. We find no triable issues of fact as to Count 1. As a matter of law section 324, and the combination of sections 312 and 331 require a three-fourths (3/4) vote in a referendum submitted on the specific question of their acceptability for ratification under the Constitution. There being no dispute over the facts that the Compact received only 72.19% of the vote and that the requisite specific question(s) concerning the relevant provisions were not submitted to the voters, the Trial Court was correct in holding that Plaintiffs are entitled to judgment on Count 1 as a matter of law.

IV. EMINENT DOMAIN

A. The Compact's Defense Site Provisions

Section 321 of the Compact gives the United States the rights to "establish and use defense sites in Palau" and to "designate for this purpose land and water areas and improvements in accordance with the provisions of a separate agreement which shall come into force simultaneously with this Compact."

The separate agreement is the Military Use and Operating Rights Agreement in which various specific areas are designated.[12] When the United States desires to establish a ⊥352 "defense site specifically identified in the separate agreement referred to in section 321, it shall so inform the government of Palau which shall make the designated site available . . . [.]" Compact § 322(a). Neither the timing nor the method for making the site "available" is specified.

While the government of Palau has a right under section 322(b) to designate alternative sites, if the alternative site is unacceptable to the United States, the first designated site must be made available "within 60 days of the original designation." Military Use and Operating Rights

[12] These include some 65 acres adjoining Airai airfield and 40 acres of submerged and adjacent "fast land" in Malakal harbor, for exclusive use of the United States. The United States has also designated the Airai airfield and all anchorages in Malakal Harbor and adjacent waters for joint use. Other needs, e.g., areas for training and maneuvers and for base and logistic support activities, are also mentioned.

Agreement, art. III(3).

Plaintiffs contend that this section 322(b) procedure is contrary to article XIII, section 7 of the Constitution, which vests in the national government "power to take property for public use upon payment of just compensation", but goes on to say, "[t]his power shall not be used for the benefit of a foreign entity. This power shall be used sparingly and only as a final resort after all means of good faith negotiation with the land owner have been exhausted."

Plaintiffs insist that the 60-day time period is too short to allow Palau to exhaust good faith negotiation possibilities and would make the use of eminent domain almost inevitable in every case rather than as a "final resort" which would be "used sparingly." Palau Const. art. XIII, § 7. Plaintiffs further contend that the exercise of the power of eminent domain to provide sites for the United States violates the "benefit of a foreign entity" clause of article XIII, section 7.

B. Not Unconstitutional On Its Face

These Compact provisions are profoundly troubling and surely raise the specter of future constitutional crisis. Yet, we have concluded that the government could possibly carry out its obligations to make designated land sites available to the United States under Compact section 322(b) without violating article XIII, section 7.

There are several options available to the government for meeting its obligation to make the land available to the ⊥353 United States within 60 days. One, of course, is to enter into negotiations with the owners of the land and reach agreement as to a satisfactory purchase price. A grant of $5.5 million is to be provided by the United States under section 213 of the Compact to assist Palau in carrying out its obligations to make designated sites available. It is possible, then, that the government of Palau will have sufficient funds to make exceptionally attractive offers to landowners. If this is the case, perhaps there will be no difficulty in obtaining the required land.

If a landowner of the site designated by the United States is adamant, the government may suggest another site to the United States. This could give the government of Palau the opportunity to seek out other landowners who may be more willing to provide land.

The feasibility of this approach turns on additional factors not in the record before us, such as how much land the United States will demand, how much money the Republic of Palau is willing to provide for acquisition of the land, and whether the United States will accommodate requests by the Republic of Palau that alternate sites be accepted.

While we cannot conclude on the record that the undertaking of Palau under section 322(b) of the Compact and article III(3) of the Military Use and Operating Rights is unconstitutional on its face, we do not minimize the constitutional risk inherent in these provisions. There is no limitation on the amount of land the United States may designate for its own use. The United States is not obliged to accept any alternative site suggested by Palau but

instead may insist that the original request be honored. After the $5.5 million provided under section 213 of the Compact is depleted, the Republic of Palau will bear full responsibility for any additional payment to landowners. Military Use and Operating Rights Agreement, art. III(4).

Moreover, the timing provided in the Compact is extraordinarily tight. The 60 days given the government to produce the land begins to run at the time of the original designation. This short period is not altered or extended by suggestion of an alternative site. It seems highly likely, if not inevitable, that Palau will be faced with the necessity of paying exorbitant prices in order to coax reluctant owners to part with their land. The difficulties could be compounded, if not rendered insuperable, by disputes as to ownership of the designated land. *See also* Palau Const. art. XIII, § 10 (concerning return of public lands).

⊥354 It is not, however, for this Court to assess the wisdom of this Compact, nor to plot strategies for fulfillment of the government's obligations under it. That is distinctly the responsibility of the Executive Branch acting with the advice and consent of the Olbiil Era Kelulau. Palau Const. art. VIII, §7(2), art. IX, § 5(7). Our role here is a limited one: to assess the constitutionality of the proposed Compact.

It is plain to us that the defense site provisions may eventually place the government of Palau at a fork where one road points toward violation of the Constitution and the other leads to breach of the Compact. That fork, however, has not yet been reached and we see a possibility that the fateful choice may never present itself. The Compact does not by its terms require exercise of the power of eminent domain. It would be premature and improper for us simply to assume that such an event will come to pass.

C. Benefit

In recognizing that the government may be capable of carrying out these defense site obligations in a constitutional manner, we should not be misunderstood. Because our ruling today requires further efforts before a constitutional compact may be adopted, it seems appropriate to furnish clarification.

The government has in this litigation repeatedly and unstintingly contended that: (1) the Compact is for the benefit of Palau; (2) that it is for the benefit of Palau for the United States to provide defense here; and (3) that therefore United States use of land as a defense site is for the benefit of Palau, not the United States. Accordingly, the government concludes that Palau's exercise of eminent domain to provide land to the United States for defense purposes would not violate the constitutional prohibition against eminent domain for the benefit of a foreign entity.

The government does not attempt to show that any particular use proposed under the Compact would be of direct benefit to the people of Palau. Instead, the government's position boils down to a claim that the mere fact that the government has decided to enter into the Compact somehow establishes that exercise of eminent domain powers under the Compact would be for the benefit of Palau, and not the United States.

This reasoning would render meaningless the constitutional prohibition against exercise of eminent domain for the benefit of a foreign entity. Eminent domain is the power exercised by the Executive Branch and the "benefit" ⊥355 language is obviously intended as a curb upon the powers of that branch. Surely the government would only invoke the power of eminent domain after concluding that exercise of the power would be beneficial to the people of Palau. The government's position is, in essence, that the eminent domain clause prevents the government from exercising such powers to provide land for a foreign entity, except when the government has decided that it would be good to do so. That is not what article XIII, section 7 says.

The clause unambiguously prohibits use of the power of eminent domain for a foreign entity. At the very least, this means that if the land in question is to be used by a foreign nation the government of the Republic of Palau has an extremely heavy burden of showing extraordinary circumstances which establish that the particular use is for the sole benefit of Palauan persons or entities.

D. "Foreign" Entity

We have considered the possibility that, by virtue of its close relationship with the Republic of Palau under the Compact of Free Association, the United States should not be considered "foreign" for purposes of the article XIII, section 7 prohibition. We have been forced to reject that possibility.

There is no such suggestion anywhere within the Constitution or the constitutional history. The Constitutional Convention's Committee on General Provisions, in proposing this provision, said, "The term'foreign entity' as used in this Section means any entity whether a person, a government, a corporation, or other association or group, which is neither a citizen of Belau nor totally owned by citizens of Belau." SCR No. 30 (March 4, 1979). Patently, the government of the United States falls within that definition of foreign entity.

Indeed, other aspects of the history leading up to adoption of this clause confirm that the people of Palau were thinking with some specificity of the United States and the proposed Compact of Free Association.

The March 22 Rosenblatt cable, seeking changes in the proposed constitution to avoid conflicts with the Compact, focused on this provision too. The cable said:

> The sentence, 'Public use does not include use by a foreign entity', could be inconsistent with U.S. responsibility for and authority in the defense of Palau under the Compact. Deletion of this phrase would not prejudice a Palauan concept in which U.S. ⊥356 would deal with local leaders rather than with the central government on lease or options. Indeed, the use of eminent domain power is carefully circumscribed in the remainder of this section. However, the phrase quoted may be interpreted to cripple U.S. defense and security rights and responsibilities and deletion of this phrase is recommended.

Rosenblatt cable to Tmetuchl (March 22, 1979) at 5-6.

It is therefore instructive for purposes of the constitution's application to the United States that the Constitutional Convention, after receiving the Rosenblatt cable, modified the sentence to make it even more clear that, "This [eminent domain] power shall not be used for the benefit of a foreign entity."

After the voided first constitutional plebiscite, in which 92% of the voters approved the constitution containing this sentence, the Drafting Commission proposed deletion of the sentence from article XIII, section 7. The Drafting Commission's report explained that "retention of this proviso [sic] would seriously undermine the ability of the constitutional government of Palau to fulfill its obligations under a compact of free association and thus close the door to a political relationship of free association." Report to the Palau Legislature from the Palau Constitutional Drafting Commission (August 21, 1979) at 6.

As already noted, the issues concerning possible incompatibility between the proposed constitution and the Compact had been framed clearly by the time the people of Palau voted in the constitutional plebiscites. The voters made clear their intention to prevent the government of Palau from agreeing to exercise the power of eminent domain in its negotiations looking toward a compact of free association.

E. Eminent Domain Conclusion

We find, then, that the Compact's defense site provisions are not unconstitutional on their face and that, under the facts here, the question of whether any particular proposed action of the government would be constitutional is not ripe for decision. Therefore we affirm the decision of the Trial Court in granting summary judgment on count 5.

At the same time, we caution the government of Palau that the exercise of eminent domain powers will be unavailable to it in attempting to comply with its obligations under the Compact to make land available to the United States. We ⊥357 suggest that this Compact section be carefully evaluated before further steps are taken to obtain Compact approval.

V. THE OTHER COUNTS

The other counts require little comment. The only evidence put forward under count 2 by the plaintiffs to establish premature implementation of the Compact is President Salii's letter to Ambassador Zeder confirming that 72.19% of the electorate had approved the Compact. We hold as a matter of law that this did not constitute implementation of the Compact. Therefore the Trial Court's dismissal of count 2 is affirmed.

In light of our holding under count 1 that the Compact has not been properly ratified, count 3 is rendered moot and we need not consider whether the Trial Court properly dismissed plaintiffs' challenge to the political education program.

Similarly, most of count 4 is rendered moot except that it follows from our ruling on count 1 that RPPL No. 2-14 was defective in failing to meet the article XIII, section 6 specific question requirement.

VI. CONCLUSIONS

IT IS, THEREFORE, ORDERED:

1. The judgments on counts 1, 2 and 5 are affirmed.

2. The judgment on count 3 is set aside as moot.

3. The judgment on count 4 is reversed and judgment is entered for plaintiffs only as to the specific question requirement of article XIII, section 6 of the Constitution of Palau.

So ordered the 17th day of September, 1986.